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More and more together: Legal family formats for same-sex and different-sex couples in European countries - Comparative analysis of data in the LawsAndFamilies Database

Waldijk, C.

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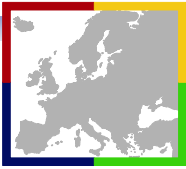
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More and more together:

Legal family formats for same-sex and different-sex couples in European countries

Comparative analysis of data in the LawsAndFamilies Database

edited by Kees Waaldijk
with contributions by

Daniel Damonzé, Marie Digoix, Marina Franchi, Natalie Nikolina,
José Ignacio Pichardo Galán, Giulia Selmi, Matias de Stéfano Barbero,
Matthias Thibeaud, Jose A.M. Vela, Kees Waaldijk, and Giuseppe Zago

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Matthias Thibeaud, Jose A.M. Vela, Kees Waaldijk, and Giuseppe Zago*

Abstract: This report offers a comparative analysis of legal and other data concerning same-sex (and different-sex) families, in marriage, in registered partnership, and in cohabitation. These data (from a legal survey among legal experts in 21 European countries, from sociological interviews with same-sex families in four countries, and from a statistical survey of twelve countries) have been brought together in *the LawsAndFamilies Database – Aspects of legal family formats for same-sex and different-sex couples* (www.LawsAndFamilies.eu). The report presents the database and the methodology of the legal survey, followed by an overview and analysis of the main results of that survey for the different countries in light of European minimum standards, plus five comparative cases studies on specific legal issues for which the database now provides detailed information, and a synthesis of the findings from the qualitative interviews. The conclusion highlights the main findings on the situation of same-sex couples, including gender aspects, and offers recommendations for further research and for legal policy; it connects legal and sociological findings, and presents correlations between laws, public attitudes, and statistics. The general theme of the report is increasing legal equality for increasing diversity of families.

Keywords: family law, marriage, registered partnership, cohabitation, same-sex couples, different-sex couples

¹ Kees Waaldijk, professor of comparative sexual orientation law at Leiden Law School (www.law.leidenuniv.nl/waaldijk), is the main author of the LawsAndFamilies questionnaire on legal family formats, and the principal editor of the law content of the resulting LawsAndFamilies Database. His report [More or less together](#) was published in 2005.

Disclaimer

This paper and the LawsAndFamilies Database contain information with a scientific aim. Nothing in this paper or database should be seen as legal advice. Not all nuances and exceptions are included, and there may be errors and further legal developments. The experts, the authors, the editors, the Institut national d'études démographiques and Leiden University cannot be held liable for any inaccurate or incomplete information in any part of this paper or database. More particularly, they cannot be held liable for any damage or consequences from the direct or indirect use of contents of this paper or database.

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Kees Waaldijk is deeply grateful to all the legal experts across Europe who answered the detailed questions in the LawsAndFamilies questionnaire for their respective jurisdictions, and who reviewed answers given by their colleagues; to the people at INED (in particular Kamel Nait Abdellah, Arianna Caporali and Marie Digoix) who made the legal survey technically possible and who worked with dedication on the creation of the LawsAndFamilies Database; to the researchers at Leiden Law School (José María Lorenzo Villaverde, Natalie Nikolina, Giuseppe Zago and Daniel Damonzé) who for different periods contributed with great commitment to the drafting and organisation of the legal questionnaire, the reviewing and editing of the answers, the creation of the legal database, and/or this comparative analysis; to Clara Cortina and Patrick Festy for their work on the statistical survey; to Marie Digoix, Marina Franchi, José Ignacio Pichardo Galán, Giulia Selmi, Matias de Stéfano Barbero, Matthias Thibeaud and Jose A.M. Vela for their work on the sociological survey; and to all those others who with their wisdom and encouragement helped to make this part of the FamiliesAndSocieties research project a success (including Livia Oláh and Gerda Neyer in Stockholm, Olivier Thévenon in Paris, other partners and stakeholders in FamiliesAndSocieties, the European Commission, the Betsy Brouwer Fonds at the Leiden University Fund, and last but not least Jacqueline Jongenelen at Leiden Law School's finance department).

For more information about the team members and experts, and about their roles in this project, see paragraph 1.5 of this Working paper, the references at the end of Chapter 2, and the Team pages at www.LawsAndFamilies.eu.

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² Many different tables can be generated in the interactive database at www.LawsAndFamilies.eu.

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Chapter 1:

Introduction to the legal survey and its methods

by Kees Waaldijk³

1.1 Changing laws on families

Not only family patterns in society,⁴ but also laws about families have changed substantially in Europe over the past fifty years.⁵ Since the 1960s a growing number of countries have started to recognize the cohabitation of different-sex couples for an increasing number of legal issues. Since the 1970s a growing number of countries have started to include same-sex cohabitants in this recognition. From the late 1980s a growing number of countries have introduced a form of registered partnership for same-sex couples. From the 1990s some countries have included different-sex couples in their laws on registered partnership, and many have increased the number of legal consequences attached to partnership registration. From the early 2000s a growing number of countries have opened up marriage to same-sex couples. And throughout the 2010s all these developments have continued to spread across Europe (and beyond).⁶ Probably, these trends will continue for some time.

In the FamiliesAndSocieties research project (in its work package 9),⁷ these remarkable changes in the legal recognition of same-sex or non-marital families have been approached from three disciplines: law, statistics, sociology. The focus of the legal study has been on the three main legal family formats that different countries have been making available – or not – to same-sex and/or different-sex couples.

³ Professor of comparative sexual orientation law, Leiden Law School, www.law.leidenuniv.nl/waaldijk. Kees Waaldijk is the main author of the LawsAndFamilies questionnaire on legal family formats, and principal editor of the law content of the resulting LawsAndFamilies Database (www.LawsAndFamilies.eu). His report *More or less together* was published in 2005.

⁴ See Oláh 2015.

⁵ To paraphrase the opening sentence of Oláh 2015, p. 2.

⁶ Many articles and books have been published about these developments, including: Boele-Woelki & Fuchs 2003, 2012 and 2017, Boele-Woelki, Mol & Van Gelder (Eds.) 2015, Curry-Sumner 2005, Gallo, Paladini & Pustorino (Eds.) 2014, Kollman 2007, Perelli-Harris & Sánchez Gassen 2012, Scherpe & Yassari (Eds.) 2005, Scherpe & Hayward 2017, Waaldijk 2004 and 2014a, Waaldijk (Ed.) 2005, Waaldijk & Fassin 2008, Wintemute & Andenaes (Eds.) 2001.

⁷ FamiliesAndSocieties – Changing families and sustainable societies: Policy contexts and diversity over the life course and across generations, 2013-2017, see www.familiesandsocieties.eu. For the main outcomes of this project, see Vono de Vilhena & Oláh 2017.

The main product of this legal study is the interactive part of *the LawsAndFamilies Database – Aspects of legal family formats for same-sex and different-sex couples*.⁸

The statistical approach led to an overview of statistical issues regarding the identification of “non-standard” families in national and cross-national surveys,⁹ and to a collection of comparative statistical data on same-sex families in 12 European countries (Belgium, Denmark, Finland, France, Iceland, Netherlands, Norway, Sweden, Slovenia, Spain, Switzerland, and United Kingdom).¹⁰ Data concern the legal formalisation of same-sex couples, through marriage and various forms of registered partnership. And the sociological approach led to an analysis of the reception of the legal recognition of same-sex partnerships in Iceland, Italy, France and Spain, based on 30 qualitative interviews for each country.¹¹ The statistical and the sociological studies were also linked to Work package 2 of FamiliesAndSocieties.

The aim of the legal database, and therefore the aim of the questionnaire used to collect data from legal experts in more than 20 European countries,¹² has been to find answers to the following questions:

- Which of the main legal consequences of different-sex marriage are now, in different European countries, also available to same-sex couples and/or to non-married different-sex couples?
- Since when have these legal consequences been available to these couples, and through which legal family formats?
- Which trends and patterns can be found in this progressive realization of the human right to non-discriminatory respect for family life?
- Do these European countries meet the minimum standards that are developing in European law?

⁸ Waaldijk, K., Digoix, M., Nikolina, N., Zago, G., Damonzé, D., Caporali, A., & Nait Abdellah, K. (Eds.) (2017). *The LawsAndFamilies Database – Aspects of legal family formats for same-sex and different-sex couples*. Paris: INED, www.LawsAndFamilies.eu (online early 2017).

⁹ Cortina & Festy 2014a.

¹⁰ Cortina & Festy 2014b (and see the statistical data at www.LawsAndFamilies.eu).

¹¹ Digoix et al. 2016. See also Chapter 8 of this comparative report, below, by the same authors, and the sociological survey at www.LawsAndFamilies.eu.

¹² Waaldijk, K., Lorenzo Villaverde, J.M., Nikolina N., & Zago, G. (2016). The LawsAndFamilies questionnaire on legal family formats for same-sex and/or different-sex couples: Text of the questions and of the accompanying guidance document. *FamiliesAndSocieties Working Paper* 64(2016), www.familiesandsocieties.eu. Although the questionnaire in this project had first been given the name “FamiliesAndLaws” it was later decided to change this to “LawsAndFamilies”.

It is hoped that the results will also suggest ways how (European) legislation and case law could build further on the emerging consensus and trends among the countries studied. Finally, the outcomes of this very systematic legal research, covering more than 50 years and more than 20 countries, will be available for use in sociological, demographic and other research. Its systematic character as well as its comprehensive coverage of three legal family formats for same-sex and different-sex couples, in 23 jurisdictions over five decades, regarding more than 60 legal issues, is what makes this study an innovative addition to the existing comparative literature.¹³

To give further focus to these aims, seventeen hypotheses were formulated at the start of the project.¹⁴ Researchers inside and outside this project will be able to test these and other hypotheses. Some of the hypotheses are already confirmed or rejected in Chapter 9.

1.2 The LawsAndFamilies Database

The core of the LawsAndFamilies Database is the interactive part where all legal data can be found. The [interactive database](#) provides two request forms. One “per one jurisdiction” and the other “per one legal question”. With these request forms the user can specify which jurisdiction(s), which question(s), which legal family format(s) and which year(s) should be selected. The interactive database provides different ways for displaying or downloading the results. The results tables and the downloads include weblinks to the authored source papers where the complete answers (with references, explanations and nuances) for one section for one jurisdiction can be found. The results tables and downloads in the database have the same columns-structure as the questionnaire and the answer-codes selected are highlighted with an intuitive colour scheme.¹⁵

Each of the source papers (six per jurisdiction, one for each of the six sections of the questionnaire) contains the complete answers (with references, explanations and nuances) of the relevant expert for one section for one jurisdiction. These papers are not only available

¹³ For some important titles of existing (or forthcoming) studies in this field, see the list of references at the end of this chapter.

¹⁴ Waaldijk et al. 2016, p. 4-5.

¹⁵ See paragraph 1.4 below, and see also the User guide of the database. For an example of the columns and the colours, see paragraph 2.2.1 below.

through weblinks in the interactive database, but can also be accessed [directly](#) from a menu listing all jurisdictions, or from a menu listing all sections.¹⁶

The interactive database and the source papers, are part of a mini-website which also includes extensive information about the background and methodology of this database, a user guide, the text of the questionnaire and its accompanying guidance document, and a list of the people who contributed to the development or the content of this database. The mini-website will also link to working papers and other publications resulting from these data. And importantly, the mini-website also brings together the results of the statistical and sociological surveys on same-sex families mentioned above in paragraph 1.1. This whole mini-site goes by the name the *LawsAndFamilies Database – Aspects of legal family formats for same-sex and different-sex couples*, and is accessible via the short weblink www.LawsAndFamilies.eu.¹⁷

The interactive database went online in open access early 2017, with legal information¹⁸ about 23 jurisdictions in 21 countries: Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland Italy, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, and the United Kingdom (England and Wales; Northern Ireland; Scotland), with more jurisdictions to be added later.

1.3 The concept of “legal family formats”

The questionnaire used for creating the *LawsAndFamilies Database*,¹⁹ introduced the term “legal family format”, to refer to family forms (for couples) that have legal effects.²⁰ It distinguishes between three such legal family formats: marriage, registered partnership, cohabitation. It was a challenge to precisely define the distinction between cohabitation and

¹⁶ The term “jurisdiction” is used both for whole countries and for the main regional/provincial/state parts that a country may have. The database contains separate data for some sub-national jurisdictions, for example Northern Ireland.

¹⁷ The recommend citation for the database is: K. Waaldijk et al. (eds.), *The LawsAndFamilies Database – aspects of legal family formats for same-sex and different-sex couples*, Paris: INED, 2017, www.LawsAndFamilies.eu. Within the mini-website (hosted on an INED server) the web-address of the interactive legal database is <http://lawsandfamilies-database.site.ined.fr/en/legal-project/interactive-database/>.

¹⁸ *Disclaimer*: This paper and the LawsAndFamilies Database contain information with a scientific aim. Nothing in this paper or database should be seen as legal advice. Not all nuances and exceptions are included, and there may be errors and further legal developments. The experts, the authors, the editors, the Institut national d'études démographiques and Leiden University cannot be held liable for any inaccurate or incomplete information in any part of this paper or database. More particularly, they cannot be held liable for any damage or consequences from the direct or indirect use of contents of this paper or database.

¹⁹ Waaldijk et al. 2016.

²⁰ The first publications using the term “legal family formats” are Waaldijk 2014a and 2014b.

registered partnership. On the basis of his expertise on Spanish legislations,²¹ José María Lorenzo Villaverde (who as a researcher for this project at Leiden Law School played an important role in developing the questionnaire) contributed to the definition of this distinction in the questionnaire. After he had thus contributed to the elaboration of the definition for the 2014 test-version of the questionnaire, I gratefully used a similar definition in my article “Great diversity and some equality”.²² In the end, the guidance document for the legal experts answering the final version of the questionnaire gave the following definition:

“[...] registered partnership is defined here as a legal family format for two partners:
(1) that is constituted in a procedure that results in registration,
(2) for which it is not a condition that the partners are already living together for a substantial period of time (six months or more),
(3) that is registered in a register kept by a public authority,
(4) that has an extended or limited set of substantive legal consequences,
(5) and that is not dissolved automatically when the partners no longer live together.”²³

And reversely, as regards ‘cohabitation’ the document specified:

“When a condition for registration is that the partners must have been living together already for a substantial period (six months or more), then such a legal regime does not count as registered partnership, because it is not created by the act of registration. It should then be classified as ‘cohabitation’. Also when the registration is not in a public register, it should be considered here as a form of cohabitation. *Idem*, when the formalisation is only valid for as long as the partners live together.”²⁴

It seems that the Italian legislation of 2016 meets all five conditions for registered partnership.²⁵ The same is true for Greece (that opened up registered partnership to same-sex couples by the end of 2015)²⁶ and probably also for Cyprus (where registered partnership

²¹ Expertise gained and developed in his PhD research at the Faculty of Law of the University of Copenhagen since 2009. See J.M. Lorenzo Villaverde (2015), *The Legal Position of Same-Sex Couples in Spain and Denmark. A Comparative Study of Family Law*. Copenhagen: Faculty of Law of the University of Copenhagen (PhD thesis defended April 2016, not yet published).

²² Waaldijk 2014a.

²³ Waaldijk et al. 2016, p. 20.

²⁴ *Idem*, p. 19.

²⁵ See Winkler 2017a (questions 1.1, 1.8 and 1.16) and Gattuso 2017e.

²⁶ See Papadopoulou 2017a (questions 1.1, 1.8 and 1.16) and Papadopoulou 2017e.

legislation entered into force in 2015),²⁷ but maybe not yet for Estonia (where some partnership legislation entered into force in 2016).²⁸

With these definitions it seemed no longer necessary or practical to distinguish between formalised cohabitation and informal cohabitation, as had been suggested in the original plans for this project.²⁹

1.4 Methods

1.4.1 *Legal experts*

The interactive part of the *LawsAndFamilies Database* contains the results of a legal survey about families and laws beyond different-sex marriage among selected legal experts in over 20 European countries. These experts were asked to complete a detailed questionnaire online, so that the results could be included in this open-access online database of legal aspects of different family formats. The information provided by the legal experts mostly applies to whole countries. However, for countries like the United Kingdom, the information has not been collected for the country as a whole, but for all or some specific regional/provincial/state jurisdictions (such as Northern Ireland) that are part of it. For those jurisdictions the answers in the database represent a combined picture of regional and national law. In this database the term “jurisdiction” is used both for whole countries and for the main regional/provincial/state parts that a country may have. Further information on how such complex countries are treated in this survey, can be found in the Guidance for experts.³⁰

For every country the coordinators invited at least two legal experts. The aim was to include for each country the one or two best available legal experts (working in practice, policy or academia) specialised in legal issues concerning same-sex partners, with ideally one of the experts also being specialised in family law. For several countries it was difficult or even impossible to find two available qualified experts in time. The non-availability of experts has thus impacted on the selection of jurisdictions for this project. In the end, for each of the

²⁷ For a chronological overview of the 21 European countries that introduced registered partnership for same-sex partners earlier, see Waaldijk 2014a, p. 44. In 2015 also Luxembourg and Ireland have opened up marriage to same-sex couples. See also Carroll 2016, p. 50-52.

²⁸ About the implementation problems regarding the new Estonian law, see Roudik 2016.

²⁹ About the many different terminologies proposed by legal authors to characterize non-marital legal family formats, see Waaldijk 2014a, p. 45-48.

³⁰ Waaldijk et al. 2016, p. 21.

countries now covered in the database, two good experts could be selected (three for the United Kingdom and Austria). A modest fee for their contributions to this project was agreed with each expert. Experts were selected on the basis of their participation in other projects or networks in this field, or on the basis of recommendations from such experts (some of whom had declined an invitation to join this project themselves). Several of the experts selected had also contributed to the 2005 report *More or less together*,³¹ and many of them are a member of the *European Commission on Sexual Orientation Law*,³² and/or had been involved in the EU funded project *Rights on the Move – Rainbow families in Europe*.³³ Some of them had also joined the FamiliesAndSocieties project as a stakeholder or as a representative of an organisation that had joined as stakeholder.³⁴

The legal survey was conducted as a peer review process of seven steps (expert – review by other expert – expert – review by coordinators – expert – editing by coordinators – expert). Once two legal experts had been found for a country, then the six sections were divided between them (according to their own specialisations and preferences). So each expert would be the author of the answers in one or more whole sections. They then answered questions in the relevant sections of the questionnaire by using the online web application.³⁵ After both experts for a country would have given their answers (including references, explanations and nuances), they would review each other's answers. Then each expert adjusted his or her own original answers in light of the comments and suggestions of the other expert for that country. This was followed by a round of review by the coordinators (Kees Waaldijk and Natalie Nikolina, assisted by Giuseppe Zago and Daniel Damonzé). After this each expert was invited to further adjust their answers in light of the comments and suggestions of the coordinators. Then the coordinators checked if all comments and suggestions had been given due attention (sometimes asking for further clarifications), and they edited the text of the answers, references, explanations and nuances. Finally the expert was asked to approve all the edits.

Occasionally the review by the coordinators was done before or immediately after the review by the other expert. For countries consisting of different jurisdictions, typically one expert per jurisdiction would be asked to answer all sections of the questionnaire, and then an expert of

³¹ Waaldijk (Ed.) 2005.

³² See www.sexualorientationlaw.eu.

³³ See <http://events.unitn.it/en/rotm>.

³⁴ See the list of all stakeholders in FamiliesAndSocieties at www.familiesandsocieties.eu/?page_id=2179.

³⁵ Developed at INED in [Voozanoo software](#) of the company EpiConcept.

another jurisdiction in that country would act as reviewer. For one country (Austria) all sections were answered by one expert, and each section was then reviewed by one of two other experts for that country. Experts for some countries were assisted by a research assistant (see the first footnote of the relevant source papers).

Most of the more than 40 legal experts completed most of their work by early 2016 (with their answers mostly covering legal developments upto 2015), while other experts completed their answers late in 2016, often taking into account recent changes in law. This means that in the database the most recent year for some jurisdictions is 2015, and for other jurisdictions 2016. Hopefully there will be occasional updates in coming years, so as to reflect future legal changes (and any recent changes that came too late for this first round of the survey).

A [Guidance document](#) was prepared and made available to the experts. This “Guidance for experts answering questions the LawsAndFamilies questionnaire on legal family formats for same-sex and/or different-sex couples”³⁶ provided them with detailed information, for example on:

- how to answer the questionnaire by selecting answer-codes and years;
- the meaning of terms for the legal family formats employed in the questionnaire, and in particular the distinction between cohabitation and registered partnership;
- how to complete the questionnaire in case of countries having multiple jurisdictions;
- how to refer to legal sources, and how to provide explanations, nuances and background information.

Apart from the *Guidance document*, the legal experts were also given a technical *Manual* on how to use the web application for answering questions and for commenting on answers given by the other expert. And some further guidance was given by the coordinators, when they were commenting on draft answers during the peer review process mentioned above.

1.4.2 The questionnaire

The questionnaire for this project,³⁷ is largely based on the set of questions developed for and used in the 2005 report *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners*.³⁸ Since then,

³⁶ Waaldijk et al. 2016, p. 14-24.

³⁷ For the full text of the questionnaire, see Waaldijk et al. 2016, p. 8-13.

³⁸ Waaldijk (Ed.) 2005. See also Waaldijk & Fassin 2008.

a number of issues gained prominence that were not adequately covered by the questionnaire. Therefore, a wide consultation has been held in 2013/2014 to get input regarding the ideal set of questions that can ensure a good picture of this dynamic and diverse field. These consultations led to useful suggestions from several partners and stakeholders of the FamiliesAndSocieties project,³⁹ and from legal experts from various countries. And a final round of clarifications could be made thanks to legal experts from Spain who kindly agreed to answer parts of this questionnaire using a 2014 test-version of it. To a few questions a line of clarification has been added (sometimes referring to Guidance document), so as to ensure that different experts will interpret the questions in the same way.

The final version of questionnaire used in this survey contains 69 questions and has been divided into six sections, roughly reflecting the main legally relevant *transitions that many families go through*. In fact, legal rules often only make themselves felt to a family and its members when such a family goes through a major transition. Therefore the questionnaire was divided in the following sections:

1. Formalisation (17 questions)
2. Income and troubles (9 questions)
3. Parenting (14 questions)
4. Immigration (10 questions)
5. Splitting up (12 questions)
6. Death (7 questions)

The following criteria for selecting the questions have been used; the questions should:

- give a good overview of the main aspects of the legal position of non-marital and/or same-sex partners (and their children) in the law of the country concerned;
- include the main issues that have been the subject of major litigation, or of early legislation, or of controversial exceptions to legislation, or that are key demands of social movements;
- be easy to understand for legal experts in different countries (and ideally also for non-lawyers interested in the topic);
- not be too difficult to research for the legal experts;
- not be too many.

³⁹ See the lists of partners and of stakeholders in FamiliesAndSocieties at www.familiesandsocieties.eu.

Almost all questions require separate answers for different-sex and same-sex marriage and for same-sex and different-sex registered partnership, and in most cases also for different-sex and same-sex cohabitation. (If a question was not asked for cohabitation, then an “X” appears in the relevant cells of the results.) Therefore, almost all questions have answers in six columns, one column for each same-sex or different-sex legal family format. Furthermore, each question is not only asked for the current period, but also for previous periods (ideally stretching back to 1965). Therefore, each of the six columns appears as a timeline (see paragraph 1.4.3 below). For each question, the legal experts were also given the possibility to provide references to the relevant legal source(s) and to provide explanations or nuances regarding the answers given.

1.4.3 Answer-codes and years

The legal experts were asked to choose an answer-code from a drop down menu for each of the (six) types of relationship (different-sex and same-sex marriage, different-sex and same-sex registered partnership, different-sex and same-sex cohabitation). Seven answer-codes were available in the questionnaire. Here they are displayed with the (“traffic light”) colours that have been attached to these answer-codes in the database, and with the definitions as they were communicated to the experts in the Guidance document:⁴⁰

Table 1.1: Legenda of answer-codes used in LawsAndFamilies questionnaire and database

Yes	Yes, this is so in the law of this country/jurisdiction, although possibly with a qualifying period of 24 months or less.
Yes, but	Yes, but with exceptions or restrictions, for example a qualifying period of 25 months or more, or only in most parts of the country/jurisdiction, or this is mostly a “dead letter”.
No, but	No, but it may be so exceptionally, or in a very limited way, or in a few parts of the country/jurisdiction, or indirectly, or by using a different legal instrument, or legislation says no while some courts might say yes.
No	No, this is not so in the law of this country/jurisdiction.
Doubt	The law is unclear (the law does not “know” the answer).
?	The expert does not know and cannot find the answer.
N/A	Not applicable (for example because this family format is not available in this jurisdiction, or not for same-sex or different-sex couples).

⁴⁰ Waaldijk et al. 2016, p. 16-17.

For each answer to a question, legal experts were also asked to indicate what the answer was during *previous periods*, and to indicate the year since when the answer applied. Thereby a vertical timeline was created for each same-sex or different-sex legal family format in each question (see example below).

Originally the legal expert who could not find an exact year, was given the possibility to mention a probable year by adding a question mark to it (1989?), to indicate a decade (1980s), or to put a question mark (?). Unfortunately, later these options had to be cancelled because of the possibilities of the database software. Since then the expert could only indicate uncertainty about the beginning or end of a period, by providing a “?” as the answer-code for certain years.

If an expert could not close a timeline with a year before 1965, they were asked to close the timeline by inserting the year “0000” (meaning that the answer applied since a day in an unknown year before 1965). When it was not possible to provide answers going back that far, the experts were encouraged to go back at least to the time that the answer was “No” or “N/A” for cohabiting and/or same-sex relationships. For example (with the colours that have been attached to these answer-codes in the database):

<p style="text-align: center;">2016 Yes 2015</p>
<p style="text-align: center;">No, but 2010</p>
<p style="text-align: center;">No 2008</p>
<p style="text-align: center;">? 0000</p>

Please note that for the visualisation of the periods in the interactive database, the timelines were transformed into coloured segments. To this end the (pragmatic, but legally incorrect) assumption was made that if a legal change occurred in the course of a year, this change already applied since the beginning of that year. So if, as in the example given, a certain legal situation lasted from a day in 2010 until a day in 2015, then the year 2014 would be the last year with the answer-code (and colour) corresponding to the legal situation that applied in that period. The whole year 2015 would get the answer-code (and colour) corresponding to the legal situation that began in the course of that year. And the year 2009 would be the last year with the answer-code that legally applied until a day in 2010. This can be seen most clearly in

those results tables of the interactive database where the periods are transformed into coloured segments representing all single years. In the example given, this would be as follows:

2016	Yes
2015	Yes
2014	No, but
2013	No, but
2012	No, but
2011	No, but
2010	No, but
2009	No
2008	No
2007	?
2006	?
etc.	?
0000	?

This way of visualising the data makes it easy for the user of the database to conclude (correctly) that in this example the answer has been “No, but” *since* 2010. A lawyer or similar user of the database will understand that this means “since *a day in* 2010”.

The colours for the answer-codes have been chosen so as to facilitate easy understanding. The (“traffic light”) colours green, yellow, orange and red, symbolise the attitude of a legal system towards a certain family format. The colour grey indicates there is a “grey area” (the law itself is in doubt) and the colour white indicates there is a “white spot” (no information). The colour white has not only been used when an expert answered with a “?”, but also when a question was not asked for a specific legal family format (“X”) or when a question was not answered at all.

As indicated above, in this database the term “*jurisdiction*” is used both for whole countries and for the main regional/provincial/state parts that a country may have.

By “*residence*” and “*residing*” is meant: having *lawful residence* and/or, as the case may be, domicile, habitual residence, etc.⁴¹ When choosing an answer-code (and unless the specific question implies otherwise), the legal experts were asked to make the following *five assumptions* when answering the questions:

⁴¹ See the Guidance document, Waaldijk et al. 2016, p. 18-19.

1. both partners have the citizenship of the *country where they are residing* (and for which the expert is answering the questionnaire);
2. they are also residing in this country (in the jurisdiction of the expert);
3. in this jurisdiction they *have been living together as a couple for already at least two years*;
4. if they have formalised (or are formalising) their relationship, this formalisation will have taken place (or will take place) in that same jurisdiction (and not in any consulate); and
5. if they want to split up, they will also do that in this same jurisdiction.

This way, in most cases the chosen answer-codes do not need to reflect possible international or interregional complications (nor the eventuality of the partners not living together). The legal experts could choose to say something about such complications in the explanations. There are several questions that specifically deal with international complications. Section 4 (Migration) includes four questions about the recognition of *foreign* marriages and *foreign* partnerships (questions 4.2, 4.4, 4.5 and 4.6) and two about *foreign* adoptions (4.8 and 4.9). This section furthermore includes questions about individuals with a *foreign citizenship* (questions 4.1 to 4.4 and 4.7), while also Section 1 (Formalisation) includes such questions (1.3 to 1.7). In most questions, however, the jurisdiction of citizenship of the partners is assumed to be the same as the jurisdiction of residence of the partners, and also the same as the jurisdiction of celebration (that is: the jurisdiction where the marriage or partnership was entered into).

1.4.4 Sources and explanations

The legal experts were asked to provide references to the legal sources of their answers. They were asked to do that for each of the three family formats – and ideally for each of the periods for which they give an answer. If a *primary source* was not easily available, they were asked to refer to a reliable *secondary source*, such as a legal handbook, law journal article or (official) website. They were also given guidelines as to how sources should be quoted.⁴²

After mentioning the source, the legal experts could also add an explanation and/or some nuances to the given answers. In most questions, there was space for three explanations – one regarding marriage, one regarding registered partnership, and one regarding cohabitation.

⁴² See Waaldijk et al. 2016.

When the given answer was “Yes, but” or “No, but”, an explanation was required to explain the “but”.

The references and explanations for a question can be found in the [interactive database](#) (by clicking on “More...” or by accessing the relevant source paper, authored by the relevant legal expert. In each of these [source papers](#) the complete answers (with references, explanations and nuances) for one section for one jurisdiction can be found.

At the end of each section a “background question” is included (and in sections 1 and 3 one or two other open questions) to provide the legal experts with the opportunity to give a better overall picture, and to mention issues that are relevant in the country/jurisdiction but that were not included in other questions.

1.5 Research team

The following people contributed to the development of the LawsAndFamilies questionnaire⁴³ and database.⁴⁴

At Leiden Law School in the Netherlands:

- Kees Waaldijk (professor of comparative sexual orientation law, www.law.leidenuniv.nl/waaldijk): project coordinator and primary investigator; conception of the questionnaire and the database; editor of the content of the database; principal author and editor of this comparative analysis.
- José Maria Lorenzo Villaverde (researcher in comparative sexual orientation law 2013-2014): contributed to the selection and formulation of the questions, to the drafting of the Guidance for experts and to the coordination of the project. On the basis of his expertise on Spanish legislations he contributed to the definition of the characteristics that distinguish “cohabitation” from “registered partnership”.⁴⁵
- Natalie Nikolina (researcher in comparative sexual orientation law, 2015-2016): contributed to finalising the formulation of the questions and of the Guidance for

⁴³ Waaldijk et al. 2016.

⁴⁴ Waaldijk et al. (Eds.) 2017.

⁴⁵ Expertise gained and developed in his PhD research at the Faculty of Law of the University of Copenhagen since 2009. See Lorenzo Villaverde, J.M. (2015). *The Legal Position of Same-Sex Couples in Spain and Denmark. A Comparative Study of Family Law*. Copenhagen: Faculty of Law of the University of Copenhagen (PhD thesis defended April 2016, not yet published).

experts), to the coordination of the project and of all the legal experts, to the reviewing and editing of the answers provided by these experts (in particular in sections 3 (Parenting) and 5 (Splitting up), and to this comparative analysis.

- Giuseppe Zago (researcher in comparative sexual orientation law, 2014-2016): contributed to finalising the formulation of the questions and of the Guidance for experts), to the coordination of all the legal experts in the project, to the reviewing and editing of the answers provided by these experts, and to this comparative analysis.
- Daniel Damonzé (researcher in comparative sexual orientation law, 2016-2017, www.universiteitleiden.nl/en/staffmembers/daniel-damonze): contributed to the reviewing and editing of the answers provided by the legal experts, to finalising the content of the database, and to this comparative analysis.

And at the Institut national d'études démographiques (INED, France):

- Arianna Caporali (research engineer at the Surveys Department, in charge of contextual databases and providing access to survey data): conception of the interactive database; coordination of its development and implementation, and of the contacts with the company producing it (Opixido); co-author of the user guide; co-editor of the website.
- Kamel Nait Abdellah (IT engineer at the Surveys Department): development of the web application used to let experts answer the questionnaire online (with Voozanoo software of the company EpiConcept); contribution to the implementation of the interactive database; co-editor of the website.
- Marie Digoix (social historian at INED's Family Research Unit): coordination between the legal, sociological and statistical research teams and co-editor of the website.
- Geneviève Bourge (Webmaster and web project manager at the Communication Department): contribution to the website and to the database implementation.
- Raphaël Laurent (IT department head assistant manager, in charge of the Information system): contribution to the specifications for the interactive database.

The content of the interactive legal database was provided by over 40 legal experts in over 20 countries. Their 138 authored source papers with their complete answers, references and

explanations can be found in the database.⁴⁶ For a [list of all experts](#), see the database, or see the references in Chapter 2 of this comparative analysis.

1.6 The structure of this comparative analysis

Chapter 2 offers an overview of the main results of the legal survey. Chapters 3, 4, 5, 6 and 7 are detailed case studies of some specific issues covered by the questionnaire and the database. Chapter 8 contains an overview of the results of the sociological survey. Chapter 9 highlights the main findings, including gender aspects. It draws parallels between legal and sociological findings, between laws and public attitudes, and between laws and statistics. And it offers recommendations for further research and for policy and law.

Each chapter has its own list of references, and the footnotes mostly use a simple author/date system to refer to books, articles and reports in those lists.

This comparative analysis is only a start. The *LawsAndFamilies Database* brings a wealth of data together, that calls for many more comparative studies. The editors of the database always welcome offers to carry out (or fund) further data gathering or data analysis. In fact, it is hoped that in coming years this database will bring *more and more* information *together* about legal, statistical and sociological aspects of legal family formats for same-sex and different-sex families, in *more and more* countries.

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⁴⁶ See <http://lawsandfamilies-database.site.ined.fr/en/legal-project/data/>.

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Chapter 2:

Overview of the results from the legal survey

by Kees Waaldijk ⁴⁷

2.1 More legal family formats for same-sex couples in more European countries

Over the last five decades, Europe has seen a remarkable growth both in the number of countries that offer some legal recognition to *de facto* cohabitation (of different-sex and/or same-sex partners), and in the number of countries that allow same-sex couples to enter into marriage, or at least into a form of registered partnership that more or less resembles marriage.⁴⁸ The detailed questionnaire used for the LawsAndFamilies Database makes it possible to describe these developments in much more detail. The introduction of registered partnerships started in 1989 (in Denmark) and has been an even more rapid trend than the recognition of cohabitation. The opening up of marriage started in 2001 (in the Netherlands), and has also become a remarkably fast trend.

All this is particularly the case in – but not limited to – the 21 countries sampled for the LawsAndFamilies questionnaire, as is shown in (the middle column of) *Table 2.1*.⁴⁹ All 21 countries in the sample are part of the European Economic Area (the EEA, consisting of the 28 European Union countries plus Iceland, Norway and Liechtenstein).

The numbers and percentages in *Table 2.1* indicate that the LawsAndFamilies sample of (21) countries is fairly representative for the group of (31) countries that are part of the EEA. However, it should be borne in mind that within the group of (10) countries outside the sample, there are four countries (Slovakia and the three Baltic countries) where neither

⁴⁷ Professor of comparative sexual orientation law, Leiden Law School, www.law.leidenuniv.nl/waaldijk. Kees Waaldijk is the main author of the LawsAndFamilies questionnaire on legal family formats, and principal editor of the law content of the resulting LawsAndFamilies Database (www.LawsAndFamilies.eu). His report *More or less together* was published in 2005.

⁴⁸ Many articles and books have been published about these remarkable developments in (European) countries, including: Boele-Woelki & Fuchs 2003, 2012 and 2017, Boele-Woelki, Mol & Van Gelder (Eds.) 2015, Curry-Sumner 2005, Gallo, Paladini & Pustorino (Eds.) 2014, Kollman 2007, Perelli-Harris & Sánchez Gassen 2012, Scherpe & Yassari (Eds.) 2005, Scherpe & Hayward 2017, Waaldijk 2004 and 2014a, Waaldijk (Ed.) 2005, Waaldijk & Fassin 2008, Wintemute & Andenaes (Eds.) 2001.

⁴⁹ For the chronology of years in which countries have made marriage of registered partnership available to same-sex couples, see Waaldijk 2014a, p. 44, and see Carroll 2016, p. 50-52.

marriage nor partnership registration is available to same-sex couples. Even when the Estonian partnership legislation will be fully implemented,⁵⁰ the three remaining countries represent a rather greater percentage (30%) than the three countries (14 %) within the sample where marriage and registered partnership are not yet available to same-sex partners (Poland, Bulgaria, Romania).

*Table 2.1: Number and percentage of countries where **marriage and/or partnership registration** is nationally available to same-sex couples*

	whole Council of Europe (n=47)	whole European Economic Area (n=31)	LawsAnd Families project (n=21)	rest of European Economic Area (n=10)	rest of Council of Europe (n=16)
1985	0	0	0	0	0
1990	1	1	0	1	0
1995	3	3	2	1	0
2000	7	7	6	1	0
2005	12	12	9	3	0
2010	19	17	14	3	2
2016	26	24	18	6	2
% in 1990	2%	3%	0%	10%	0%
% in 1995	6%	10%	10%	10%	0%
% in 2000	15%	23%	29%	11%	0%
% in 2005	26%	39%	43%	30%	0%
% in 2010	40%	55%	67%	30%	13%
% in 2016	55%	77%	86%	60%	13%

Sources: various (see the main text)

Almost all countries outside the EEA (including many former parts of Yugoslavia and of the Soviet Union, plus Albania, Turkey, Monaco and San Marino) do also not provide such legal options.⁵¹ Therefore the sample is *not* representative for the whole of the Council of Europe.

⁵⁰ About the implementation problems regarding the new Estonian law, see Roudik 2016.

⁵¹ The Commissioner for Human Rights of the Council of Europe (Nils Muižnieks) has recently pointed out that draft “legislation on registered same-sex partnerships is currently under discussion in San Marino and Monaco” (Human Rights Comment, 21 February 2017, www.coe.int/en/web/commissioner/-/access-to-registered-same-sex-partnerships-it-s-a-question-of-equality). However, it is not certain that the legislation proposed in these two countries will meet the criteria that have been used in the LawsAndFamilies project to distinguish registered partnership from cohabitation (see paragraph 1.3 above).

The only member states of the Council of Europe outside the EEA that have so far introduced a form of registered partnership to same-sex couples, are Switzerland and Andorra (assuming that the legislation of the latter meets the definition of registered partnership discussed in paragraph 1.3 above).

The six countries within the EEA that are not included in this legal survey, but that have same-sex marriages and/or registered partnerships, are Denmark, Luxembourg, Spain, Liechtenstein, Croatia and Cyprus. As indicated above, it is possible that Estonia will soon join this category.

Table 2.1 (above) allows for the conclusion that the number of countries within the EEA where same-sex couples are allowed to formalize their relationship as marriage or registered partnership, has increased consistently and rapidly over the last 30 years, and now form a large majority (77%; and in the sample of 21 countries the majority is even larger: 86%).

All seven exceptions to this are former communist countries in Eastern or Central Europe that have joined the EU (Estonia, Latvia, Lithuania, Poland, Slovakia, Bulgaria, Romania). It is difficult to predict if and when these countries will follow the clear trend among the other 24 countries in the EEA. However, it should be noted that having a communist past and a Central European geography has not prevented Slovenia, Hungary, Croatia and the Czech Republic from introducing a form of registered partnership. Furthermore, also Estonia has passed legislation to this effect (see above), and the *LawsAndFamilies* database shows that there is a beginning of legal recognition of same-sex couples also in Poland, Bulgaria and Romania.⁵² Furthermore, the Romanian Civil Code, by referring to EU legislation in its article 277, may have an opening for the recognition of foreign same-sex marriages as regards free movement.⁵³ All this is extra relevant, because the European Court of Human Rights takes national legal developments into account when considering whether or not the non-availability of a “specific legal framework providing for the recognition and protection of [...] same-sex unions” amounts to a violation of the right to respect for private and family life as guaranteed by article 8 of the European Convention on Human Rights.⁵⁴

⁵² See paragraph 2.3.3 below.

⁵³ For a brief discussion of art. 277 of the Romanian Civil Code, see Ionescu 2017d (question 4.4). See also paragraph 6.3 below, about the case of *Coman and Others*, now pending in the Court of Justice of the European Union (Case C-673/16).

⁵⁴ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/1, par. 179-185. For a discussion about the importance of the *Oliari* case, see Zago 2015a and 2015b. For an overview of earlier judgments in this field of the European Court of Human Rights and the Court of Justice of the EU, see Waaldijk 2014a.

The expectation can therefore be that the number of EEA countries enabling same-sex couples to formalize their partnership will continue to grow. The future pace of growth may be slower than over the last 30 years. It is unclear if and when a similar growth will be seen among member states of the Council of Europe that are not part of the EEA.

2.2 Main results in the six sections of the database

The following paragraphs offer a broad overview of the results in the database, especially for some of the most interesting questions used in collecting legal data for the six sections of this database. The focus is here on the answers given by the legal experts for the years 1995, 2005 and for the most recent year that they have covered (i.e. 2015 or 2016). These results cover 23 jurisdictions,⁵⁵ including the three jurisdictions of the United Kingdom. This analysis was made when for some jurisdictions the answers given were still subject to final adjustments or validation. However, not many final adjustments had to be made, so overall the next paragraphs give a reliable picture. In *Table 2.2*, the colours are those used in the LawsAndFamilies Database for the answer codes “Yes”, “Yes, but”, etc. (see paragraph 1.4.3 above). In the further tables in this chapter the colours red-orange-yellow-green give a rough indication on the level of equality (green indicating the highest levels of equality, and red the lowest).

2.2.1 Section 1 – Formalisation

The first question of the questionnaire⁵⁶ asks which legal family formats have been made available to same-sex and/or different-sex couples, and since when. In *Table 2.2* below, the current availability of the three different formats is visualized. The results regarding cohabitation in this table only reflect the overall assessments given by the legal experts for these jurisdictions in their answers to question 1.1. How many and which of the legal consequences of marriage now also apply to (non-formalised) cohabitation there – and since when – is something that can be derived from the answers to many other questions in the LawsAndFamilies Database.

⁵⁵ Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, and the United Kingdom (England and Wales; Northern Ireland; Scotland).

⁵⁶ Waaldijk et al. 2016.

Table 2.2: Answers of the legal experts to question 1.1 (**Legal family formats**), for the most recent year for which they answered this question ⁵⁷

Question 1.1 – Which of the three legal family formats mentioned here are available to different-sex and/or same-sex couples?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
<i>No same-sex marriage and no registered partnership:</i>							
Bulgaria	2015	Yes	No	No	No	Yes	No, but
Poland	2015	Yes	No	No	No	Yes	Yes
Romania	2015	Yes	No	No	No	No, but	No
<i>Only same-sex registered partnership:</i>							
Austria	2016	Yes	No	No	Yes	Yes	Yes
Czech Republic	2015	Yes	No	No	Yes	Yes	Yes
Finland	2015	Yes	No	No	Yes	Yes, but	Yes, but
Germany	2015	Yes	No	No	Yes	Yes	Yes
Hungary	2015	Yes	No	No	Yes	Yes	Yes
Italy	2016	Yes	No	No	Yes	Yes	Yes
Slovenia	2015	Yes	No	No	Yes	Yes, but	No, but
Northern Ireland	2016	Yes	No	No	Yes	Yes, but	Yes, but
<i>Same-sex & different-sex registered partnership:</i>							
Greece	2016	Yes	No	Yes	Yes	No, but	No, but
Malta	2015	Yes	No	Yes	Yes	No	No
<i>Same-sex marriage and same-sex & different-sex registered partnership:</i>							
Belgium	2015	Yes	Yes	Yes	Yes	Yes	Yes
France	2015	Yes	Yes	Yes	Yes	Yes	Yes
Netherlands	2015	Yes	Yes	Yes	Yes	Yes	Yes
<i>Same-sex marriage and same-sex registered partnership:</i>							
England&Wales	2016	Yes	Yes	No	Yes	Yes, but	Yes, but
Scotland	2016	Yes	Yes	No	Yes	Yes, but	Yes, but
<i>Only same-sex marriage:</i>							
Portugal	2015	Yes	Yes	No	No	Yes	Yes
<i>Same-sex marriage and no longer the possibility to start a new same-sex registered partnership:</i>							
Iceland	2015	Yes	Yes	No	No, but	Yes	Yes
Ireland	2016	Yes	Yes	No	No	Yes	Yes
Norway	2015	Yes	Yes	No	No, but	Yes	Yes
Sweden	2015	Yes	Yes	No	No, but	Yes	Yes

Source: The LawsAndFamilies Database 2017

⁵⁷ For the meaning of these answer-codes, see paragraph 1.4.3 above.

Please note that after the legal experts for Finland completed their answers, Finland has opened up marriage to same-sex couples per March 2017.⁵⁸ Conclusions from these data regarding question 1.1, and regarding three other salient questions in Section 1 (concerning contracts between the partners, questions 1.11 and 1.12, and concerning the right to use the surname of your partner, question 1.13, see *Table 2.3*) are presented in *Table 2.4* below.

Table 2.3: Text of the most relevant questions in Section 1 (Formalisation)

1.1 Legal family formats	Which of the three legal family formats mentioned here are available to different-sex and/or same-sex couples? <i>(For the distinction between registered partnership and cohabitation, see section e of the Guidance. If there are two or more formats available for cohabiting couples, then please mention these formats separately in the explanation to this question.)</i>
1.11 Contract	Can the partners make a contract (with or without third-party effect) to organise their relationship, for example with regard to property or personal obligations? <i>(Think of prenuptial contracts and cohabitation contracts.)</i>
1.12 Statutory contract	Are there specific statutory rules regarding such a contract? <i>(See question 1.11 about the possibility for the partners to make a contract to organise their relationship.)</i>
1.13 Surname	Can (or must) one partner use or have the surname of the other partner?

Source: Waaldijk e.a. 2016.

⁵⁸ Hiltunen 2017a (questions 1.1 and 1.16).

Table 2.4: Some conclusions about the results in Section 1 – Formalisation

Different-sex	Same-sex
<p>Marriage:</p> <ul style="list-style-type: none"> All 23 jurisdictions allow different-sex marriages. <p>Registered partnership:</p> <ul style="list-style-type: none"> Only five countries allow different-sex partnership registrations (1.1). <p>Cohabitation:</p> <ul style="list-style-type: none"> Experts for all but one countries (Malta) answered “Yes”, “Yes, but” or “No, but” as regards the availability by 2015/2016 of some legal recognition for cohabitation (1.1). For 2005 a very large majority said so, while a small majority said this for 1995. A large majority of jurisdictions allow contracts between cohabitants (1.11). But only a minority (7 out of 23) specifically regulate cohabitation contracts (1.12). Only in Austria and the UK cohabitants have a similar right to use each other’s surname as spouses (1.13).⁵⁹ 	<p>Marriage:</p> <ul style="list-style-type: none"> Almost half of the jurisdictions (10 out of 23) now allow same-sex marriages (1.1), and Finland is following in March 2017.⁶⁰ No jurisdiction treats same-sex spouses differently as regards surnames (1.13) or contracts (1.11 and 1.12). <p>Registered partnership:</p> <ul style="list-style-type: none"> A large majority allows same-sex partnership registrations (15 out of 23; and another 5 allowed them until same-sex marriage was made available) (1.1). In 1995 only very few countries did this, but in 2005 already a majority. The absence of any registration scheme for same-sex couples in the other three countries, may be against the 2015 judgment of the European Court of Human Rights in the case of <i>Oliari and others v. Italy</i> (see paragraph 2.1 above).⁶¹ Very few jurisdictions treat same-sex registered partners differently than different-sex spouses as regards contracts (1.11 and 1.12). But almost half (9 out of 20 jurisdictions) do not apply the same rules on surnames (1.13). <p>Cohabitation:</p> <ul style="list-style-type: none"> The number of jurisdictions where legal recognition also covers same-sex cohabitants, is in 2015/2016 almost as high as for different-sex cohabitation. A decade ago this could already be said for a small majority of jurisdictions, while the answers indicate that back in 1995 this was only true for a handful of countries. All but one of the seven countries that regulate cohabitation contracts, also regulate them for same-sex couples (1.12). The right to use each other’s surname is as limited as for different-sex cohabitants (1.10).

Source: The LawsAndFamilies Database 2017

⁵⁹ See the answers to questions 1.13 of Graupner 2017a, Norrie 2017a, Sloan 2017a and Sloan 2017b.

⁶⁰ Hiltunen 2017a (questions 1.1 and 1.16).

⁶¹ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/11.

2.2.2 Section 2 – Income and troubles

Having a partner can sometimes lead to lower income tax (2.1), but also (when one's partner has an income) to loss or reduction of a basic social benefit (2.2). Three examples of rights that might be triggered in times of crisis, are the right to paid or unpaid leave to care for your partner in need (2.4), the right to refuse to testify against your partner in criminal proceedings (2.8), or the availability of specific statutory protection against domestic violence (2.7). See also the case studies on the latter two questions in chapter 3 and 4 below.

Table 2.5: Text of the most relevant questions in Section 2 (Income and troubles)

2.1 Lower income tax	Can a relationship of this type result in lower income tax than for two individuals without a partner?
2.2 Social benefits	When one partner (long-term unemployed or even never having been employed at all) would be entitled to a basic social benefit, will the income of the other partner then be taken into consideration and will it possibly result in loss or reduction of this entitlement?
2.4 Care between partners	In case one partner is in need of care, does the other partner then have a statutory right to paid or unpaid leave to give that care?
2.7 Domestic violence	When one partner uses violence against the other partner, does specific statutory protection apply?
2.8 Criminal procedure	In case of a criminal prosecution against one partner, can the other partner then refuse to testify against the partner who is being prosecuted?

Source: Waaldijk e.a. 2016

Table 2.6: Some results from Section 2 – *Income and troubles* ⁶²

Different-sex	Same-sex
<p>Marriage:</p> <ul style="list-style-type: none"> All 23 jurisdictions now have specific rules on domestic violence inside marriage (2.7), but this a fairly recent type of legislation (see also Chapter 3 below). All or all but one of the 23 jurisdictions have legislation on lower tax for married couples (2.1), on the consequences of a spouse's income for the other spouse's basic social benefit (2.2), and on exemption from the duty to testify against your spouse (2.8). Since more recently, almost all jurisdictions (20 out of 23) also have legislation regarding leave to care for your spouse (2.4). <p>Cohabitation:</p> <ul style="list-style-type: none"> A slowly growing minority (9 out of 22 jurisdictions) includes cohabitants in their rules on exempting spouses from having to testify in criminal procedure (2.8); the European Court of Human Rights has ruled that countries do not have to do this (2012 judgment in the case of <i>Van der Heijden v. Netherlands</i>; see also Chapter 4 below).⁶³ Only in a minority of jurisdictions (8 out of 22) cohabitation can lead to lower income tax (2.1). In almost all jurisdictions (21 out of 23) cohabitants are now covered in legislation on social benefits (2.2), and also (19 out of 20) in legislation on care leave (2.4). However, in some jurisdictions this is to a lesser extent than spouses. All jurisdictions include different-sex cohabitants in their domestic violence legislation (2.7). (On domestic violence, see also Chapter 3 below.) 	<p>Marriage:</p> <ul style="list-style-type: none"> No difference with different-sex marriage for these five issues. <p>Registered partnership:</p> <ul style="list-style-type: none"> No difference with different-sex marriage regarding social benefits (2.2) or domestic violence (2.7). But a few countries (2 out of 22) make a difference regarding testifying in criminal procedures (2.8). Only one country (Slovenia, but only until February 2017)⁶⁴ made differences between spouses and registered partners as regards income tax (2.1) and care leave (2.4). The difference regarding care leave probably amounted to forbidden sexual orientation discrimination in the sense of the Employment Equality Directive (2000/78/EC), as interpreted by the Court of Justice of the EU (most recently in the case of <i>Hay</i>).⁶⁵ <p>Cohabitation:</p> <ul style="list-style-type: none"> The number of countries that distinguish between same-sex and different-sex cohabitants on any of these issues, is small and shrinking: one regarding income tax (2.1), at least two regarding social benefits (2.2), three regarding care leave (2.4), at least two regarding domestic violence (2.7), and three regarding criminal procedure (2.8). All these distinctions are clearly incompatible with the jurisprudence of the European Court of Human Rights (starting with its 2001 judgment in the case of <i>Karner v. Austria</i>).⁶⁶

Source: *The LawsAndFamilies Database 2017*

⁶² See also Chapter 3 (about domestic violence) and Chapter 4 (about the right to refuse to testify against your partner), below.

⁶³ ECtHR, 3 April 2012, *Van der Heijden v. Netherlands*, App. No. 42857/05.

⁶⁴ See Raigelj 2017b (questions 2.1 and 2.4) and Kogovsek Salamon 2017a (questions 1.1 and 1.16).

⁶⁵ CJEU, 12 December 2013, *Hay v. Crédit agricole mutuel*, C-267/12. See also Waaldijk 2014a, p. 53.

⁶⁶ ECtHR, 24 July 2003, *Karner v. Austria*, App. No. 40016/98. See also Waaldijk 2014a, p. 51.

2.2.3 Section 3 – Parenting

The questionnaire contains a long list of questions about parenting issues. The issues of assisted insemination (3.1), legal parenthood for the female partner of a mother (3.4), second-parent adoption (3.9) and joint adoption (3.10) have probably been the most controversial in discussions about same-sex partners. See also the case study on parenting issues in Chapter 5 below.

Table 2.7: Text of the most relevant questions in Section 3 (Parenting)

3.1 Assisted insemination	Is it legally possible in this type of relationship to become pregnant through medically assisted insemination using sperm of a donor?
3.4 Legal parenthood	When one partner gives birth, will (or can) the other partner then also become legal parent of the child, without having to go through adoption? <i>(For example automatically, or by way of recognition/acknowledgement.)</i>
3.9 Second-parent adoption	When only one partner is the legal parent of a child, does the other partner then have the possibility of becoming the child's second parent by way of adoption?
3.10 Joint adoption	Can partners jointly adopt a child?

Source: Waaldijk e.a. 2016

Table 2.8: Some results from Section 3 – Parenting⁶⁷

Different-sex	Same-sex
<p>Marriage:</p> <ul style="list-style-type: none"> • Of the 23 jurisdictions all but one (Malta) allow assisted insemination with sperm of a donor (3.1).⁶⁸ • All jurisdictions in the sample allow joint and second-parent adoption (3.10 and 3.9) already since at least 20 years. <p>Cohabitation:</p> <ul style="list-style-type: none"> • All jurisdictions allow a cohabiting man to become the legal father of the child born to the woman with whom he cohabits (3.4). • Almost all jurisdictions allow assisted insemination with sperm of a donor (3.1) • The number of jurisdictions that allow cohabiting different-sex partners to adopt is growing (3.9 and 3.10). • But a small majority of the jurisdictions do not yet allow joint adoptions (3.10), and a large minority do not yet allow second-parent adoptions (3.9) by different-sex cohabitants. 	<p>General:</p> <ul style="list-style-type: none"> • A growing majority of jurisdictions (14 out of 23) allow a woman in a same-sex relationship to access medically assisted insemination (3.1). • A growing minority of jurisdictions (9 out of 23) now allow a woman to become the second legal parent when her female partner gives birth (without having to go through adoption) (3.4). <p>Marriage:</p> <ul style="list-style-type: none"> • Of the 10 jurisdictions that allow same-sex marriage, all but one (France) also allow women in such a marriage to access medically assisted insemination (3.1).⁶⁹ • A few countries (Belgium, Portugal) waited several years after opening up marriage to same-sex couples, before they also allowed such couples to adopt (3.9 and 3.10).⁷⁰ <p>Registered partnership:</p> <ul style="list-style-type: none"> • Most jurisdictions (17 out of 20) now allow second-parent adoptions by registered partners (and 13 out of 20 also allow joint adoption), but most of them at first excluded the possibility of adoption from the legal consequences of registered partnership (3.9 and 3.10) <p>Cohabitation:</p> <ul style="list-style-type: none"> • At least in five countries (Italy, Norway, Poland, Romania, Slovenia) the rules on adoption are more restrictive for same-sex cohabitants than for different-sex cohabitants (3.9 and 3.10);⁷¹ this seems to be against the 2013 judgment of the European Court of Human Rights in the case of <i>X and others v. Austria</i>.⁷²

Source: The LawsAndFamilies Database 2017

⁶⁷ See also Chapter 5 below, about parenting issues.

⁶⁸ See Attard 2017c (question 3.1).

⁶⁹ See Ronzier 2017c (question 3.1).

⁷⁰ See the answers to questions 3.9 and 3.10 by Borghs 2017c and Freitas 2017c.

⁷¹ See the answers to questions 3.9 and 3.10 by Winkler 2017c, Eeg 2017c, Pudzianowska 2017c, Cojocariu 2017c, and Rajgelj 2017c.

⁷² *X and others v. Austria*

2.2.4 Section 4 – Migration

The questions in this section have often been the most challenging. The questions concern complex areas of law: immigration law (residence entitlement for a foreign partner, 4.1 to 4.4), nationality law (citizenship for a foreign partner, 4.7), and private international law (including the recognition of foreign marriages or registered partnerships, see Chapter 6 below, and including the recognition of foreign adoptions). Here we will only look at immigration and nationality law.

Table 2.9: Text of the most relevant questions of Section 4 (Migration)

4.1 Partner of national citizen	When one partner is a residing national citizen, while the other is a foreigner from another continent, will the foreign partner then have a residence entitlement/eligibility? <i>(Please assume that they married/registered/cohabited in the country where they now want to reside. As to the meaning of 'residing', see section c of the Guidance.)</i>
4.2 Partner of national citizen (foreign status)	When one partner is a residing national citizen, while the other partner is a foreigner from another continent, <i>and this couple married/registered in the country of the foreigner</i> , will the foreign partner then have a residence entitlement/eligibility?
4.3 Partner of (non-EU) foreigner	When both partners are foreigners from another continent, and one of them is residing in the country, will the other partner then have a residence entitlement/eligibility? <i>(Please assume that they married/registered/cohabited in the country where they now want to reside.)</i>
4.4 Partner of EU citizen (foreign status)	When one partner is a foreign EU citizen who is residing in the country, while the other is a foreigner from another continent, <i>and this couple married/registered/cohabited in the country of the EU citizen</i> , will the non-EU partner then have a residence entitlement?
4.7 Citizenship	Does a relationship of this type make it easier for a foreign partner to obtain citizenship?

Source: Waaldijk e.a. 2016

Table 2.10: Some results from Section 4 – Migration ⁷³

Different-sex	Same-sex
<p>Marriage:</p> <ul style="list-style-type: none"> • It seems that all jurisdictions recognise foreign different-sex spouses in their immigration law and nationality law. • Foreign different-sex marriages are mostly recognised in all jurisdictions. <p>Cohabitation:</p> <ul style="list-style-type: none"> • ■ The recognition of different-sex cohabiting partners in the context of immigration law is in many countries less than the recognition of different-sex spouses. • ■ Only a minority of countries (8 out of 21) recognise cohabitants (to some degree) in their nationality law (4.7). 	<p>Marriage:</p> <ul style="list-style-type: none"> • ■ No differences with different-sex marriage in immigration law or nationality law. • ■ Several countries that do not allow same-sex couples to marry will in some situations recognise foreign same-sex marriages (see Chapter 6). <p>Registered partnership:</p> <ul style="list-style-type: none"> • ■ Three countries (Belgium, France and (until 2017) Slovenia) distinguish between spouses and registered partners in their nationality law (4.7).⁷⁴ • ■ Several countries distinguish between spouses and registered partners in their immigration law (4.1 to 4.4). • ■ Several of the countries that do not allow same-sex couples to register as partners, recognise foreign registered same-sex partnerships (see Chapter 6). <p>Cohabitation:</p> <ul style="list-style-type: none"> • ■ All eight countries that recognise different-sex cohabitants to some degree in nationality law, extend this recognition to same-sex cohabitants (4.7). • ■ A few of the countries that recognise different-sex cohabitants in immigration law, do not extend this recognition (clearly, and in the same way) to same-sex cohabitants (for question 4.1 this is so in 3 out of 16 countries: Bulgaria, Greece, Romania).⁷⁵ Those countries that do not do this, are probably in violation of the European Convention of Human Rights, as interpreted in recent judgments of the European Court of Human Rights,⁷⁶ especially if same-sex couples do not have an option to acquire immigration rights via marriage or partnership registration.⁷⁷

Source: The LawsAndFamilies Database 2017

⁷³ See also Chapter 6 below, about recognition of foreign same-sex marriage and foreign registered partnerships.

⁷⁴ See the answers to question 4.7 by Willems 2017d, Kouzmine 2017d and Kogovsek Salamon 2017d (and 2017a).

⁷⁵ See the answers to question 4.1 by Katchaunova 2017d, Lima 2017d and Ionescu 2017d.

⁷⁶ ECtHR, 23 February 2016, *Pajic v. Croatia*, App. No. 68453/13.

⁷⁷ ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, App. No. 51362/09.

2.2.5 Section 5 – Splitting up

Here we leave aside the many questions in Section 5 about different procedures to end a marriage or registered partnership. Arguably the two most important questions in this section are about alimony (5.10) and the division of property (5.9). Based on the available data, the following conclusions can be drawn as regards these legal consequences.

Table 2.11: Text of the most relevant questions of Section 5 (Splitting up)

5.9 Property at dissolution	In case the partners split up, do statutory rules consider as joint property any possessions acquired by either of them after they started this type of relationship?
5.10 Alimony	In case the partners split up, do statutory rules on alimony apply?

Source: Waaldijk e.a. 2016

Table 2.12: Some results from Section 5 – Splitting up

Different-sex	Same-sex
<p>Marriage:</p> <ul style="list-style-type: none"> All jurisdictions have rules on alimony that can be invoked at divorce (5.10). Less consensus exists as to whether or not possessions acquired during the marriage will be considered as joint at the time of divorce (5.9). <p>Cohabitation:</p> <ul style="list-style-type: none"> A large majority of jurisdictions treats cohabitants differently than spouses as regards alimony (5.10) and as regards property (5.9). 	<p>Marriage:</p> <ul style="list-style-type: none"> Currently no difference with different-sex marriage for the two issues. <p>Registered partnership:</p> <ul style="list-style-type: none"> Very few jurisdictions make any difference between marriage and registered partnership as regards property at dissolution (5.9). Very few jurisdictions do not apply the rules on alimony in the same way to the dissolution of marriage as to the dissolution of a registered partnership (5.10). <p>Cohabitation:</p> <ul style="list-style-type: none"> Almost all countries that apply rules on alimony (5.10) and property (5.9) to different-sex cohabitants, also apply them to same-sex cohabitants.

Source: The LawsAndFamilies Database 2017

2.2.6 Section 6 – Death

The questionnaire contains six questions about the protection of a surviving partner during the vulnerable period after the death of the other partner. Based on the available data, the following conclusions can be drawn. See also the case study on wrongful death in Chapter 7 below.

Table 2.13: Text of the most relevant questions of Section 6 (Death)

6.1 Tenancy continuation	When the partner who holds the rental contract dies, does the other partner then have a right to continue to rent the home?
6.2 Property at death	When one partner dies, do statutory rules consider as joint property any possessions acquired by either of them after they started this type of relationship? <i>(In other words: would the surviving partner be deemed to own 50% of these possessions, while the other 50% are subject to relevant rules of inheritance law?)</i>
6.3 Inheritance	When one partner dies without testament, is the other partner then an inheritor?
6.4 Inheritance tax	Is the surviving partner exempted from paying inheritance tax (or required to pay less than a mere friend would have to pay)?
6.5 Survivor's pension	When one partner dies while being employed, is the surviving partner then normally entitled to a survivor's pension? <i>(For example on the basis of statutory law, and/or on the basis of a collective labour agreement or arrangements of the employer.)</i>
6.6 Wrongful death	In case of wrongful death of one partner, is the other partner then entitled to compensation from the wrongdoer?

Source: Waaldijk e.a. 2016

Table 2.14: Some results from Section 6 – *Death* ⁷⁸

Different-sex	Same-sex
<p>Marriage:</p> <ul style="list-style-type: none"> • Consensus as regards intestate inheritance (6.3) and compensation for wrongful death (6.6). • Near consensus (all countries except Poland) regarding survivor's pension (6.5).⁷⁹ • Now also near consensus (all countries except Bulgaria, and very limited in Hungary) as regards tenancy continuation after death of one partner (6.1),⁸⁰ but less so in 1995 and 2005. • Several countries (Austria, Malta, Norway and Sweden) do not (or no longer) have inheritance tax (in the database this is indicated with the answer "Yes, but" to question 6.4),⁸¹ but all others, except Romania,⁸² give the surviving spouse an exemption or advantage as regards inheritance tax (6.4). • No consensus as to whether or not possessions acquired during the marriage will be considered as joint when one spouse dies (6.2). 	<p>Marriage:</p> <ul style="list-style-type: none"> • Currently no difference with different-sex marriage for all six issues, except for survivor's pensions (6.5) in Scotland and in England and Wales.⁸³ <p>Registered partnership:</p> <ul style="list-style-type: none"> • For each of the six issues there are (or were) a few jurisdictions where a surviving registered partner does not have the same rights as a surviving spouse. However, there is a trend towards reducing or abolishing these differences. As regards tenancy continuation (6.1), inheritance tax (6.4) and wrongful death (6.6) the only exception was Slovenia,⁸⁴ but that is no longer the case since February 2017.⁸⁵ • As regards intestate inheritance (6.3), Slovenia is no longer an exception since 2017, but Belgium and France still are.⁸⁶ • As regards property (6.2) the only exceptions are Belgium and Czech Republic.⁸⁷ • And as regards survivor's pensions (6.5) the exceptions are Belgium, Czech Republic, France and the UK.⁸⁸ Many differences regarding employment related pensions probably amount to forbidden sexual orientation discrimination in the sense of the Employment Equality Directive (2000/78/EC), as interpreted by the Court of Justice of the EU (most recently in the case of <i>Hay</i>).⁸⁹

⁷⁸ See also Chapter 7, below, about wrongful death.

⁷⁹ See Smiszek 2017f (question 6.5)

⁸⁰ See the answers to question 6.1 by Katchaunova 2017f and Polgari 2017f.

⁸¹ In Malta, however, a fiscal "duty on documents" may apply when inheriting immoveable property. See Galea Borg 2017f (question 6.4). See also the answers to this question by Graupner 2017f, Eeg 2017f and Walleng 2017f.

⁸² See Ionescu 2017f (question 6.4)

⁸³ See Norrie 2017f (question 6.5) and Hayward 2017f (question 6.5).

⁸⁴ Kogovsek Salamon 2017f (question 6.1 and 6.6).

⁸⁵ Kogovsek Salamon 2017a (questions 1.1 and 1.16).

⁸⁶ See the answers to question 6.3 by Willems 2017f, and Kogovsek Salamon 2017f.

⁸⁷ See the answers to question 6.2 by Willems 2017f and Plesmid 2017f.

⁸⁸ See the answers to question 6.5 by Willems 2017f, Plesmid 2017f, Ronzier 2017f, Hayward 2017f, Norrie 2017f and Sloan 2017i. As regards Ireland, see Ryan 2017f and also the *Parris* case decided by the CJEU, 24 November 2016, C-443/15.

⁸⁹ CJEU, 12 December 2013, *Hay v. Crédit agricole mutuel*, C-267/12. See also Waaldijk 2014a, p. 53.

Table 2.14 (continued): Some results from Section 6 – Death

Different-sex	Same-sex
<p>Cohabitation:</p> <ul style="list-style-type: none"> • A slowly growing majority of jurisdictions treats surviving cohabitants and spouses similarly as regards tenancy continuation (18 out of 21, question 6.1) and compensation for wrongful death (18 out of 23, question 6.6). • A large but slowly shrinking majority of jurisdictions treats cohabitants differently as regards intestate inheritance (6.3), inheritance tax (6.4), survivor's pension (6.5), property (6.2). 	<p>Cohabitation:</p> <ul style="list-style-type: none"> • For each of the six issues there are still one or two jurisdictions breaching the equality principle that same-sex cohabitants should not be treated differently than different-sex cohabitants. This principle has been repeated many times by the European Court of Human Rights, starting with its 2001 judgment in the case of <i>Karner v. Austria</i>.⁹⁰ • Near consensus that a same-sex surviving cohabitant should not be treated differently than a different-sex surviving cohabitant. As regards property (6.2) the only exceptions are Iceland and Slovenia, as regards intestate inheritance (6.3) only Slovenia, and as regards inheritance tax (6.4) only Finland and Slovenia.⁹¹ • Now also almost such consensus as regards tenancy continuation (6.1). Only Slovenia still treats same-sex cohabitants differently than different-sex cohabitants in this respect,⁹² which is a very clear violation of the judgments of the European Court of Human Rights in 2003 in <i>Karner v. Austria</i> and in 2010 in <i>Kozak v. Poland</i> (both cases specifically concerned such unequal treatment with respect to tenancy continuation after the death of one partner).⁹³ • Also almost such consensus regarding compensation for wrongful death (6.6). Only Slovenia treats same-sex cohabitants differently,⁹⁴ and court practice in Poland is not clear on this point.⁹⁵ Also as regards survivor's pension (6.5), Slovenia is the only exception.⁹⁶

Source: *The LawsAndFamilies Database 2017*

⁹⁰ ECtHR, 24 July 2003, *Karner v. Austria*, App. No. 40016/98. See also Waaldijk 2014a, p. 51.

⁹¹ See the relevant answers by Friðriksdóttir 2017f, Kogovsek Salamon 2017f and Hiltunen 2017f.

⁹² Kogovsek Salamon 2017f (question 6.1 and 6.6).

⁹³ ECtHR, 24 July 2003, *Karner v. Austria*, App. No. 40016/98; ECtHR, 2 March 2010, *Kozak v. Poland*, App. No. 13102/02. See also Waaldijk 2014a, p. 51.

⁹⁴ Kogovsek Salamon 2017f (question 6.6).

⁹⁵ Smiszek 2017f (question 6.6).

⁹⁶ Kogovsek Salamon 2017f (question 6.5).

2.3 More and more European consensus on legal recognition of same-sex partners

2.3.1 Legal family formats available to same-sex couples

The previous paragraphs have shown that same-sex partners have gained much more legal recognition over recent decades. This recognition may have come in the shape of:

- attaching a (gradually growing) number of rights and responsibilities to (same-sex) cohabitation,
- introducing a form of registered partnership for (same-sex) couples with a range of rights and responsibilities attached to it,
- opening up of marriage to same-sex couples,
- a combination of two or three of these possibilities.

Table 2.15 gives an overview of the years in which the 21 countries surveyed made any of these three legal family formats available. For cohabitation this overview uses as indicator the year since when same-sex cohabitation has been recognised for *more than one or two issues* out of 26 selected substantive issues (rights and responsibilities).⁹⁷ The selection of 26 substantive legal issues (26 questions) is presented and explained in paragraph 2.3.2 below. For an overview that includes also other European countries than the 21 covered in this survey, see paragraph 2.1 above.

⁹⁷ The choice for “at least three” is of course somewhat arbitrary; it also possible to argue that cohabitation is only really recognised once a legal system takes it into account for at least four or five substantive issues.

Table 2.15: Years since when (in the 21 countries) **same-sex** partners have been given access to **marriage** or **registered partnership** (question 1.1), or since when **same-sex cohabitation** has been recognised for at least 3 legal issues (out of 26 selected substantive questions)

	Marriage opened up to same-sex couples	Registered partnership introduced for same-sex couples	Same-sex cohabitation recognised for at least 3 legal issues
2016		Italy	
2015	Ireland	Greece	
2014	England&W + Scotland	Malta	
2013	France		
2012			Poland
2011		Ireland (until 2015)	Slovenia
2010	Iceland + Portugal	Austria	Italy
2009	Norway + Sweden	Hungary	
2008			
2007			
2006		Czech	Iceland + Malta
2005		Slovenia + UK	
2004			
2003	Belgium		
2002		Finland	
2001	Netherlands	Germany	Germany + Portugal
2000		Belgium	Ireland
1999		France	France + UK
1998		Netherlands	Austria + Belgium
1997			Czech + Hungary
1996		Iceland (until 2010)	
1995		Sweden (until 2009)	Finland
1994			
1993		Norway (until 2009)	
1992			
1991			
1990			
1989			
1988			
1987			
1986			Norway
1985			
1984			
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1982			
1981			
1980			
1979			
1978			
1977			
1976			
1975			Netherlands
1974			Sweden
Not yet in 2015/16	11 countries + Northern Ireland	Bulgaria + Portugal Poland + Romania	Bulgaria + Greece Romania
Number of countries by 2006	2 out of 21 = 10%	11 out of 21 = 52%	15 out of 21 = 71%
Number of countries by 2015/16	9.67* out of 21 = 41%	17 out of 21 = 81%	18 out of 21 = 86%

Source: The LawsAndFamilies Database 2017. * Each of the UK jurisdictions is counted as a third.

2.3.2 Recognition of substantive rights and responsibilities of same-sex partners

However, knowing which of these three legal family format(s) have been made available to same-sex couples and when, is only part of the story. For practical legal purposes it is often less important to know by *which legal family format* a right or responsibility has become applicable to same-sex partners. More important to know is *which substantive rights and responsibilities* are now available to same-sex partners, and thereby no longer the exclusive privilege of different-sex couples. The data in the LawsAndFamilies Database make it possible to track this development for many of the rights and responsibilities included in the questionnaire used to create this database, and for each of the 23 jurisdictions surveyed.

For tracking this development some of the 69 questions in the questionnaire are less useful. In fact, only 26 of the 69 questions are being used here to assess the substantive legal recognition of same-sex couples. There are several reasons for not taking into account the other 43 questions.

First, the nine open questions in the questionnaire, have not been answered for all jurisdictions, and the answers to these open questions do not provide a precise overview. Secondly, a number of the questions deal with procedural aspects of marriage and registered partnership (most questions in section 1, on formalisation, and also most in section 5, on splitting up). Therefore only those legal questions have been selected that attach a *substantive* legal consequence to marriage, registered partnership or cohabitation. Thirdly, the answers of several questions do not say much about the legal recognition of the couples concerned; examples are the questions about the freedom to make a contract (1.11), about obligations to live together or to have sex or intimacy (questions 1.14 and 1.15), about individual adoption (3.11). Fourthly, some questions are not directly about attaching rights or responsibilities to a legal family format, but instead concern the recognition of foreign family status (questions 4.2, 4.4 to 4.6, 4.9 and 4.10).⁹⁸ The answers to some questions did not provide much additional information (the answers to question 3.2 about IVF are almost identical to the answers to question 3.1 about assisted insemination), and the question about health insurance (2.3) was almost always answered with “No”, “No, but” or “Doubt” even for different-sex marriage.⁹⁹ And finally some questions were interpreted differently by some experts, for

⁹⁸ About these questions, see Chapter 6 below.

⁹⁹ Inclusion of same-sex partners in health insurance cover therefore mostly is not an important issue in the European countries surveyed, although problems have been reported for Poland (see Pudzianowska 2017b, question 2.3), Romania (see

example because they depended on the answers to other questions, as in the case of surrogacy (question 3.3), parental leave for both parents (3.6), grandparents (question 3.8), parental authority in case of splitting up (question 5.11).

The remaining 26 questions all tell us something about the degree to which countries recognise same-sex partners by making substantive rights and responsibilities available to them. These 26 questions have been brought together in *tables 2.16 to 2.18* below. In these three tables the questions are ranked according to the “*same-sex legal recognition consensus*” for each question for 2015/2016 (that is: for the most recent year for which the questions have been answered). This quantitative indicator is introduced here to assess if there is common ground between European countries as to which rights and responsibilities should at least be made available to same-sex couples.

The European Court of Human Rights has spoken repeatedly about (the failure of Italy to provide to same-sex couples) the “core rights relevant to a couple in a stable committed relationship”,¹⁰⁰ And the Court has indicated many times that in considering whether or not a restriction, exclusion or distinction is justifiable under the European Convention of Human Rights, it would look at comparative studies of the situation in the member states of the Council of Europe.¹⁰¹ This so-called “consensus analysis” gives extra importance to the data in the LawsAndFamilies Database, and to this assessment of the “same-sex legal recognition consensus” for each of the selected 26 questions.

The *same-sex legal recognition consensus* for a year is a percentage that indicates how many of the surveyed jurisdictions have started to recognise (fully or in a limited way) same-sex partners by giving them access to a specific substantive right or responsibility that is typically

Cojocariu 2017b, question 2.3) and Slovenia (see Rajgelj 2017b, question 2.3). It is apparently a bigger issue in other parts of the world, such as the USA (see for example Ponce et al. 2010).

¹⁰⁰ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/11, par. 174 (see also par. 172 and 185 of that judgment). In its later judgment in the case of *Taddeucci & McCall v. Italy*, the Court spoke of “droits essentiels” (ECtHR, 30 June 2016, App. No. 51362/09, par. 83 and 95).

¹⁰¹ See for example ECtHR, 19 February 2013, *X and others v. Austria*, App. No. 19010/07, par. 54; and ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, App. No. 51362/09, par. 88 and 97. In fact, in its judgment of 24 June 2010 in the same-sex marriage case of *Schalk & Kopf v. Austria* (App. No. 30141/04), the Court devoted eight paragraphs to a description of the “state of relevant legislation in Council of Europe member States” (par. 27-34), and based the last four of these paragraphs apparently (although not explicitly) on the report *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners – a comparative study of nine European countries* (Waaldijk (Ed.) 2005), which introduced the methods and many of the questions that have now been used for the LawsAndFamilies Database (see paragraph 1.4 above).

attached to different-sex marriage. The exact way this percentage is calculated, is explained in *Table 2.21* in the *Annex* to this chapter (see below). The calculation is based on the answers that the legal experts have given to each of the 26 selected questions.

Those answers have been brought together in *tables 2.22 to 2.29* in the *Annex* at the end of this chapter.¹⁰² These tables indicate since what year the answer (given by the legal expert for the jurisdiction concerned) became “Yes” or “Yes, but” for at least one legal family format for same-sex couples (marriage, registered partnership, cohabitation). So here it does not matter if the right or responsibility concerned became available through marriage, or through registered partnership, or through cohabitation, or through two or three of these legal family formats.

In the *tables 2.22 to 2.29* there is one column for each of the 26 selected questions. In addition to the years since when the answer has been “Yes” or “Yes, but”, the columns in these tables also mention (between brackets) since when an answer has been “No, but”. Towards the end of each column the jurisdictions are listed for which the answer is still “No” or “Doubt”. And at the bottom of each column the *same-sex legal recognition consensus* for each question is calculated, both for 2006 and for 2015/2016. These calculations then provide the input for the ranking of the questions in *tables 2.16 to 2.18* below.

¹⁰² Please note that this type of tables cannot be generated automatically in the *LawsAndFamilies Database*, on which they are based.

Table 2.16: Legal questions (out of 26 selected substantive questions) with the highest “same-sex legal recognition consensus” in 2015/2016

Question		Same-sex legal recognition consensus 2006	Same-sex legal recognition consensus 2015/16
2.2 – Loss or reduction of social benefit	When one partner (long-term unemployed or even never having been employed at all) would be entitled to a basic social benefit, will the income of the other partner then be taken into consideration and will it possibly result in loss or reduction of this entitlement?	71%	93%
6.1 – Tenancy continuation	When the partner who holds the rental contract dies, does the other partner then have a right to continue to rent the home?	63%	93%
2.6 – Next of kin	In case of accident or illness of one partner, is the other partner considered as next of kin for medical purposes (even without power of attorney)?	53%	89%
6.5 – Survivor’s pension	When one partner dies while being employed, is the surviving partner then normally entitled to a survivor’s pension? <i>(For example on the basis of statutory law, and/or of a collective labour agreement or arrangements of the employer.)</i>	50%	88%
4.1 – Partner of national citizen	When one partner is a residing national citizen, while the other is a foreigner from another continent, will the foreign partner then have a residence entitlement/eligibility? <i>(Please assume that they married/registered/cohabited in the country where they now want to reside. As to the meaning of ‘residing’, see section c of the Guidance.)</i>	57%	88%
2.7 – Domestic violence	When one partner uses violence against the other partner, does specific statutory protection apply?	57%	86%
2.8 – Criminal procedure	In case of a criminal prosecution against one partner, can the other partner then refuse to testify against the partner who is being prosecuted?	57%	86%
6.6 – Wrongful death	In case of wrongful death of one partner, is the other partner then entitled to compensation from the wrongdoer?	57%	86%
5.10 – Alimony	In case the partners split up, do statutory rules on alimony apply?	48%	86%
6.3 – Inheritance	When one partner dies without testament, is the other partner then an inheritor?	43%	86%
4.3 – Partner of (non-EU) foreigner	When both partners are foreigners from another continent, and one of them is residing in the country, will the other partner then have a residence entitlement/eligibility? <i>(Please assume that they married/registered/cohabited in the country where they now want to reside.)</i>	50%	86%

Source: The LawsAndFamilies Database 2017, and tables 2.22 to 2.29 below. See the explanation of “same-sex legal recognition consensus” in paragraph 2.3.2 above and in table 2.21 below.

Table 2.17: Legal questions (out of 26 selected substantive questions) with the lowest “same-sex legal recognition consensus” in 2015/2016

Question		Same-sex legal recognition consensus 2006	Same-sex legal recognition consensus 2015/16
2.4 – Care between partners	In case one partner is in need of care, does the other partner then have a statutory right to paid or unpaid leave to give that care?	61%	83%
4.7 – Citizenship	Does a relationship of this type make it easier for a foreign partner to obtain citizenship?	48%	81%
1.12 – Statutory contract	Are there specific statutory rules regarding such a contract? (See question 1.11 about the possibility for the partners to make a contract to organise their relationship.)	48%	81%
2.1 – Lower income tax	Can a relationship of this type result in lower income tax than for two individuals without a partner?	47%	80%
5.9 – Property at dissolution	In case the partners split up, do statutory rules consider as joint property any possessions acquired by either of them after they started this type of relationship?	50%	80%
6.2 – Property at death	When one partner dies, do statutory rules consider as joint property any possessions acquired by either of them after they started this type of relationship? (In other words: would the surviving partner be deemed to own 50% of these possessions, while the other 50% are subject to relevant rules of inheritance law?)	50%	80%
1.13 – Surname	Can (or must) one partner use or have the surname of the other partner?	48%	79%
3.9 – Second-parent adoption	When only one partner is the legal parent of a child, does the other partner then have the possibility of becoming the child’s second parent by way of adoption?	33%	74%
3.1 – Assisted insemination	Is it legally possible in this type of relationship to become pregnant through medically assisted insemination using sperm of a donor?	43%	63%
3.10 – Joint adoption	Can partners jointly adopt a child?	21%	55%
3.4 – Legal parenthood	When one partner gives birth, will (or can) the other partner then also become legal parent of the child, without having to go through adoption? (For example automatically, or by way of recognition/acknowledgement.)	7%	38%

Source: The LawsAndFamilies Database 2017, and tables 2.22 to 2.29 below. See the explanation of “same-sex legal recognition consensus” in paragraph 2.3.2 above and in table 2.21 below.

Table 2.18: Legal questions (out of 26 selected substantive questions) with a high “same-sex legal recognition consensus” in 2015/2016, but thanks to the fact that for a large minority of countries the answer is also “No” for different-sex marriage

Question		Same-sex legal recognition consensus 2006	Same-sex legal recognition consensus 2015/16
3.7 – Parental leave for partners	When only one partner is the legal parent of a child, does each partner then have a statutory right to paid or unpaid parental leave?	54% (7 out of 13)	92% (12 out of 13)
3.5 – Parental authority	Is joint parental authority/responsibility possible for the couple, while only one of the partners is the legal parent of the child?	67% (8 out of 12)	92% (11 out of 12)
6.4 – Inheritance tax	Is the surviving partner exempted from paying inheritance tax (or required to pay less than a mere friend would have to pay)?	50% (9 out of 18)	88% (14 out of 16)
2.5 – Care for a parent	In case the parent of one partner is in need of care, does the other partner then have a statutory right to paid or unpaid leave to give that care?	50% (8 out of 16)	88% (14 out of 16)

Source: The LawsAndFamilies Database 2017, and tables 2.22 to 2.29 below. See the explanation of “same-sex legal recognition consensus” in paragraph 2.3.2 above and in table 2.21 below.

The following conclusions can be drawn from the three tables above:

Firstly, among the 21 countries surveyed, the consensus on legally recognizing same-sex couples has increased considerably over the last 10 years for each of the 26 selected substantive rights and responsibilities (an increase of at least 20 percent points for each).

Cynically, but maybe not surprisingly, the issue with the highest *same-sex legal recognition consensus* (already in 2006) is the possibility of loss or reduction of social benefit because of the income of one’s partner (question 2.2).

Most of the rights and responsibilities with the highest consensus (see *Table 2.16*), however, are about situations where one of the partners dies, or where the partners are hit by other seriously “bad times” (accident, illness, domestic violence, criminal prosecution, splitting up). It seems that a very large majority of countries now take the position that it would be unfair (and non-compassionate) to exclude same-sex partners from legal protections designed for such sad times. This could also explain why a large majority of countries now recognize a statutory right to paid or unpaid leave to care for your same-sex partner (question 2.4, see the top of *Table 2.17*) or for a parent of your same-sex partner (question 2.5, see *Table 2.18*), and why a large majority of countries now treat same-sex partners favourably as regards inheritance tax (question 6.4, *Table 2.18*).

The very high consensus as regards a residence entitlement for a foreign same-sex partner (questions 4.1 and 4.3, see *Table 2.16*), however, cannot be explained in the same way. Probably here the common rationale is that without such a residence entitlement the two partners might not even be able to live together in the same country and to have family life.¹⁰³ Perhaps this could also explain why a large majority of countries now take same-sex partnership into account in their citizenship legislation (question 4.7, see *Table 2.17*).

Apart from citizenship and giving care to each other, there are a few other issues with a slightly smaller consensus: property, contract, income tax (see *Table 2.17*). Here the “sadness” factor may seem less prominent, and concerns about legal certainty may be a little stronger, but of course the material equality argument can be very strong on such issues, which may explain the relative high same-sex legal recognition consensus.

On five more controversial issues, the consensus is more limited (see *Table 2.17*). One of these is the right to use your partner’s surname – a symbolic classic in traditional marriage law, but apparently too controversial for full inclusion in the registered partnership laws of Austria, Belgium, Czech Republic, Finland, France, Hungary and Slovenia.¹⁰⁴ Maybe in some countries it was or is still too difficult to think of this right outside the context of marriage. Medically assisted reproduction (questions 3.1 and 3.2) and different ways for a child to have two legal parents of the same sex (questions 3.4, 3.9 and 3.10) are even more controversial. Nevertheless, also on these parenting issues, the consensus has been growing considerably over the last ten years (as also shown in Chapter 5 below). And now at least as regards second-parent adoption, a large majority of the jurisdictions surveyed allow children to have two parents of the same sex.

Interestingly, in almost all of the (12 or 13) countries that allow the *partner of a parent* to share in parental authority or to take parental leave (question 3.5 and 3.7, see *Table 2.18*), this is allowed irrespective of the partners being of the same sex or of different sexes.

Overall, there is broadly growing consensus, which may inspire more countries to broaden their legal recognition of same-sex couples. And it could provide the European courts with extra arguments to require European countries to make a core minimum of substantive rights and responsibilities available to same-sex couples. This survey indicates clearly that such a

¹⁰³ A good example of this is the case of *Taddeucci & McCall v. Italy*, where the ECtHR allowed precisely this, even in the absence of same-sex marriage or registered partnership legislation; see its judgment of 30 June 2016, App. No.51362/09.

¹⁰⁴ See the answers to question 1.13 in Graupner 2017a, Borghs 2017a, Otáhal 2017a, Hiltunen 2017a, Kouzmine 2017a, Polgari 2017a, and Kogovsek Salamon 2017a.

core minimum would consist *at the very least* of legal protections for times of death and other great sadness, plus the right to be able to live in the same country.

2.3.3 The level of substantive legal recognition of same-sex couples per country

The same basic calculations (as were used to calculate the *same-sex legal recognition consensus* for each of the 26 selected questions in the previous paragraph, and in *tables 2.21 to 2.29*) can be used to assess the *level of substantive legal recognition of same-sex couples* for each country.

The result is presented in *Table 2.19* below. It appears that seven countries would score full points for all 26 selected questions (Austria, Belgium, Netherlands, Norway, Portugal, Sweden, UK).

At the other end of the scale three countries only recognise same-sex couples for a few specific issues: three issues in the case of Poland (while for another three there is some limited or indirect recognition, and for yet another three there is doubt as to whether same-sex partners are excluded),¹⁰⁵ two issues in the case of Romania (with two times legal doubt),¹⁰⁶ and one issue in the case of Bulgaria (with three times some limited or indirect recognition, and two times legal doubt).¹⁰⁷

In between are two countries where a third (Czech Republic) or a quarter (Slovenia) of the legal consequences of different-sex marriage are still unavailable to same-sex couples,¹⁰⁸ plus a group of nine countries where recognition of same-sex couples extends to almost all such legal consequences (Iceland, Malta, Germany, Ireland, France, Italy, Finland, Greece, Hungary).

¹⁰⁵ Recognition regarding social benefits (2.2), next of kin (2.6) and tenancy continuation (6.1); limited or indirectly regarding surname (1.13) and immigration (4.1 and 4.3); legal doubt regarding domestic violence (2.7), criminal procedure (2.8) and wrongful death (6.6). For details about Poland, see the source papers (2017) by Pudzianowska and by Smiszek.

¹⁰⁶ Recognition regarding care for partner or parent (2.4 and 2.5); legal doubt regarding next of kin (2.6) and domestic violence (2.7). For details about Romania, see the source papers (2017) by Ionescu and by Cojocariu.

¹⁰⁷ Recognition regarding wrongful death (6.6); limited or indirectly regarding social benefits (2.2) and second-parent adoption (3.9); legal doubt regarding criminal procedure (2.8) and immigration (4.1). For details about Bulgaria, see the source papers (2017) by Furtunova and by Katchaunova.

¹⁰⁸ See the source papers (2017) by Plesmid and by Otáhal (Czech Republic), and by Rajgelj and by Kogovsek Salamon (Slovenia).

Table 2.19: The degree to which the 21 countries legally recognise same-sex couples for 26 substantive rights and obligations (26 selected questions)

Points (out of number of relevant questions*) in 2006	Level of substantive legal recognition of same-sex couples in 2006	Country	Points (out of number of relevant questions*) in 2015/2016	Level of substantive legal recognition of same-sex couples in 2015/2016
24 out of 24	100%	Sweden	24 out of 24	100%
25 out of 26	96%	Netherlands	26 out of 26	100%
22 out of 23	96%	Belgium	25 out of 25	100%
23 out of 26	88%	UK	26 out of 26	100%
21 out of 24	88%	Norway	24 out of 24	100%
11 out of 24	46%	Portugal	25 out of 25	100%
9 out of 24	38%	Austria	23 out of 23	100%
22.5 out of 23	98%	Iceland	22.5 out of 23	98%
3 out of 20	15%	Malta	19 out of 20	95%
18 out of 22	82%	Germany	22.5 out of 24	94%
15 out of 24	63%	France	24 out of 26	92%
6.5 out of 25	26%	Ireland	24 out of 26	92%
21.5 out of 26	83%	Finland	23.5 out of 26	90%
2.5 out of 24	10%	Italy	21 out of 24	88%
3.5 out of 22	16%	Greece	19 out of 22	86%
11 out of 24	46%	Hungary	22 out of 26	85%
9 out of 22	41%	Slovenia	18 out of 24	75%
10.5 out of 22	48%	Czech	16 out of 25	64%
1 out of 24	4%	Poland	4.5 out of 24	19%
1.5 out of 23	7%	Bulgaria	2.5 out of 23	11%
2 out of 23	9%	Romania	2 out of 23	9%

Source: *The LawsAndFamilies Database 2017 and tables 2.21 to 2.29 in the Annex at the end of this chapter.*

Note: *The countries are listed according to their level of substantive legal recognition in 2015/2016 (and – if for some countries these levels were the same – according to the levels in 2006).*

* *The “number of relevant questions” is the number of selected questions (26) minus the number of questions for which the answer was (also) “No” or “No info” for different-sex marriage.*

It should be noted that this is just a rough snapshot of a rapidly developing situation. For example, the legal situation in Slovenia and Finland has already improved considerably, in the three months after the completion of this survey.¹⁰⁹ It should also be noted that by equating “Yes” to “Yes, but”, the calculations used are not very precise (quite often the answer would be “Yes, but” for same-sex couples, while for different-sex spouses it would be “Yes”). And of course forms of non-recognition beyond the 26 selected questions – or even beyond the 69 questions in the survey – remain unnoticed here. There are more precise ways to calculate the *level of legal consequences* of different legal family formats for same-sex or different-sex couples in different countries,¹¹⁰ and even more sophisticated methods could be developed. It is hoped that such a method can be applied soon to this new dataset, ideally for each of the more than 50 years covered in the LawsAndFamilies Database.

The following conclusions can be drawn from *Table 2.19* above:

Firstly, in 18 of the 21 countries the level of substantive legal recognition of same-sex couples has increased over the last 10 years, in some cases spectacularly so (Greece, Ireland, Italy, Malta).¹¹¹ The exceptions are Sweden, Iceland and Romania, where the level of recognition remained the same.

Secondly, the gap in levels of recognition between Romania, Bulgaria and Poland on the one hand and almost all other countries on the other hand, seems very large. However, it should be borne in mind, that the level of recognition in the first three countries in 2015/2016 is very similar to what it was for Greece, Italy and Malta in 2006, three countries that have since increased their level of substantive legal recognition of same-sex couples considerably. And by 2015/2016 Slovenia and the Czech Republic offered a level of recognition similar to what France had offered in 2006, and already much higher than that of Austria, Hungary, Ireland and Portugal ten years ago.

Finally, it can be observed that in a large majority of the countries surveyed there is scope for a further increase in the legal recognition. Such an increase seems to be probable, desirable, and – in light of developing European minimum standards discussed in paragraph 2.3.2 above – also necessary.

¹⁰⁹ See Kogovsek Salamon 2017a (questions 1.1 and 1.16) and Hiltunen 2017a (questions 1.1 and 1.16).

¹¹⁰ See Waaldijk (Ed.) 2005, p. 4.

¹¹¹ For details about these four countries, see the source papers (2017) written by Papadopoulou and by Lima (Greece), by Tobin and by Ryan (Ireland), by Winkler and by Gattuso (Italy), and by Attard and by Galea Borg (Malta).

2.4 Conclusions

There is a clear and rapid trend among a large majority of the 21 countries surveyed of offering same-sex couples the opportunity to formalise their relationship as marriage and/or as registered partnership. The absence of any such opportunity in three of the countries may well be against the 2015 judgment of the European Court of Human Rights in the case of *Oliari and others v. Italy* (see paragraphs 2.1 and 2.2.1 above).

And there is a clear and rapid trend among all 21 countries surveyed of attaching more and more rights and responsibilities to the cohabitation, the registered partnership and/or the marriage of two people of the same sex. This trend, too, has been strengthened by case law of the European Court of Human Rights, and it has been furthered by EU legislation and case law of the Court of Justice of the EU.¹¹²

Both these trends reflect the recognition by the European Court of Human Rights that same-sex couples are covered by the right to respect for family life.¹¹³ And that they are “in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship”,¹¹⁴ and “have the same needs in terms of mutual support and assistance as different-sex couples”.¹¹⁵ Both trends also show the growing awareness in European countries that there should be no discrimination based on anyone’s sexual orientation (or on the sex of anyone’s partner), especially as regards the “right to establish and develop relationships with other human beings”.¹¹⁶ This right, that can be called the “right to relate”,¹¹⁷ has been recognised by the European Court of Human Rights as an important aspect of the right to respect for private life.¹¹⁸

Where same-sex marriage is available, the legal consequences of such marriages are the same or almost the same as those of different-sex marriages, with most exceptions in the field of

¹¹² For an inventory of relevant EU legislation, and of relevant case law of both courts, see Waaldijk 2014a, p. 48-54. See also Crisafulli 2014 and Orzan 2014.

¹¹³ ECtHR, 24 June 2010, *Schalk & Kopf v. Austria*, App. No. 30141/04, par. 94.

¹¹⁴ ECtHR, 24 June 2010, *Schalk & Kopf v. Austria*, App. No. 30141/04, par. 99; see also ECtHR, 7 November 2013, *Vallianatos v. Greece*, App. No. 29381/09, 32684/09, par. 78.

¹¹⁵ ECtHR, 7 November 2013, *Vallianatos v. Greece*, App. No. 29381/09, 32684/09, par. 81. About such “affirmative eloquence”, see Waaldijk 2014a, p. 54-55.

¹¹⁶ This right was first articulated by the European Commission of Human Rights, 18 May 1975, *X v. Iceland*, App. No. 6825/74.

¹¹⁷ Waaldijk 2013.

¹¹⁸ See for example ECtHR, 22 January 2008, *EB v. France*, App. No. 43546/02, par. 43 and 49.

parenting (see paragraph 2.2.3 above and Chapter 5 below), and in a few jurisdictions with respect to survivor's pensions (see paragraph 2.2.6 above).

Furthermore such marriages are not always recognised in other countries (see Chapter 6 below). Where the legal recognition of same-sex couples is offered by way of registered partnership, mostly the legal consequences are similar to those of marriage, with most exceptions concerning parenting, migration, citizenship, and surnames (see paragraphs 2.2.1, 2.2.3 and 2.2.4 above), while there are also some exceptions in other areas, including income tax, property, inheritance, care leave and survivor's pensions (see paragraphs 2.2.2, 2.2.5 and 2.2.6). Because exceptions in the latter two areas relate to employment, they most probably amount to violations of EU law, in particular violations of the Employment Equality Directive 2000/78/EC (see paragraphs 2.2.2 and 2.2.6 above).

The trend of extending legal consequences of marriage to cohabitation is less uniform and somewhat slower.¹¹⁹ It is strongest with regard to domestic violence, care leave, social benefits, assisted insemination, paternity, second-parent adoption, tenancy continuation after death, and compensation for wrongful death, while the trend is much weaker with regard to surnames, cohabitation contracts, testifying in criminal procedures, immigration, citizenship, joint adoption, property, alimony, tax, inheritance, and survivor's pensions (see paragraph 2.2). In almost all areas one or more jurisdictions distinguish between same-sex and different-sex cohabitants, in particular as regards parenting, care leave, domestic violence, testifying in criminal procedures, immigration, inheritance tax, and property after death. Almost all of these exclusions affecting same-sex cohabitants, will amount to violations of the well-established *Karner* case law interpreting the European Convention on Human Rights (see paragraphs 2.2.2, 2.2.3, 2.2.4 and 2.2.6 above). And whenever they relate to employment (care leave, pensions) they could also amount to violations of the EU's Employment Equality Directive (see paragraphs 2.2.2 and 2.2.6). Exclusion of (same-sex) cohabitants from immigration may violate Directive 2004/38/EC on free movement, Directive 2003/86/EC on family reunification and Directive 2011/95/EU on asylum.¹²⁰

Apart from the specific legal family formats through which couples are being recognised, this survey also suggests a core minimum of substantive rights and responsibilities that should at

¹¹⁹ See also chapter 3, 4, 5 and 7 below.

¹²⁰ See the 2015 FRA report *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU*, especially p. 79-96, and see Waaldijk 2014a, p. 49.

least be made available to same-sex partners. That same-sex couples should at least have access to such a minimum of rights, has been indicated repeatedly by the European Court of Human Rights (in the *Oliari* and *Taddeucci* cases, see paragraph 2.3.2 above).

Among the 21 countries surveyed, over the last 10 years, the *same-sex legal recognition consensus* has increased considerably for *each* of the 26 selected substantive rights and responsibilities.¹²¹ Such a consensus is now very high as regards legal protections for times of death¹²² and for times of other great sadness,¹²³ and also as regards the right to be able to live in the same country.¹²⁴ These (and a few other) rights and responsibilities, could form the core minimum of substantive legal consequences that should be made available to same-sex couples. Soon this core could also include one or more forms of parenting, because, although more controversial, the consensus also keeps growing on parenting issues. Already a large majority of the jurisdictions surveyed allow children through second-parent adoption to have two parents of the same sex.¹²⁵

¹²¹ See *tables 2.16 to 2.18* above, and *tables 2.22 to 2.29* in the Annex below.

¹²² Tenancy continuation, inheritance, inheritance tax, survivor's pension, wrongful death compensation; see paragraph 2.3.2 above.

¹²³ Accident, illness, domestic violence, criminal prosecution, splitting up; see paragraph 2.3.2 above.

¹²⁴ Immigration of foreign partner, citizenship; see paragraph 2.3.2 above.

¹²⁵ See *Figure 5.2 and Table 5.6* in Chapter 5, and see *Table 2.26* in the Annex to Chapter 2.

Annex to Chapter 2: Legal recognition of same-sex partners for specific issues ¹²⁶

Tables 2.22 to 2.29 give an overview of the growth of the number of countries that offer legal recognition to same-sex partners for specific legal issues. The 26 selected questions of the LawsAndFamilies questionnaire all tell us something about the degree to which countries recognise same-sex partners by making substantive rights and responsibilities available to them (irrespective of whether they do this through marriage, or through registered partnership, or through cohabitation, or through two or three of these legal family formats). The 26 selected questions are presented in tables 2.16 to 2.18 in paragraph 2.3.2 above, ranked according to the “same-sex legal recognition consensus” for each of these questions for 2015/2016. The selection of these 26 questions and the notion “same-sex legal recognition consensus” are also explained in paragraph 2.3.2. Further explanations are given in the legenda in Table 2.21 below. See also Table 2.20 below, for a legenda of the answer-codes used in the LawsAndFamilies questionnaire and database.

Table 2.20: *Legenda of answer-codes used in LawsAndFamilies questionnaire and database*

Yes	Yes, this is so in the law of this country/jurisdiction, although possibly with a qualifying period of 24 months or less.
Yes, but	Yes, but with exceptions or restrictions, for example a qualifying period of 25 months or more, or only in most parts of the country/jurisdiction, or this is mostly a “dead letter”.
No, but	No, but it may be so exceptionally, or in a very limited way, or in a few parts of the country/jurisdiction, or indirectly, or by using a different legal instrument, or legislation says no while some courts might say yes.
No	No, this is not so in the law of this country/jurisdiction.
Doubt	The law is unclear (the law does not “know” the answer).
?	The expert does not know and cannot find the answer.
N/A	Not applicable (for example because this family format is not available in this jurisdiction, or not for same-sex or different-sex couples).

¹²⁶ The References to Chapter 2 can be found after the ten tables of this Annex.

Table 2.21: **Legenda** of symbols and terms used in the green fields of tables 2.22 to 2.29

In the year rows	Example	Explanation
Jurisdiction name not in italics	Finland	For this jurisdiction, for each year since the indicated year, the legal expert answered this question with “Yes” or “Yes, but” for same-sex couples in at least one of the legal family formats.
Jurisdiction name with “=”, between brackets	(Finland=)	Idem, but the expert has answered “No, but” both for same-sex couples and for different-sex married couples.
Jurisdiction name in italics, between brackets	(<i>Finland</i>)	Idem, but the expert has answered “No, but” only for same-sex couples, and “Yes” or “Yes, but” for different-sex married couples.
Year with “=”, between brackets	Finland(1993=)	Already since this year the answer was “No, but” both for same-sex couples and for different-sex married couples.
Year in italics, between brackets	Finland(<i>1993</i>)	Idem, but since this year the answers was “No, but” only for same-sex couples, and “Yes” or “Yes, but” for different-sex married couples.
Jurisdiction name with “*” or year with “*”	Finland* or (<i>Finland*</i>) or Finland(<i>1993*</i>)	It was possibly already so in an earlier year, but there is no information available to confirm or deny this, or there is legal doubt according to the legal expert.
In the last rows	Example	Explanation
Same-sex legal recognition consensus 2006	53%	Percentage indicating how many of the surveyed countries have started to recognise same-sex partners (fully or in a limited way) for a specific legal issue. It is calculated by adding up the countries for which the answer for 2006 was “Yes” or “Yes, but” for same-sex couples, plus the countries for which the answer for 2006 was “No, but” for both same-sex couples and different-sex married couples, plus a half point for each country for which the answer for 2006 was “No, but” for same-sex, but “Yes” or “Yes, but” for different sex married couples. The resulting number is then divided by the number of relevant countries. The number of relevant countries (“out of”) is the total number of countries (21) minus the number of countries for which the answer for 2006 was “No” or “Doubt” for both same-sex couples and different-sex married couples.
Same-sex legal recognition consensus ’15/16	89%	Idem, but now for the latest year for which the legal experts answered the question (2015 or 2016).

Table 2.22: Years since when same-sex partners have been recognised for specific legal issues concerning **Formalisation** (two questions in Section I of the questionnaire)

	1.12 Statutory contract	1.13 Surname
2016	Italy	Italy
2015	Greece	Greece
2014	Malta	Malta + (Poland*)
2013		France
2012		
2011	Ireland	Ireland(1965*)
2010	Austria + Portugal	Portugal
2009	Hungary	
2008		
2007		
2006	France	(Czech)
2005	Slovenia + UK	Slovenia*
2004		
2003		Belgium
2002	Finland	(Finland)
2001	Germany	Germany
2000	Belgium	
1998	Netherlands	Netherlands
1996	Iceland	(Iceland=)
1995		Sweden
1993		Norway(1965*)
1991	Norway	
1988	Sweden	Austria
1965		UK*
"No" in 2015/16 (but same as for different-sex)		
"No" in 2015/2016 (while "Yes (but)" for different-sex)	Bulgaria + Czech Poland Romania	Bulgaria Hungary Romania
Countries by 2006	10 out of 21	9 (+2/2) out of 21
Same-sex legal recognition consensus 2006	48%	48%
Countries by 2015/16	17 out of 21	15 (+3/2) out of 21
Same-sex legal recognition consensus '15/16	81%	79%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21.

Table 2.23: Years since when same-sex partners have been recognised for specific legal issues concerning **Income and troubles** (three questions in Section 2 of the questionnaire)

	2.1 Lower income tax	2.2 Loss or reduction of social benefit	2.6 Next of kin
2016	(Italy=)	(Italy=)	Italy
2015	England&Wales Nor'Ireland(2005=) (Greece=)	Malta (Greece=) (Bulgaria)	Greece*
2014	Czech + Malta		Malta
2013			
2012			Czech*
2011	Hungary + Ireland	Ireland(1989)	
2010			
2009			
2008			Poland* + Slovenia*
2007			Austria
2006		Portugal	
2005	Belgium + Scotland	Slovenia* + UK	England&Wales* NorthernIreland*
2004		Poland*	
2003	Austria	Austria	
2002	(Finland=)	Finland	Belgium* + France*
2001	Germany + Portugal	Germany	Germany + Norway*
2000			Scotland*
1999	France	France*	
1998			Hungary*
1996	Iceland	Hungary + Iceland*	Iceland*
1995		Czech*	Netherlands
1993	Norway	Norway(1965*)	Finland*
1988		Sweden*	Sweden*
1987		Netherlands	
1984	Netherlands		
1980		Belgium	
"No" or "Doubt" in 2015/16 (but same as for different-sex)	Sweden (since 1971)		Bulgaria (since 2005) Portugal?
"No" or "Doubt" in 2015/16 (while "Yes (but)" for different-sex)	Bulgaria Poland Romania Slovenia	Romania	Ireland? Romania?
Countries in 2006	9.33 out of 20	15 out of 21	11 out of 19
Same-sex legal recognition consensus 2006	47%	71%	53%
Countries by 2015/16	16 out of 20	19 (+1/2) out of 21	17 out of 19
Same-sex legal recognition consensus'15/16	80%	93%	89%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21.

Table 2.24: Years since when same-sex partners have been recognised for specific legal issues concerning **Income and troubles** (four questions in Section 2 of the questionnaire)

	2.4 Care between partners	2.5 Care for a parent	2.7 Domestic violence	2.8 Criminal procedure
2015			Greece	Greece + Ireland
2014				Malta
2013				(France=)
2012				
2011				
2010	Italy(1965*)	Italy(1965*) (Norway=)	Italy(2001)	
2009		Hungary	Neth'lands(1998=)	Slovenia
2008	France* Germany	France* Germany	Slovenia*	
2007	Czech*	Czech*	Hungary(2006=) Portugal	Portugal(2001)
2006			Iceland(2000=*) Malta	Czech* Iceland(1965*)
2005			Scotland*	UK
2004			Czech(1965=)	
2003	Austria	Belgium(1994*=)		Belgium
2002				Finland*
2001	Ireland + Portugal Netherlands*	Ireland + Portugal Netherlands*	Germany	Germany
1999	UK	(UK=)	France* NorthernIreland	
1998	Belgium(1994*=) Finland	Finland	Belgium Sweden	Austria Netherlands
1997			Austria England&Wales	
1996	Hungary		Ireland	Hungary
1995			Finland	
1993				Italy*
1992	(Romania=*)	(Romania=*)		
1990	Norway			
1989	Sweden	Sweden*		
1988				Sweden
1986				Norway(1965*)
1982			Norway(1965*)	
"No" in 2015/16 (but same as for different-sex)	Greece Iceland Malta	Austria + Greece Iceland + Malta Slovenia		
"No" or "Doubt" in 2015/16 (while "Yes (but)" for different-sex)	Bulgaria Poland Slovenia	Bulgaria Poland	Bulgaria Poland? Romania?	Bulgaria? Poland? Romania
Countries by 2006	11 out of 18	8 out of 16	12 out of 21	12 out of 21
Same-sex legal recognition consensus 2006	61%	50%	57%	57%
Countries by 2015/16	15 out of 18	14 out of 16	18 out of 21	18 out of 21
Same-sex legal recognition consensus '15/16	83%	88%	86%	86%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21.

Table 2.25: Years since when same-sex partners have been recognised for specific legal issues concerning **Parenting** (three questions in Section 3 of the questionnaire)

	3.1 Assisted insemination	3.5 Parental authority	3.7 Parental leave for partner of parent
2016	Portugal		
2015	Austria	Ireland + Portugal	
2014		(Hungary=)	Slovenia
2013			
2012			France(1999=)
2011			Belgium
2010			
2009	Norway		Hungary
2008			
2007	Belgium(1965=)		Finland
2006	Iceland	France* + (Czech=)	Ireland
2005			
2004			
2003			
2002	Greece*		Scotland
2001	Germany(1965*)		Austria + Germany Netherlands*
2000	Ireland* + (Slovenia*)		
1999			England&Wales NorthernIreland
1998		Netherlands	
1997		Scotland*	
1996		Iceland* NorthernIreland*	
1995		(Sweden=)	Sweden
1991		England&Wales*	
1984		Finland*	
1977			Norway
1965	Finland* + Sweden* Netherlands* + UK*	(Germany=*)	
"No" in 2015/2016 (but same as for different-sex)	Malta (since 2013)	Austria + Belgium Greece + Italy Malta + Norway Poland + Romania Slovenia	Bulgaria + Czech Greece + Iceland Italy + Portugal Malta + Romania
"No" in 2015/16 (while "Yes (but)" or "No, but" for different-sex)	Bulgaria + Czech France + Hungary Italy + Poland Romania	Bulgaria	Poland
Countries by 2006	8 (+1/2) out of 20	8 out of 12	7 out of 13
Same-sex legal recognition consensus 2006	43%	67%	54%
Countries by 2015/16	12 (+1/2) out of 20	11 out of 12	12 out of 13
Same-sex legal recognition consensus '15/16	63%	92%	92%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21.

Table 2.26: Years since when same-sex partners have been recognised for specific legal issues concerning **Parenting** (three questions in Section 3 of the questionnaire)

	3.4 Legal parenthood	3.9 Second-parent adoption	3.10 Joint adoption
2016	Portugal	Portugal	Austria + Portugal
2015	Austria + Belgium	Ireland	Ireland
2014	Netherlands	Italy* + Malta*	Malta
2013		Austria + France NorthernIreland	France + (<i>Germany</i>) NorthernIreland
2012			
2011		Slovenia*	
2010			
2009	Norway + UK	Finland + Scotland	Norway + Scotland
2008			
2007			
2006	(<i>Iceland</i>)	Belgium	Belgium + Iceland
2005	Sweden	England&Wales	England&Wales
2004		Germany	
2003		Sweden	Sweden
2002		Norway	
2001		Netherlands	Netherlands
2000		Iceland	
1965		(<i>Bulgaria*</i>)	
"No" in 2015/16 (but same as for different-sex)			
"No" or "Doubt" in 2015/16 (while "Yes (but)" for different-sex)	12 countries + Malta?	Czech Greece Hungary Poland Romania	Bulgaria + Czech Finland + Greece Hungary + Italy Poland + Romania Slovenia
Countries by 2006	1 (+1/2) out of 21	6.33 (+1/2) out of 21	4.33 out of 21
Same-sex legal recognition consensus 2006	7%	33%	21%
Countries by 2015/16	7 (+1/2) out of 21	15 (+1/2) out of 21	11 (+1/2) out of 21
Same-sex legal recognition consensus '15/16	38%	74%	55%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21..

Table 2.27: Years since when same-sex partners have been recognised for specific legal issues concerning **Migration** (three questions in Section 4 of the questionnaire)

	4.1 Partner of national citizen	4.3 Partner of (non-EU) foreigner	4.7 Citizenship
2016		Italy	Italy
2015	Greece(2011*)	Greece	Greece(1965*)
2014	Malta + (Poland*)	Malta + (Poland*)	Malta
2013			France(1999*)
2012			
2011	Slovenia	Slovenia	Ireland
2010	Italy	Austria	Austria
2009		Hungary	Hungary
2008	Ireland(2006)	Ireland(2006)	
2007	Hungary(2005)		
2006	Czech		Czech + Portugal
2005	Austria	France(1999*)	UK
2004			
2003			Belgium + Finland
2002		Finland* + Iceland	
2001	Portugal(1999)	Portugal + (Bulgaria)	Germany
2000	UK(1965*)	UK(1965*)	
1999	France*		
1997	Belgium	Belgium	
1996	Germany + Iceland	Germany	Iceland
1995			Sweden
1993	Finland(1965*)		Norway
1988	Norway(1965*)	Norway*	
1985			Netherlands
1975	Netherlands	Netherlands	
1974	Sweden*	Sweden*	
"No" in 2015/16 (but same as for different-sex)			
"No" or "Doubt" in 2015/16 (while "Yes (but)" for different-sex)	Bulgaria? Romania	Czech Romania	Bulgaria Poland Romania Slovenia
Countries by 2006	12 out of 21	10 (+1/2) out of 21	10 out of 21
Same-sex legal recognition consensus 2006	57%	50%	48%
Countries by 2015/16	18 (+1/2) out of 21	17 (+2/2) out of 21	17 out of 21
Same-sex legal recognition consensus '15/16	88%	86%	81%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21.

Table 2.28: Years since when same-sex partners have been recognised for specific legal issues concerning **Splitting up** or **Death** (four questions in sections 5 and 6 of questionnaire)

	5.10 Alimony	5.9 Property at dissolution	6.2 Property at death	6.6 Wrongful death
2016	Italy	Italy	Italy	
2015	Greece	(Greece=*)	(Greece=)	Greece
2014	Malta	Malta	Malta	
2013	France(1965*)			
2012				
2011	Ireland	(Ireland=)	(Ireland=)	Ireland* + Italy*
2010	Austria Portugal*	(Austria=) Portugal	(Austria=) Portugal	Austria
2009	Hungary			
2008				Portugal
2007				Bulgaria(1965*)
2006	Czech			
2005	Slovenia UK	Slovenia (UK=)	Slovenia (Scotland=)	England&Wales NorthernIreland Scotland*
2004				
2003	Belgium(1965*)	Belgium(2000)	Belgium(2000)	
2002	Finland	Finland	Finland	Finland*
2001	Germany			Germany
2000				Belgium*
1999		France	France	France*
1998	Neth'lands(1965*)	Neth'lands(1965*)	Neth'lands(1965*)	
1996	Iceland	Hungary (Iceland=)	Hungary (Iceland=)	Czech* + Hungary Iceland*
1995	Sweden			
1993	Norway	Norway(1965*)	Norway(1965*)	Norway(1972*) Sweden
1992				Netherlands
1988		(Sweden=)	(Sweden=)	
1979			(Nor'Ireland=)	
1976			(England&W=)	
1965				Malta*
"No" in 2015/16 (but same as for different-sex)		Germany	Germany	
"No" or "Doubt" in 2015/16 (while "Yes (but)" for different-sex)	Bulgaria Poland Romania	Bulgaria Czech Poland Romania	Bulgaria Czech Poland Romania	Poland? Romania Slovenia
Countries by 2006	10 out of 21	10 out of 20	10 out of 20	12 out of 21
Same-sex legal recognition consensus 2006	48%	50%	50%	57%
Countries by 2015/16	18 out of 21	16 out of 20	16 out of 20	18 out of 21
Same-sex legal recognition consensus '15/16	86%	80%	80%	86%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21.

Table 2.29: Years since when same-sex partners have been recognised for specific legal issues concerning **Death** (four questions in Section 6 of the questionnaire)

	6.1 Tenancy continuation	6.3 Inheritance	6.4 Inheritance tax	6.5 Survivor's pension
2016	Italy*	Italy	Italy	Italy
2015	Greece	Greece	Greece	Greece
2014	Czech*	Malta		Malta
2013		France	Hungary	France
2012	Poland*			
2011	Ireland*	Ireland	Ireland(1999)	Ireland
2010		Austria Portugal(2001)	Germany	Austria Portugal*
2009		Hungary Slovenia	Slovenia	
2008				
2007	Belgium			(Czech*)
2006		Czech*		
2005	(Slovenia)	England&W(1976) Nor'Ireland(1979) Scotland	UK	Germany Slovenia UK(1993*)
2003	Austria NorthernIreland*	Belgium		Belgium
2002	Finland*	Finland	Finland	Finland
2001	Germany Portugal	Germany	Belgium	
1999	France + Scotland England&Wales		France	
1998		Netherlands		
1996	(Hungary=) Iceland*	Iceland	Iceland*	Hungary + Iceland Neth'lands(1965*)
1995		Sweden(1965*)		
1993		Norway		Norway
1992			Czech*	
1991	Norway			
1990				Sweden
1988	Sweden			
1981			Netherlands	
1979	Netherlands			
1965	Malta*		Portugal*	
"No" in 2015/16 (but same as for different-sex)	Bulgaria		Romania (see note below)	Poland
"No" in 2015/16 (while "Yes (but)" for different-sex)	Romania	Bulgaria Poland Romania	Bulgaria Poland	Bulgaria Romania
Countries by 2006	12 (+1/2) out of 20	9 out of 21	9 out of 18	10 out of 20
Same-sex legal recognition consensus 2006	63%	43%	50%	50%
Countries by 2015/16	18 (+1/2) out of 20	18 out of 21	14 out of 16	17 (+1/2) out of 20
Same-sex legal recognition consensus '15/16	93%	86%	88%	88%

Source: The LawsAndFamilies Database 2017. See legenda in tables 2.20 and 2.21.

Note: There is no inheritance tax in **Austria** (since 2007), **Malta** (since at least 1965), **Norway** (since 2014; equal for same-sex since 1993; and **Sweden** (since 2005; equal for same-sex since 1988).

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Chapter 3:

Statutory protection against domestic violence in Europe – a comparative case study of question 2.7 in the LawsAndFamilies Database

by Daniel Damonzé¹²⁷

3.1 Introduction

This chapter analyses the legal situation in 23 jurisdictions regarding question 2.7 (domestic violence) of the LawsAndFamilies Database:¹²⁸ “*When one partner uses violence against the other partner, does specific statutory protection apply?*” The analysis evaluates all three family formats – Marriage, Registered partnership and Cohabitation – of both different-sex and same-sex couples for the period 1989 – 2015/2016.¹²⁹ The jurisdictions are: Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, England and Wales, Northern Ireland, and Scotland. The sources for the information in this chapter are the 23 source papers by the legal experts who answered section 2 (Income and Troubles) of the LawsAndFamilies questionnaire.¹³⁰

Presently, all selected jurisdictions have specific statutory protection against domestic violence but this varies across family formats. The data (visualised in *figures 3.1* and *3.2* and *tables 3.3* and *3.4* below) show that 23 jurisdictions have protection for married/registered different-sex partners as well as for cohabiting different-sex partners. Conversely, 20 of the 23 jurisdictions have protection for married/registered same-sex partners and in 18 jurisdictions same-sex cohabiting partners are also protected by rules on domestic violence. Different-sex partners are therefore still the most protected against domestic violence. However, in jurisdictions where married/registered same-sex partners receive protection this is on a par

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¹²⁸ Waaldijk et al. (Eds.) (2017).

¹²⁹ For some countries 2015 was the latest year for which this question was answered by the legal experts, for others it was 2016.

¹³⁰ See the list of references (to the source papers authored by the legal experts) at the end of this chapter.

with protection enjoyed by married/registered different-sex partners. Moreover, in the 18 jurisdictions, except Italy, the protection afforded to same-sex cohabiting partners is also on a par with the protection for different-sex cohabiting partners. As regards the remaining five jurisdictions, two have no protection for same-sex cohabitants,¹³¹ and for three jurisdictions there exists legal doubt/uncertainty as to whether such protection applies to them.¹³²

The data show that legislative rules on domestic violence protection are quite a recent phenomenon, which only gained regulatory momentum at the turn of the twentieth century.

Interesting similarities and few differences can be observed between the jurisdictions, concerning among other things: the definition of domestic violence, victim, family member and offender. Three jurisdictions surveyed stand out for leading the way in domestic violence protection. The earliest protection against domestic violence recorded in this survey can be observed in Norway.¹³³ This was followed by Ireland¹³⁴ and England & Wales¹³⁵ during the latter half of the 1970s, when they became some of the first to adopt specific legislative rules against domestic violence.

Domestic violence regulation produces standard protection measures for victims of abuse. Some of the protection measures available in the jurisdictions surveyed include non-molestation and occupancy orders (England & Wales and Northern Ireland),¹³⁶ interdict and exclusion orders (Scotland)¹³⁷ and expulsion or ejection orders (Czech Republic and Greece).¹³⁸ The expert for Scotland highlighted that different-sex and same-sex cohabitants, like married spouses and registered partners, may apply to the court (pursuant the Protection from Abuse Act) for the “power of arrest” to be attached to an existing interdict, whereupon the police may arrest the interdicted person without a warrant if in breach of the interdict or if posing a mere risk of abuse.¹³⁹ Other protection measures found include inside-the-family

¹³¹ Furtunova 2017b (question 2.7); Lima 2017b (question 2.7).

¹³² Pudzianowska 2017b (question 2.7); Cojocariu 2017b (question 2.7); Rajgelj 2017b (question 2.7).

¹³³ Frihagen 2017b (question 2.7).

¹³⁴ Ryan 2017b (question 2.7).

¹³⁵ Hayward 2017b (question 2.7).

¹³⁶ Hayward 2017b (question 2.7); Sloan 2017c (question 2.7).

¹³⁷ Norrie 2017b (question 2.7).

¹³⁸ Friðriksdóttir 2017b (question 2.7); Lima 2017b (question 2.7).

¹³⁹ Norrie 2017b (question 2.7). See also Protection from Abuse (Scotland) Act of 2001, arts. 1 and 4.

restraining orders (Finland),¹⁴⁰ preliminary injunctions (Austria),¹⁴¹ safety and barring orders (Ireland),¹⁴² and restraining orders (Netherlands).¹⁴³ In Belgium, the victim spouse or partner gets “almost automatically” use of the residence during separation.¹⁴⁴ In Hungary, preventative protection orders were available since 2009 and in 2014 the domestic violence law was amended to make it possible for victims to apply for restraining orders against an ex-cohabiting partner.¹⁴⁵ Problematic in Hungary’s requirements is that the violence must have been committed on a “regular basis”,¹⁴⁶ which could exclude from protection victims who were abused only once or irregularly. Similarly, Sweden requires “repeated violation” for specific protection;¹⁴⁷ whereas Malta’s Domestic Violence Act triggers protection for “any act of violence, even if only verbal” and also for “any omission which causes physical or moral harm”.¹⁴⁸

For domestic violence protection there either has to be or should have been a relationship as between relatives or a relationship that resembles one between married spouses or civil partners (for example Ireland, England & Wales, Sweden, Finland, Germany and Iceland).¹⁴⁹ However, Malta also includes for protection “any persons living together”.¹⁵⁰

In the beginning stages of domestic violence regulation in some jurisdictions (France, Finland and Hungary) protection was only for people in existing relationships and not for people who have since separated.¹⁵¹ There is now a trend in the jurisdictions to also protect former spouses or partners regardless different-sex or same-sex (see paragraphs 3.3.2 and 3.4).

In a few jurisdictions surveyed (see paragraphs 3.3.3 and 3.4) it is still a requirement for the victim to initiate a complaint before domestic violence protection is triggered. This may be in

¹⁴⁰ Valleala 2017b (question 2.7).

¹⁴¹ Graupner 2017b (question 2.7).

¹⁴² Ryan 2017b (question 2.7).

¹⁴³ Nikolina 2017b (question 2.7).

¹⁴⁴ Willems 2017b (question 2.7).

¹⁴⁵ Dombos 2017b (question 2.7).

¹⁴⁶ Dombos 2017b (question 2.7).

¹⁴⁷ Walleng 2017b (question 2.7).

¹⁴⁸ Galea Borg 2017b (question 2.7).

¹⁴⁹ Ryan 2017b (question 2.7); Hayward 2017b (question 2.7); Walleng 2017b (question 2.7); Valleala 2017b (question 2.7); Adamietz 2017b (question 2.7); Friðriksdóttir 2017b (question 2.7).

¹⁵⁰ Galea Borg 2017b (question 2.7).

¹⁵¹ Kouzmine 2017b (question 2.7); Valleala 2017b (question 2.7); Dombos 2017b (question 2.7).

conflict with the protection standards in the Istanbul Convention (see paragraph 3.2.3 below). In Malta, however, the police may institute proceedings against the offender *ex officio* without the need for a formal complaint by the victim.¹⁵² In Hungary, the expert mentioned that milder acts of violence (such as degrading violent acts that infringes upon human dignity), may not be prosecuted *ex officio*.¹⁵³ In Germany, it is still required (across all family formats) for a victim who sustained bodily injury to initiate the complaint before protection is triggered.¹⁵⁴ The latter may be contrary to the standards on *ex officio* proceedings in the Istanbul Convention (see paragraph 3.2.3).

In the beginning years of domestic violence regulation these protections, however, mostly benefited different-sex partners. The lack of specific domestic violence rules often meant that ordinary penal rules on assault or similar offences were used to prosecute domestic violence cases.¹⁵⁵ A compounding factor was the late criminalisation of spousal rape in some jurisdictions.¹⁵⁶

3.2 Developments at European level

In recent years norms and standards on countering domestic violence have also been developed at European level, both within the EU and in the Council of Europe. In a 2009 European Parliament Resolution on violence against women, member states were called upon to improve national laws and policies addressing violence against women and other groups vulnerable to violence, including, among others, homosexual women.¹⁵⁷ It urged member states to recognise as a crime “*rape against women, including within marriage and intimate informal relationships*”.¹⁵⁸ Since then, several European instruments have been adopted that address domestic violence protection more specifically, including the Victims’ Directive, the Rights and Equality Regulation, and the Istanbul Convention.

¹⁵² Galea Borg 2017b (question 2.7).

¹⁵³ Domos 2017b (question 2.7).

¹⁵⁴ Adamietz 2017b (question 2.7).

¹⁵⁵ Plesmid 2017b (question 2.7); Frihagen 2017b (question 2.7); Valleala 2017b (question 2.7).

¹⁵⁶ Frigahen 2017b (question 2.7); Valleala 2017b (question 2.7); Adamietz 2017b (question 2.7); Lima 2017b (question 2.7).

¹⁵⁷ Resolution of the European Parliament on the elimination of violence against women, P7_TA(2009)0098, 26 November 2009, paras. 1 and 16.

¹⁵⁸ *Idem*, paras. 24-25. Norway, Finland, Germany and Greece are among the jurisdictions surveyed that had already criminalised rape within marriage by 2009. See Frigahen 2017b (question 2.7); Valleala 2017b (question 2.7); Adamietz 2017b (question 2.7); Lima 2017b (question 2.7).

3.2.1 The Victims' Directive

The 2012 Victims' Directive lays down minimum rules and standards on the rights, support and protection of victims of crime in the EU.¹⁵⁹ It defines key concepts applicable to cases of domestic violence, which are also reflected in the law of many jurisdictions surveyed.

The Directive recognises the need for special protection measures for victims of violence committed in a close relationship.¹⁶⁰ The Directive states about violence committed in a close relationship that “it is committed by a person who is a current or former spouse, or partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss.”¹⁶¹ And the Directive requires that victims of violence in close relationships have a right to special protection measures during criminal proceedings.¹⁶²

For examples of protection measures found in the jurisdictions surveyed, see paragraph 3.1 above.

3.2.2 The Rights and Equality Regulation

In order to contribute to further development related to equality and human rights, the EU Parliament and Council in 2013 adopted a Regulation to this effect.¹⁶³ Through this Regulation member states commit themselves to establishing a programme on Rights, Equality and Citizenship for the period 2014 – 2020. Some of the specific objectives are to finance a broad spectrum of initiatives in member states aimed at preventing and combatting, among other things, “all forms of violence against children, young people and women, as well as violence against other groups at risk, in particular groups at risk of violence in close relationships, and to protect victims of such violence”.¹⁶⁴ Besides combatting violence in close relationships, another specific objective is the prevention and combatting of

¹⁵⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (entered into force: 15 November 2012).

¹⁶⁰ *Idem*, preamble, para. 18

¹⁶¹ *Idem*, preamble, para. 18

¹⁶² *Idem*, art. 23; see also para. 18 of the preamble.

¹⁶³ Regulation 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 (entered into force: 29 December 2013), see art. 3.

¹⁶⁴ *Idem*, art. 4(e).

“homophobia and other forms of intolerance”.¹⁶⁵ And promoting the effective implementation of the non-discrimination principle, including, among other grounds, sexual orientation in Article 21 of the Charter of Fundamental Rights of the European Union.¹⁶⁶ Through this programme evidence will be generated to improve policy making at national and EU level.¹⁶⁷ Evidence generated through this programme could therefore be used to effect policy change in member states that do not yet clearly have specific domestic violence protection for same-sex cohabiting partners (see paragraph 3.3).

3.2.3 The Istanbul Convention

In the Council of Europe context, the Istanbul Convention¹⁶⁸ aims at preventing domestic violence against women. It is the first legally binding treaty in Europe that contains standards on domestic violence protection. The Convention aims to “protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence”.¹⁶⁹ States parties are obliged to apply the Convention for the protection of women, but are also “encouraged to apply this Convention to all victims of domestic violence”.¹⁷⁰ It defines domestic violence, in similar wording as the Victims’ Directive, as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”.¹⁷¹ Furthermore, states parties, in the implementation of this Convention and when adopting protection measures against domestic violence shall do so without discrimination on any ground including, among other grounds, sexual orientation.¹⁷² The Convention enshrines the principle that states parties should not make investigations or prosecution for, among other things, physical or sexual violence, dependent on the victim filing a complaint (as is still the case in a few jurisdictions surveyed – see paragraphs 3.1, 3.3.3 and 3.4); instead, states should allow for *ex officio* proceedings (as

¹⁶⁵ *Idem*, arts. 4(b).

¹⁶⁶ *Idem*, art. 4 (a).

¹⁶⁷ *Idem*, preamble, para. 17.

¹⁶⁸ Council of Europe, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, 11 May 2011, CETS No. 210 (entered into force: 1 August 2014).

¹⁶⁹ *Idem*, art. 1(a).

¹⁷⁰ *Idem*, art. 2(2).

¹⁷¹ *Idem*, art. 3(b).

¹⁷² *Idem*, art. 4(3).

are possible for example in Malta).¹⁷³ Some protection measures mentioned in the Convention include barring, restraining and protection orders, similar to measures found in some of the jurisdictions surveyed. To date, the Convention has been signed by 44 countries and ratified by 22.¹⁷⁴ The three jurisdictions in this survey that have no or unclear protection for same-sex partners (Bulgaria, Poland and Romania, see paragraphs 3.3 and 3.4 below) have all signed the Convention, but only in Poland and Romania has it entered into force.¹⁷⁵ The latter two jurisdictions therefore have a treaty obligation to provide some form of protection against domestic violence to same-sex partners. Greece and Slovenia, where registered same-sex partners are protected, but cohabiting same-sex partners have no or uncertain protection, are signatories to the Convention, but only in Slovenia has it entered into force.¹⁷⁶

3.3 Different-sex and same-sex cohabitation

Domestic violence protection for different-sex and same-sex cohabitants has had an almost parallel development since 1989. As *Figure 3.1* illustrates, presently, the number of jurisdictions that distinguish between different-sex and same-sex cohabitation is small and continues to shrink. Currently, there are only two jurisdictions where same-sex cohabitants are not covered by domestic violence legislation – Bulgaria¹⁷⁷ and Greece¹⁷⁸ – while the legal situation is in doubt in Poland¹⁷⁹ and Romania.¹⁸⁰ And it is unclear in Slovenia, where domestic violence protection exists for same-sex registered partners, but the Family Violence Prevention Act does not mention same-sex cohabitants as family members.¹⁸¹ In Bulgaria, the law does not specifically exclude same-sex cohabitants from protection, but the expert

¹⁷³ *Idem*, art. 55, read together with art. 35. See also Galea Borg 2017b (question 2.7).

¹⁷⁴ See chart of signatures and ratifications of the Convention, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p_auth=eEXPbLR5.

¹⁷⁵ *Idem*. Bulgaria has only signed the Convention on 21 April 2016. The Convention entered into force in Poland on 1 August 2015 and in Romania on 1 September 2016.

¹⁷⁶ Greece only signed the Convention on 11 May 2011 and in Slovenia it entered into force on 1 June 2015.

¹⁷⁷ Furtunova 2017b (question 2.7).

¹⁷⁸ Lima 2017b (question 2.7).

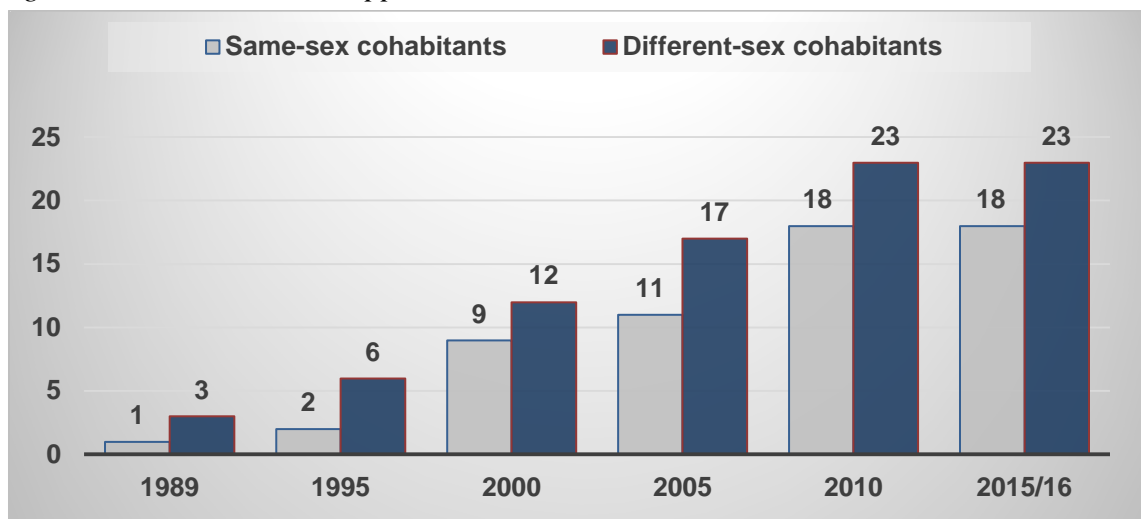
¹⁷⁹ Pudzianowska 2017b (question 2.7).

¹⁸⁰ Cojocariu 2017b (question 2.7).

¹⁸¹ Rajgelj 2017b (question 2.7).

indicated that according jurisprudence on domestic violence legislation same-sex victims do not have the right to seek protection.¹⁸²

*Figure 3.1: Number of jurisdictions (out of 23) for which the legal expert answered “Yes” or “Yes, but” for six selected years to the question (2.7) whether specific statutory protection against **domestic violence** applies to **cohabitants**.*¹⁸³



Source: *The LawsAndFamilies Database 2017*

3.3.1 Early developments

Of the jurisdictions surveyed only three (Norway, England & Wales and Scotland) had protection for cohabiting different-sex partners by 1989 and only Norway also for cohabiting same-sex partners.

As regards Norway, this (qualified) protection was not enshrined in any specific legislation but through a precedent set by the Norwegian Supreme Court against spousal rape in 1974.¹⁸⁴ In 1982 a very inclusive circular by the Attorney General encouraged the prosecuting authority to prosecute cases of domestic violence occurring among cohabitants generally.¹⁸⁵ An amendment to the Criminal Procedures Act in 1986 stressed the importance of clearer domestic violence protection also for same-sex cohabitants in Norway.¹⁸⁶ This amendment

¹⁸² Furtunova 2017b (question 2.7).

¹⁸³ For the meaning of these answer-codes, see paragraph 1.4.3 above. In this table, “2015/2016” stands for the most recent year for which a legal expert has answered a question, which was either 2015 or 2016.

¹⁸⁴ Frihagen 2017b (question 2.7).

¹⁸⁵ Frihagen 2017b (question 2.7).

¹⁸⁶ Frihagen 2017b (question 2.7).

considers both different-sex and same-sex cohabitation as a family relationship, which is an aggravating circumstance in domestic violence cases.¹⁸⁷ In France, the existence of cohabitation is also considered an aggravating factor since 1999 (same-sex cohabitants) and 1992 (different-sex cohabitants), however, only if the violence is of sufficient gravity.¹⁸⁸

In England and Wales, (qualified) protection for cohabiting different-sex partners was available since 1976. Different-sex cohabitants could benefit from family law protection on the basis of being an “associated person”¹⁸⁹ of the offender. And if the different-sex cohabitant also had a property law interest in the residence, he/she enjoyed further protection as “entitled person”.¹⁹⁰ Contrarily, same-sex cohabitants only enjoyed protection as associated/entitled persons since 1997. However, this did not mean that same-sex cohabitation was formally recognised or that protection was given based on a same-sex intimate relationship. This only followed formally in 2005 when the Civil Partnership Act specifically included same-sex cohabitants within the definition of cohabitant.¹⁹¹ Consequently, domestic violence legislation redefined cohabitants as “two persons who, although not married to each other, are living together as husband and wife or (if of the same sex) in an equivalent relationship”.¹⁹²

In Scotland, “gender specific language”¹⁹³ meant that (apart from married spouses) only different-sex cohabitants/partners enjoyed protection already since 1981. Scottish law defined cohabitation as when “a man and a woman are living with each other as if they were man and wife”.¹⁹⁴ Protection to same-sex cohabitants became available in 2006 when the definition of cohabitant was amended to include “two persons of the same sex who are (or were) living together as if they were civil partners”.¹⁹⁵ The legal expert indicated that from 2004 until 2006 legal doubt existed in Scotland as to whether domestic violence law was applicable to

¹⁸⁷ Frihagen 2017b (question 2.7).

¹⁸⁸ Kouzmine 2017b (question 2.7).

¹⁸⁹ Hayward 2017b (question 2.7).

¹⁹⁰ Hayward 2017b (question 2.7).

¹⁹¹ Hayward 2017b (question 2.7).

¹⁹² Civil Partnership (England and Wales) Act of 2004, Schedule 9, para. 13.

¹⁹³ Norrie 2017b (question 2.7).

¹⁹⁴ Matrimonial Homes (Family Protection) (Scotland) Act of 1981, art. 18.

¹⁹⁵ Family Law (Scotland) Act of 2006, §25.

same-sex cohabitants. The doubt arose due to the above-mentioned gender specific wording in combination with the interpretative obligation in the Human Rights Act.¹⁹⁶

It is clear from these early developments in domestic violence protection that it developed to protect family and partners in an intimate relationship.

3.3.2 Developments until 1995

In 1995, Finland joined Norway in protecting same-sex cohabitants, when the prosecutor's right to bring assault charges was broadened to include "private places".¹⁹⁷

By 1995 France and Portugal had joined Norway, England & Wales, Scotland and Finland in protecting different-sex cohabitants. This resulted in a total of 6 jurisdictions protecting different-sex cohabitants (see also *Table 3.3* below). Interestingly, in France until 2006, there existed a problematic qualifying factor, which meant that former or ex-partners (including cohabitants) regardless whether same-sex or different-sex were excluded from domestic violence protection. In other words, an existing family relationship was required for protection. It is possible that other jurisdictions also could have excluded former or ex-partners. This could be derived from the fact that the legal expert mention former or ex-partners as now included for protection after certain amendments occurred, for example, in Finland,¹⁹⁸ Iceland,¹⁹⁹ England & Wales,²⁰⁰ Slovenia²⁰¹ and Sweden.²⁰² Hungary also (since 2014) includes both different-sex and same-sex former cohabiting partners in the definition of relatives, which was previously reserved for former married spouses and existing cohabiting partners.²⁰³

3.3.3 Developments until 2000

Between 1995 and 2000, a sharp increase is observed in *Figure 3.1* in protection for same-sex cohabitants, which by the year 2000 would bring the total number of jurisdictions that extended protection to same-sex cohabitants to nine. These now also included Ireland (1996),

¹⁹⁶ Norrie, 2017b (question 2.7).

¹⁹⁷ Valleala 2017b (question 2.7).

¹⁹⁸ Valleala 2017b (question 2.7).

¹⁹⁹ Friðriksdóttir 2017b (question 2.7).

²⁰⁰ Hayward 2017b (question 2.7)

²⁰¹ Rajgelj 2017b (question 2.7).

²⁰² Wallend 2017b (question 2.7).

²⁰³ Dombos 2017b (question 2.7).

Austria (1997), Belgium (1998), Sweden (1998), England & Wales (1997), Northern Ireland (1999) and France (1999). By the year 2000, except for Austria, all these jurisdictions had one or more qualifying factors attached to the available protection for same-sex cohabitants.

According to the legal expert for Austria, already in 1997 the legislature had started to extend the protection to same-sex partners.²⁰⁴ In Finland, the decision to prosecute the defendant was still dependent on the victim's will or willingness to bring charges.²⁰⁵ Domestic violence protection can therefore only be invoked when the victim takes the initiative to bring a complaint. This requirement was specifically abolished in Finland (2004)²⁰⁶ and in Norway (1988)²⁰⁷ for both different-sex and same-sex cohabiting partners. The expert for Norway, mentioned that the "former spouse or cohabitant" since a 1988 Penal Code amendment no longer had to initiate charges before the offender could be prosecuted.²⁰⁸ If some jurisdictions still place too much focus on the will of an abused victim to bring charges, then it may be contrary to the standards in the Istanbul Convention (see paragraph 3.2.3 above).

Among the 12 jurisdictions that had protection for cohabiting different-sex partners in place by 2000, a minority of five had no qualifying factors attached to protection (Austria, Poland, Portugal, England & Wales and Northern Ireland). Poland, for example, has since 1997 provided domestic violence protection to different-sex cohabitants on the basis that they are "next-of-kin"; however, legal doctrine contains contradictory views whether a same-sex partner in a common household is next-of-kin of the other partner.²⁰⁹ Portugal, even though it only fully recognised different-sex cohabitation as a legal family format in 1999 already in 1995 provided protection to different-sex cohabitants without any qualifying factors.²¹⁰ The data shows that many jurisdictions have provided protection to cohabitants before comprehensive recognition of cohabitation as a legal family format. Besides Portugal, other jurisdictions that followed this trend include Austria (as regards same-sex cohabitants),²¹¹ Czech Republic,²¹² Finland,²¹³ France (as regards different-sex cohabitants),²¹⁴ Ireland,²¹⁵

²⁰⁴ Graupner 2017b (question 2.7).

²⁰⁵ Valleala 2017b (question 2.7).

²⁰⁶ Valleala 2017b (question 2.7).

²⁰⁷ Frihagen 2017b (question 2.7).

²⁰⁸ Frihagen 2017b (question 2.7).

²⁰⁹ Pudzianowska 2017b (question 2.7).

²¹⁰ Freitas 2017b (question 2.7); Pamplona Côte-Real 2017a (question 1.1).

²¹¹ Graupner 2017b (question 2.7); Graupner 2017a (question 1.1).

²¹² Plesmid 2017b (question 2.7); Otáhal 2017a (question 1.1).

Italy,²¹⁶ Norway,²¹⁷ and Sweden (as regards same-sex cohabitants).²¹⁸ In the UK, where cohabitation is “inherently informal”²¹⁹ for both different-sex and same-sex, Scotland was the only UK jurisdiction that provided protection (for different-sex cohabitants only) well before cohabitation gained more comprehensive recognition in 2006.

3.3.4 Recent Developments

Another significant increase in protection for cohabiting same-sex partners occurred during the period 2005 – 2010. Since then the total number of jurisdictions protecting cohabiting same-sex partners is 18 jurisdictions. The remaining five jurisdictions are Bulgaria and Greece (with no protection for same-sex cohabitants), and Poland, Romania and Slovenia (with possibly no such protection).²²⁰ In Italy the law does not specifically include same-sex cohabitants for protection, but according to the legal expert recent case law would prohibit any difference in treatment between different-sex and same-sex cohabitants.²²¹

The expert for Sweden suggested that specific domestic violence protection would apply (across all family formats) only if “repeated violation” occurs against a relative;²²² therefore, the specific protection would only be triggered in case of repeated violation. This is very similar to the law in Hungary, which sets a high threshold before specific protection is triggered.²²³

²¹³ Valleala 2017b (question 2.7); Hiltunen 2017a (question 1.1).

²¹⁴ Kouzmine 2017b (question 2.7); Kouzmine 2017a (question 1.1).

²¹⁵ Ryan 2017b (question 2.7); Tobin 2017a (question 1.1).

²¹⁶ Gatusso 2017b (question 2.7); Winkler 2017a (question 1.1).

²¹⁷ Frihagen 2017b (question 2.7); Eeg 2017a (question 1.1).

²¹⁸ Wallang 2017b (question 2.7); Ytterberg 2017a (question 1.1).

²¹⁹ Norrie 2017b (question 2.7); Norrie 2017a (question 1.1).

²²⁰ See *Table 3.4* below.

²²¹ Gatusso 2017b (questions 2.7 and 2.9).

²²² Walleng 2017b (question 2.7).

²²³ Dombos 2017b (question 2.7).

3.4 Married/registered same-sex and married/registered different-sex partners

Domestic violence protection for married/registered different-sex partners (see *Figure 3.2* below) developed almost parallel with protection for different-sex cohabitants (see *Figure 3.1* above). The only major difference was that in 1989, apart from Norway, England & Wales and Scotland (which had protection for different-sex cohabitants), three more jurisdictions also had protection but only for married different-sex partners – Ireland,²²⁴ Portugal,²²⁵ and Northern Ireland.²²⁶ In the same year, none of these jurisdictions had marriage/registered partnership for same-sex partners available, which is indicated by the zero in the year 1989. This however changed in the 1990s. *Figure 3.2* illustrates the *late* development of more formal family formats (marriage and registered partnership) for same-sex partners. It evidences also the general *slow* development of specific domestic violence protection even for married/registered different-sex partners.

Norway (as with same-sex cohabitation) became the first of the 23 jurisdictions surveyed to provide protection to registered same-sex partners. This protection already existed since 1993, which was the year registered same-sex partnership became a legal family format in Norway.²²⁷

By 1995, Norway, Ireland, Portugal, France, Finland and the three UK jurisdictions all had protection for married different-sex partners. At this time, Finland (until 2004), France (until 2006) and Portugal (until 2007) still excluded different-sex former partners from protection.²²⁸ Overall, development was still in its infancy, for example, in Finland until 1995 the prosecutor could not initiate charges for assault occurring in “private places”.²²⁹ Also, the victim’s will whether to lay charges or not was still a decisive factor (until 2004).²³⁰

²²⁴ Ryan 2017b (question 2.7).

²²⁵ Freitas 2017b (question 2.7).

²²⁶ Sloan 2017c (question 2.7).

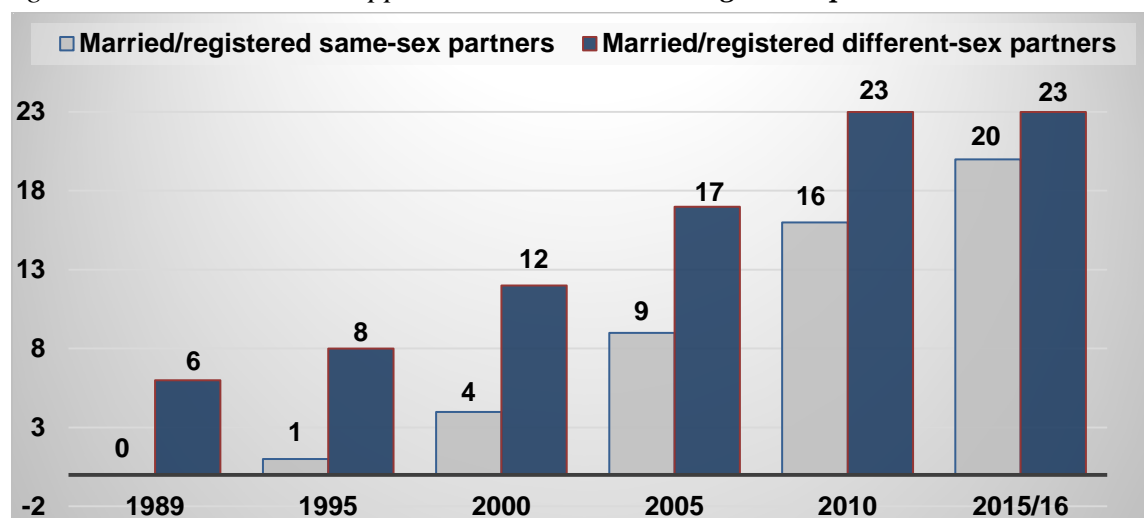
²²⁷ Frihagen 2017b (question 2.7) ; Eeg 2017a (question 1.1).

²²⁸ Valleala 2017b (question 2.7); Kouzmine 2017b (question 2.7).

²²⁹ Valleala 2017b (question 2.7).

²³⁰ Valleala 2017b (question 2.7).

Figure 3.2: Number of jurisdictions (out of 23) for which the legal expert answered “Yes” or “Yes, but” for six selected years to the question (2.7) whether specific statutory protection against **domestic violence** applies to **married and/or registered partners**.²³¹



Source: *The LawsAndFamilies Database 2017*

By 2010 a significant increase had occurred in the number of jurisdictions providing protection to married/registered same-sex partners: 9 jurisdictions by 2005 (up by 5 jurisdictions) and 16 jurisdictions by 2010 (up by 7 jurisdictions). These 16 jurisdictions were Austria, Belgium, Czech Republic, Finland, France, Germany, Hungary, Iceland, Netherlands, Norway, Portugal, Slovenia, Sweden, England & Wales, Northern Ireland and Scotland. This happened as more jurisdictions during this period recognised either marriage or registered partnership for same-sex partners and thereby equalised protection between different-sex and same-sex partners.²³² Surprisingly, the Netherlands already provided registered partnership (since 1998) and marriage (since 2001) for same-sex partners, before it started to provide specific domestic violence protection (across all legal family formats) in 2009.²³³

The last jurisdictions to provide protection to registered same-sex partners were Ireland (2011), Malta (2014), Greece (2015) and Italy (2016).²³⁴ For a current overview, see *Table 3.4* below.

²³¹ For the meaning of these answer-codes, see paragraph 1.4.3 above. In this table, “2015/2016” stands for the most recent year for which a legal expert has answered a question, which was either 2015 or 2016.

²³² Graupner 2017a (question 1.1); Otahal 2017a (question 1.1); Polgari 2017a (question 1.1); Pamplona Corte-Real 2017a (question 1.1); Kogovsek Salamon 2017a (question 1.1); Sloan 2017a (question 1.1); Sloan 2017b (question 1.1); Norrie 2017a (question 1.1).

²³³ Sumner 2017a (question 1.1); Nikolina 2017b (question 2.7).

²³⁴ Italy legalised same-sex registered partnership in 2016; see Gattuso 2017b (question 2.9).

Figure 3.2 illustrates the narrowing and continuously shrinking gap between the domestic violence protection enjoyed by married/registered different-sex partners and married/registered same-sex partners. In all jurisdictions providing marriage or registered partnership for same-sex partners there is also no difference with the protection enjoyed by married/registered different-sex partners. All 23 jurisdictions by 2015/2016 have protection for married/registered different-sex partners, and 20 jurisdictions for married/registered same-sex partners. The standards of protection have been equalised across these legal family formats for same-sex and different-sex partners.

3.5 Conclusion

Tables 3.3 and *3.4* below paint two very different pictures. *Table 3.3* shows the general lack of specific statutory domestic violence protection in 1995 (marked in red and orange – “No” and “No, but”). *Table 3.4* shows that specific domestic violence protection exists in 2015/2016 in all 23 jurisdictions (marked in green and yellow – “Yes” and “Yes, but”), but that in a few jurisdictions same-sex couples still lack protection.

This chapter analysed legal trends on statutory protection against domestic violence in 23 jurisdictions in Europe. The data revealed that presently, all selected jurisdictions have specific statutory protection against domestic violence, albeit with one or more qualifying condition(s) in some jurisdictions.

Different-sex married, registered or cohabiting partners are still the most protected against domestic violence. Same-sex partners are still not protected in a few countries (Bulgaria, and possibly Poland and Romania), although these states have signed or even ratified the Istanbul Convention (see paragraph 3.2.3 above). This perpetuates their vulnerability for domestic violence. In all Western European jurisdictions, equality of protection exists for different-sex and same-sex partners, while only some of the former communist jurisdictions have included same-sex partners in the protection.

All 23 jurisdictions now offer not only married and registered, but also cohabiting partners some specific protection against domestic violence, with the exception of same-sex cohabitants in Bulgaria and Greece (and possibly in Poland, Romania and Slovenia).

The data also reveal that specific statutory protection against domestic violence is a relatively recent phenomenon in the jurisdictions surveyed. Apart from earlier developments in Norway, protection for same-sex partners developed from the 1990s onwards. Domestic abuse was

long deemed to be a private issue, and not classified as domestic violence. This was also reflected in the late criminalisation of rape within marriage. The data reveal an evolution from a lack of specific protection to well-regulated forms of protection. Protection has also been extended to former partners since they are vulnerable to post-relationship violence. Being a spouse, partner or cohabitant of the victim is also an aggravating circumstance in sentencing in some jurisdictions.

Table 3.3: Answers of the legal experts to question 2.7 (*Domestic violence*) for 1995²³⁵

Question 2.7 – When one partner uses violence against the other partner, does specific statutory protection apply?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	1995	No	N/A	N/A	N/A	No	No
Belgium	1995	No	N/A	N/A	N/A	No	No
Bulgaria	1995	No	N/A	N/A	N/A	No	No
Czech Republic	1995	No, but	N/A	N/A	N/A	No, but	No, but
Finland	1995	Yes, but	N/A	N/A	N/A	Yes, but	Yes, but
France	1995	Yes, but	N/A	N/A	N/A	Yes, but	?
Germany	1995	No	N/A	N/A	N/A	No	No
Greece	1995	No	N/A	N/A	N/A	No	No
Hungary	1995	No	N/A	N/A	N/A	No	No
Iceland	1995	No	N/A	N/A	N/A	No	?
Ireland	1995	Yes	N/A	N/A	N/A	No	No
Italy	1995	No	N/A	N/A	N/A	No	No
Malta	1995	No	N/A	N/A	N/A	No	No
Netherlands	1995	No, but	N/A	N/A	N/A	No	No
Norway	1995	Yes, but	N/A	N/A	Yes, but	Yes, but	Yes, but
Poland	1995	?	N/A	N/A	N/A	?	?
Portugal	1995	Yes	N/A	N/A	N/A	Yes	No
Romania	1995	No	N/A	N/A	N/A	No	No
Slovenia	1995	?	N/A	N/A	N/A	?	?
Sweden	1995	No	N/A	N/A	No	No	No
England&Wales	1995	Yes	N/A	N/A	N/A	Yes, but	No
Northern Ireland	1995	Yes	N/A	N/A	N/A	No	No
Scotland	1995	Yes	N/A	N/A	N/A	Yes, but	No

Source: *The LawsAndFamilies Database 2017*

²³⁵ For the meaning of these answer-codes, see paragraph 1.4.3 above.

Table 3.4: Answers of the legal experts to question 2.7 (*Domestic violence*) for the most recent year for which they answered this question ²³⁶

Question 2.7 – When one partner uses violence against the other partner, does specific statutory protection apply?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	2016	Yes	N/A	N/A	Yes	Yes	Yes
Belgium	2015	Yes	Yes	Yes	Yes	Yes, but	Yes, but
Bulgaria	2015	Yes	N/A	N/A	N/A	Yes	No
Czech Republic	2015	Yes	N/A	N/A	Yes	Yes	Yes
Finland	2015	Yes	N/A	N/A	Yes	Yes	Yes
France	2015	Yes	Yes	Yes	Yes	Yes	Yes
Germany	2015	Yes, but	N/A	N/A	Yes, but	Yes, but	Yes, but
Greece	2016	Yes	N/A	Yes	Yes	Yes	No
Hungary	2015	Yes	N/A	N/A	Yes	Yes	Yes
Iceland	2015	Yes	Yes	N/A	Yes	Yes	Yes
Ireland	2016	Yes	Yes	N/A	Yes	Yes, but	Yes, but
Italy	2016	Yes	N/A	N/A	Yes	Yes	Yes, but
Malta	2015	Yes	N/A	Yes	Yes	Yes	Yes
Netherlands	2015	Yes	Yes	Yes	Yes	Yes	Yes
Norway	2015	Yes	Yes	N/A	Yes	Yes	Yes
Poland	2015	Yes	N/A	N/A	N/A	Yes	Doubt
Portugal	2015	Yes	Yes	N/A	N/A	Yes	Yes
Romania	2015	Yes	N/A	N/A	N/A	Yes	Doubt
Slovenia	2016	Yes	N/A	N/A	Yes	Yes	?
Sweden	2015	Yes, but	Yes, but	N/A	Yes, but	Yes, but	Yes, but
England&Wales	2016	Yes	Yes	N/A	Yes	Yes	Yes
Northern Ireland	2016	Yes	N/A	N/A	Yes	Yes	Yes
Scotland	2016	Yes	Yes	N/A	Yes	Yes, but	Yes, but

Source: The LawsAndFamilies Database 2017

²³⁶ For the meaning of these answer-codes, see paragraph 1.4.3 above.

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Chapter 4:

The right to refuse to testify against your partner in criminal procedures – a comparative case study of question 2.8 in the LawsAndFamilies Database

by Giuseppe Zago²³⁷

4.1 Overview

This chapter of the comparative analysis focuses on question 2.8 of the LawsAndFamilies Database,²³⁸ concerning the possibility for a partner to exercise the right to refuse to testify against the other partner who is being prosecuted in a criminal proceeding.²³⁹

Based on a study of 23 jurisdictions (Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, England and Wales, Northern Ireland, Scotland), this chapter attempts to identify some general trends from the scrutiny of the information provided by the national legal experts who answered this question 2.8.²⁴⁰

Preliminarily, it should be observed that the right under examination has been identified with different terms, such as: the right to refuse to testify against the partner;²⁴¹ testimonial exemption;²⁴² compellability to give evidence against the accused;²⁴³ marital privilege.²⁴⁴

²³⁷ Giuseppe Zago is a PhD student at Northumbria University, Newcastle. His current research concerns the treatment of lesbian, gay, bisexual and transgender prisoners in places of detention, critically investigating the international human rights legal framework and the ways it is enforced in national jurisdictions. Prior to joining Northumbria University, he was a researcher on comparative sexual orientation law at Leiden Law School, where he worked on the FamiliesAndLawsDatabase (see (www.LawsAndFamilies.eu), by contributing to the formulation of the questions and of the Guidance for experts answering the questionnaire (see Waaldijk, Lorenzo Villaverde, Nikolina & Zago 2016) and to the reviewing and editing of the answers provided by these legal experts. His principal areas of research focus upon sexual orientation law, gender and sexuality.

²³⁸ Waaldijk et al. (Eds.) 2017. For the methodology of the legal survey at the basis of this database, see paragraph 1.4 above. And see the list of specific references for each jurisdiction at the end of this chapter; the list refers to the source papers authored by the legal experts.

²³⁹ The text of the question was: “2.8 – *Criminal procedure – In case of a criminal prosecution against one partner, can the other partner then refuse to testify against the partner who is being prosecuted?*”

²⁴⁰ Table 4.1 at the end of this chapter gives an overview of the current situation in the 23 jurisdictions.

²⁴¹ See e.g. Graupner 2017b (question 2.8).

²⁴² See e.g. Willems 2017b (question 2.8); Nikolina 2017b (question 2.8).

Nonetheless, in spite of the different terminology adopted, it seems that in all jurisdictions the right to refuse to testify against the other partner represents a privilege designed to protect a family bond based on intimacy, that acknowledges the importance of shielding witnesses from having to choose between giving false evidence to protect their partner, or saying the truth, yet jeopardising the relationship.²⁴⁵ Some experts²⁴⁶ stress that the testimonial privilege, where applicable, persists also after divorce or dissolution; others clarify that the exemption applies only to information or facts known during the cohabitation.²⁴⁷

Almost all countries examined provide some form of legal protection for individuals who refuse to give evidence against the accused partner.

Overall, as of 2015/2016 the testimonial privilege is guaranteed at various degrees to married couples in all jurisdictions but Scotland (see paragraph 4.2 below); it has also been extended to couples in registered partnerships where provided, with (apart from Scotland) France and Ireland as the only exceptions (see paragraph 4.3 below).

The legal situation of cohabitants with respect to the testimonial exception indicates a less coherent framework. Differences among countries prove to be more extensive than for registered partnership and marriage, although in the recent past progress towards its recognition has been achieved in several jurisdictions, especially in relation to different-sex cohabitants (see paragraph 4.4 below). Nonetheless, the current scenario seems to confirm that legislators still hesitate to attach legal consequences to informal relationships, and rather favour partnerships that can be recognized through an official registration procedure.

4.2 Marriage

In none of the jurisdictions studied except France and Scotland, spouses are obliged to give evidence in criminal proceedings when the other spouse is a suspect. In some countries (e.g.

²⁴³ See e.g. Ryan 2017b (question 2.8); Hayward 2017b (question 2.8); Sloan 2017c (question 2.8); Norrie 2017b (question 2.8).

²⁴⁴ Ryan 2017b (question 2.8).

²⁴⁵ European Court of Human Rights, *Van der Heijden v. Netherlands*, App. No. 42857/05, 3 April 2012, par. 25.

²⁴⁶ Graupner 2017b (question 2.8); Nikolina 2017b (question 2.8); Willems 2017b (question 2.8).

²⁴⁷ Gattuso 2017b (question 2.8); Freitas 2017b (question 2.8).

Belgium, and Malta except for specific offences) the law does not allow spouses to testify,²⁴⁸ while in other jurisdictions (e.g. Czech Republic, Finland, Hungary, Iceland, Slovenia) the spouse can decide whether or not to refuse to give evidence.²⁴⁹

France and Scotland represent an exception to the general trend. In France every person, regardless of their marital status, is compelled to testify against the other partner, but the husband or wife does not have to give evidence under oath, even after divorce.²⁵⁰ In Scotland marital privilege for different-sex couples remained applicable until 2011, when the exemption was abolished.²⁵¹ So when the Marriage and Civil Partnership (Scotland) Act entered into force in 2014 same-sex spouses were also not granted the testimonial privilege.

The right of refusing to testify may be subject to certain limitations, such as in England and Wales,²⁵² and Northern Ireland;²⁵³ in Ireland it can be restricted in case of violent crimes or sexual offences committed against one's partner or child or targeting a person under 18.²⁵⁴

In ten jurisdictions out of the 23, the legislature has opened up marriage to same-sex couples (Belgium, France, Iceland, Ireland, Netherlands, Norway, Portugal, Sweden, England and Wales, Scotland). Here same-sex spouses generally enjoy the same legal treatment as different-sex spouses: hence, marital privilege, where already provided by law, has been extended to same-sex couples.

4.3 Registered partnership

Among the 23 jurisdictions analysed, only Bulgaria, Poland, Romania and Portugal have not introduced a registered partnership format, while the other nineteen jurisdictions did introduce this legal family format. Only five countries (Belgium, France, Greece, Malta and Netherlands) have opened registered partnership also to different-sex couples. Ten out of the nineteen (Austria, Czech Republic, Finland, Germany, Greece, Hungary, Italy, Malta,

²⁴⁸ See Willems 2017b (question 2.8); Galea Borg 2017b (question 2.8).

²⁴⁹ See Plesmid 2017b (question 2.8); Valleala 2017b (question 2.8); Dombos 2017b (question 2.8); Friðriksdóttir 2017b (question 2.8); Rajgelj 2017b (question 2.8).

²⁵⁰ Kouzmine 2017b (question 2.8).

²⁵¹ Norrie 2016 (question 2.8).

²⁵² Hayward 2017b (question 2.8).

²⁵³ Sloan 2017c (question 2.8).

²⁵⁴ Ryan 2017b (question 2.8).

Slovenia, Northern Ireland) do not legally acknowledge same-sex marriage: in those ten countries registered partnership constitutes the only form of legal recognition for same-sex couples. As of 2015/2016, each of these ten countries guarantees the testimonial exemption within the registered partnership format; this entails that same-sex registered partners and different-sex spouses are treated equally, which is especially relevant in these jurisdictions where homosexual couples cannot apply for marriage.

Three jurisdictions have adopted same-sex marriage and still provide registered partnerships both for different-sex and same-sex partners (Belgium, France, Netherlands). In Belgium (since 2010) and the Netherlands the testimonial privilege is the same for married and registered partners, but registered partners in France do not enjoy the (very limited) testimonial privilege that spouses have.²⁵⁵

Among the six jurisdictions that introduced same-sex marriage and allow (or previously allowed) only same-sex couples to enter a registered partnership, registered partners in four jurisdictions (Norway, Sweden, Iceland and England & Wales) have the right of refusing to testify (with limited exceptions in the case of England & Wales²⁵⁶), whereas in Scotland the privilege was abolished in 2011.²⁵⁷

Where registered partnership does not ensure testimonial exemption (e.g. Belgium until 2010; Greece until 2015 for different-sex couples; Slovenia until 2009 for same-sex couples; Scotland after 2011; France; Ireland), the introduction of same-sex marriage does not necessarily implicate its extension to registered partnership, as demonstrated by the cases of France and Ireland, where marital privilege has never been extended to registered couples.

Thus, it appears that the institution of marriage offers a stronger legal protection than registered partnership when it comes to the safeguarding of testimonial exemption.

4.4 Cohabitation

The analysis of 23 jurisdictions has emphasized a more incoherent approach as regards the recognition of the right of refusing to testify in informal relationships.

²⁵⁵ Kouzmine 2017b (question 2.8).

²⁵⁶ Hayward 2017b (question 2.8).

²⁵⁷ Norrie 2017b (question 2.8).

Indeed, there is no common ground among the jurisdictions under scrutiny to determine a minimum standard of protection for cohabiting partners in criminal procedure. Authorities may apply the testimonial exemption relying on proofs that the relationship is sufficiently stable (e.g. Norway ²⁵⁸), or on proof of the partners' "engagement" (e.g. Germany ²⁵⁹). Elsewhere, the category of "relative" as mentioned in legislation has been amended to include a gender-neutral definition of *de facto* couples, consequently extending the number of informal relationships covered by the testimonial privilege (e.g. Hungary ²⁶⁰).

As of 2015/2016 nine States guarantee witness privilege to different-sex and same-sex cohabitants (Austria, Czech Republic, Finland,²⁶¹ Hungary, Iceland, Italy, Norway, Portugal, Sweden). Except for Norway, same-sex cohabiting partners have begun benefitting from this privilege many years later than their different-sex equivalents. Where the right to not testify is granted to different-sex cohabitants, it seems likely that this right will later be extended to same-sex cohabitants.

In three countries a rule on testimonial exemption is provided only for different-sex *de facto* partners (Bulgaria, Poland, Slovenia). While textual interpretation of Slovenian law does not seem to leave room for including same-sex couples,²⁶² in Bulgaria and Poland it is not clear whether the law would exclude same-sex cohabitants from enjoying this right. Unfortunately, there is no case law offering authoritative guidance on this question.²⁶³

In the remaining eleven jurisdictions even different-sex cohabitants do not enjoy this right, although in Germany cohabiting partners who are engaged can benefit from the testimonial exemption.²⁶⁴

This incoherent framework may be controversial, but is not against the current jurisprudence of the European Court of Human Rights. In the *Van der Heijden v. the Netherlands* judgment, the Court's Grand Chamber affirmed that although the obligation imposed on a cohabitant to

²⁵⁸ Frihagen 2017b (question 2.8).

²⁵⁹ Adamietz 2017b (question 2.8).

²⁶⁰ Dombos 2017b (question 2.8).

²⁶¹ At the time of writing her answers, Valleala observed that new amendments to the Code of Judicial Procedure were about to enter into force on 1 January 2016, giving cohabiting partners the right to refuse to testify: see Valleala 2017b (question 2.8).

²⁶² Rajgelj 2017b (question 2.8).

²⁶³ Furtunova 2017b (question 2.8); Pudzianowska 2017b (question 2.8).

²⁶⁴ Adamietz 2017b (question 2.8).

testify against his/her partner represents an interference with the right to respect private and family life, this interference is legitimate in order to ensure the public interest of protecting society from crime.²⁶⁵ In addition, the Court noticed that “the wide variety of practices among Council of Europe member States relating to the compellability of witnesses [...] militates in favour of allowing the States a wide margin of appreciation”, thus leaving it to each country to make its own legal assessment.²⁶⁶

4.4.1 Legislative amendments

The testimonial privilege can become available to cohabitants by amending existing laws (Austria, Bulgaria, Czech Republic, Poland, Slovenia, Sweden) or – especially for same-sex cohabitants – after the entry into force of specific Acts aimed at regulating cohabitation (Portugal, Iceland, Sweden).

For instance, the Swedish legislature in 1973 introduced the witness privilege for different-sex couples by updating the Code of Judicial Procedure, while the same protection was granted to same-sex couples through the 1998 Homosexual Cohabitants Act.²⁶⁷

It is also possible, however, that laws regulating cohabitation mainly concern cohabitants’ rights linked with civil law and family law, while not necessarily addressing criminal law issues, such as in the case of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 in Ireland.²⁶⁸

4.4.2 Judicial interpretation

National courts have also contributed to affirm the right of refusing to testify against one’s partner in Finland, Italy, Hungary and Norway. Judgments to this effect were issued by lower tribunals, as happened in Finland and Italy,²⁶⁹ and by higher courts, as in Hungary and Norway.

In the former situation, the ascertainment of legal effects of cohabitation on testimonial privilege risk remaining ambiguous, since tribunals of first instance or courts of appeal in civil law countries do not hold the same authoritative guidance as higher courts. Indeed, Finnish

²⁶⁵ See European Court of Human Rights, *Van der Heijden v. Netherlands*, App. No. 42857/05, 3 April 2012, par. 52-54.

²⁶⁶ *Idem*, par. 61.

²⁶⁷ Walleng 2017b (question 2.8); Ytterberg 2017a (question 1.1).

²⁶⁸ Tobin 2017a (question 1.1), Ryan 2017b (question 2.8).

²⁶⁹ Gattuso 2017b (question 2.8).

lower courts have opted for different approaches concerning witness exemption, and only a 2016 amendment of the Code of Judicial Procedure managed to expressly extend the testimonial privilege to *de facto* couples.²⁷⁰

Diversely, the examples of Norway²⁷¹ and Hungary show the impact on criminal procedure issues of higher courts' decisions regarding the legal status of cohabitants. For instance, the 1995 Hungarian Constitutional Court judgment which deemed unconstitutional the Civil Code provision limiting the recognition of cohabitation to different-sex couples, made this family format gender neutral, thus opening up all legal effects of cohabitation to same-sex partners, including testimonial privilege.²⁷²

4.5 Conclusion

The answers provided by national experts from 23 jurisdictions show that almost all the countries examined guarantee a certain degree of legal protection to a person who is not willing to give evidence against his/her partner who is accused in criminal proceedings. *Table 4.1*, below, gives an overview of the current situation in these jurisdictions.

The results of the LawsAndFamilies Database show that the legal framework on cohabitation tends to be more fragmented than the one on marriage and registered partnership. In particular, with the exception of France and Scotland, the status of being married ensures to both different-sex and same-sex couples (where same-sex marriage is available) the possibility to exercise the testimonial privilege in criminal proceedings. In relation to registered partnerships, as of 2015/2016 only three of the nineteen jurisdictions with this legal family format do not ensure the testimonial exemption; nonetheless, when the right is provided, same-sex and different-sex registered partners are treated equally; likewise, same-sex registered partners and different-sex spouses enjoy the same degree of protection.

Contrarily, European countries continue adopting a more disordered approach in respect of cohabitation, while some jurisdictions discriminate between cohabitants based on sexual orientation. However, the general trend seems to suggest that, once the legislature or the judiciary start including the testimonial privilege as a legal consequence of different-sex

²⁷⁰ Valleala 2017b (question 2.8).

²⁷¹ Frihagen 2017b (question 2.8).

²⁷² Dombos 2017b (question 2.8).

cohabitation, such right is later extended to same-sex couples. More generally, there seems to be a tendency towards the legal recognition of witness privilege for *de facto* couples (see e.g. in Finland). This may allow the European Court of Human Rights to find a wide-enough consensus among the States party to the Council of Europe to reverse its previous jurisprudence,²⁷³ and decide that cohabitants should be treated equally to married couples, not only in family law and for such purposes as tenancy, social security and taxation, but also in relation to the testimonial privilege in criminal proceedings.

Table 4.1: Answers of the legal experts to question 2.8 (*Criminal procedure*), for the most recent year for which they answered this question²⁷⁴

Question 2.8 – In case of a criminal prosecution against one partner, can the other partner then refuse to testify against the partner who is being prosecuted?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	2016	Yes	N/A	N/A	Yes	Yes	Yes
Belgium	2015	Yes	Yes	Yes	Yes	No	No
Bulgaria	2015	Yes	N/A	N/A	N/A	Yes	Doubt
Czech Republic	2015	Yes	N/A	N/A	Yes	Yes	Yes
Finland	2015	Yes	N/A	N/A	Yes	Doubt	Doubt
France	2015	No, but	No, but	No	No	No	No
Germany	2015	Yes	N/A	N/A	Yes	No, but	No, but
Greece	2016	Yes	N/A	Yes	Yes	No	No
Hungary	2015	Yes	N/A	N/A	Yes	Yes	Yes
Iceland	2015	Yes	Yes	N/A	Yes	Yes, but	Yes, but
Ireland	2016	Yes, but	Yes, but	N/A	No	No	No
Italy	2016	Yes	N/A	N/A	Yes	Yes, but	Yes, but
Malta	2015	Yes	N/A	Yes	Yes	No	No
Netherlands	2015	Yes	Yes	Yes	Yes	No	No
Norway	2015	Yes	Yes	N/A	Yes	Yes, but	Yes, but
Poland	2015	Yes	N/A	N/A	N/A	Yes	Doubt
Portugal	2015	Yes	Yes	N/A	N/A	Yes	Yes
Romania	2015	Yes	N/A	N/A	N/A	No	No
Slovenia	2016	Yes	N/A	N/A	Yes	Yes	No
Sweden	2015	Yes	Yes	N/A	Yes	Yes	Yes
England&Wales	2016	Yes, but	Yes, but	N/A	Yes, but	No	No
Northern Ireland	2016	Yes, but	N/A	N/A	Yes, but	No	No
Scotland	2015	No	No	N/A	No	No	No

Source: *The LawsAndFamilies Database 2017*

²⁷³ European Court of Human Rights, *Van der Heijden v. Netherlands*, App. No. 42857/05, 3 April 2012.

²⁷⁴ For the meaning of these answer-codes, see paragraph 1.4.3 above.

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Dombos, T. (2017b). Income, troubles and legal family formats in Hungary.

Freitas, M. (2017b). Income, troubles and legal family formats in Portugal.

Frihagen, H. (2017b). Income, troubles and legal family formats in Norway.

Friðriksdóttir, H. (2017b). Income, troubles and legal family formats in Iceland.

Furtunova, D. (2017b). Income, troubles and legal family formats in Bulgaria.

Galea Borg, C. (2017b). Income, troubles and legal family formats in Malta.

Gattuso, M. (2017b). Income, troubles and legal family formats in Italy.

Graupner, H. (2017b). Income, troubles and legal family formats in Austria.

Hayward, A. (2017b). Income, troubles and legal family formats in the UK: England and Wales.

Kouzmine, J. (2017b). Income, troubles and legal family formats in France.

Lima, D. (2017b). Income, troubles and legal family formats in Greece.

Nikolina, N. (2017b). Income, troubles and legal family formats in the Netherlands.

Norrie, K. (2017b). Income, troubles and legal family formats in the UK: Scotland.

Plesmid, O. (2017b). Income, troubles and legal family formats in the Czech Republic.

Pudzianowska, D. (2017b). Income, troubles and legal family formats in Poland.

Rajgelj, B. (2017b). Income, troubles and legal family formats in Slovenia.

Ryan, F. (2017b). Income, troubles and legal family formats in Ireland.

Sloan, B. (2017c). Income, troubles and legal family formats in the UK: Northern Ireland.

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Case law

European Court of Human Rights, *Van der Heijden v Netherlands*, App. No. 42857/05, 3 April 2012.

Chapter 5:

**Evolution of parenting rights in Europe –
a comparative case study about questions in section 3 of the LawsAndFamilies Database**

Natalie Nikolina ²⁷⁵

5.1 Introduction

Section 3 of the LawsAndFamilies Database concerns issues surrounding parenting: assisted reproductive techniques (ART), surrogacy, legal parenthood, parental authority, parental leave, grandparents’ rights and adoption. This analysis takes into account 23 jurisdictions from the database:²⁷⁶ Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, England & Wales, Northern Ireland, and Scotland. It focuses specifically on three main issues from Section 3: adoption, legal parentage and parental authority. The text of the relevant questions is given in *Table 5.1* below.²⁷⁷

Table 5.1: Four questions in Section 3 (Parenting)

3.4 – Legal parenthood	When one partner gives birth, will (or can) the other partner then also become legal parent of the child, without having to go through adoption? (For example automatically, or by way of recognition/acknowledgement.)
3.5 – Parental authority	Is joint parental authority/responsibility possible for the couple, while only one of the partners is the legal parent of the child?
3.9 – Second-parent adoption	When only one partner is the legal parent of a child, does the other partner then have the possibility of becoming the child’s second parent by way of adoption?
3.10 – Joint adoption	Can partners jointly adopt a child?

Source: *Waldijk e.a. 2016*

²⁷⁵ Natalie Nikolina has defended her PhD thesis “Divided Parents, Shared Children: Legal aspects of (residential) co-parenting in England, The Netherlands and Belgium” in October 2015. She is a researcher specialising in family law and comparative law. From 2015 to 2016 she contributed to drafting and organisation of the LawsAndFamilies questionnaire (see *Waldijk, Lorenzo Villaverde, Nikolina & Zago 2016*), and to the reviewing and editing of the answers for the resulting database (www.LawsAndFamilies.eu).

²⁷⁶ *Waldijk et al. (Eds.) 2017*. For the methodology of the legal survey at the basis of this database, see paragraph 1.4 above. And see the list of specific references for each jurisdiction at the end of this chapter; the list refers to the source papers authored by the legal experts.

²⁷⁷ Another question was about individual adoption (by different categories of partners), but that question (3.11) is not covered in this comparative case study.

Historically speaking, different-sex married spouses and their legitimate children were what defined family and parentage. This notion of parentage has evolved strongly over the years to include cohabitants, step-parents, single parents and same-sex parents. Not all persons who fulfil the role of parent socially, however, are recognized as such legally in all European countries discussed. Especially same-sex parents still lack not only recognition of their parental status, but also the means to become *de facto* parents (for example because of restrictions regarding ART).

There is a large variation in the 23 European jurisdictions when it comes to same-sex parentage. While for example in Belgium, Portugal, Sweden and the Netherlands same-sex parents have (almost) the exact same rights as different-sex parents, in Bulgaria, the Czech Republic, Hungary, Poland, and Romania same-sex partners can in no circumstances both become legal parents of their child(ren) or gain parental responsibilities over their partner's child, because they are not allowed to adopt (by means of joint or step-parent adoption), to make use of ART, to be presumed to be the parent of the child that their partner gave birth to, or to legally recognize that child.

Parenting rights tend to be the last hurdle to overcome for non-traditional couples (same-sex partners and different-sex cohabitants). Where non-equality of tax advantages or social benefits is difficult for lawmakers to defend, discrimination of non-traditional parents is often said to be justified by the best interests of the child. The idea that in order to thrive, a child needs two parents of different sex who are in a committed relationship, translates in many jurisdictions into laws precluding different-sex cohabitants from adopting children and same-sex partners from both being acknowledged as legal parents of their children. The answers in Section 3 show that different-sex cohabitants have been getting more parental rights in all 23 jurisdictions over the years, while same-sex partners' parental rights are undergoing a similar progress, though at a much slower pace. This chapter analyses the development of parental rights of different-sex cohabitants and same-sex partners, set against parental rights of different-sex spouses as the default.

5.2 Legal parentage through presumption or recognition

All jurisdictions in this analysis (and probably most jurisdictions in the world) recognize the principle of '*mater semper certa est*': the rule that the birth mother automatically becomes the legal parent of the child and that the child therefore always has at least one legal parent upon

birth (barring the mother's death of course). The position of the other parent however, is not as clear-cut.

Overall, the legal mother's husband has the strongest position when it comes to parentage. In all jurisdictions analysed there is a presumption of paternity for the mother's male spouse, which means that he will automatically become the child's legal parent upon the child's birth, although this can later be contested. However, in some jurisdictions, such as the Netherlands²⁷⁸ for example, this presumption does not get triggered if the child already has two legal parents.

The mother's male cohabiting partner too has the opportunity to become the child's legal parent without going through adoption and he has had this opportunity since before 1965 in almost all 23 jurisdictions (in Germany since 1970,²⁷⁹ in Iceland since 1981,²⁸⁰ in Ireland at least since 1987,²⁸¹ and in Malta at least since 2004²⁸²). This is usually done through legal recognition with the mother's consent, although in some jurisdictions he needs to fulfil additional criteria. In Ireland, for example, he either has to be the biological father or the child has to have been born through ART.²⁸³

Legal parentage of the mother's female partner is not as self-evident. In eight of the 23 jurisdictions analysed, it is not possible at all for a child to have two legal mothers. And only in nine of the other 14 jurisdictions (Malta's legislation is unclear on this point) a woman does not need to go through the adoption process to become the (second) legal parent when her same-sex partner gives birth. Even in those nine jurisdictions this is a very recent development, in some as recent as 2015. Additionally, even in jurisdictions in which women can become legal parents of their same-sex partner's children, they often do not have the exact same rights as a man would have in the same situation. For example, in the Netherlands,²⁸⁴ Norway²⁸⁵ and Portugal²⁸⁶ there is no presumption of parentage in favour of

²⁷⁸ Nikolina 2017c (question 3.4).

²⁷⁹ Markard 2017c (question 3.4).

²⁸⁰ Friðriksdóttir 2017c (question 3.4).

²⁸¹ Tobin 2017c (question 3.4).

²⁸² Attard 2017c (question 3.4).

²⁸³ Tobin 2017c (question 3.4).

²⁸⁴ Nikolina 2017c (question 3.4).

²⁸⁵ Eeg 2017c (question 3.4).

²⁸⁶ Freitas 2017c (question 3.4).

the mother's wife if the child was conceived with the help of a known donor, while in case of a known donor this presumption does exist in favour of the mother's husband. Instead, the wife will have to legally recognize the child. In Sweden²⁸⁷ even if the child was conceived through ART performed at a publicly financed hospital, the mother's wife still officially have to legally recognize the child (while a man would be presumed to be the father), although the court will declare her the legal parent if she refuses to recognize the child.²⁸⁸ This distinction is usually justified with the argument that the presumption of parenthood of the mother's husband stems from the assumption that he is likely the biological father of the child, while this assumption is absent when it concerns the mother's wife. However, this justification loses its foundation when the child is conceived with donated sperm and yet the presumption of paternity of the mother's husband still applies. Additionally, the non-applicability of the presumption of parentage in lesbian relationships is not necessary to protect the biological father's or known donor's legal position with regard to the child, because the presumption of parentage can be challenged and disproven.

The possibility for the same-sex partner of the mother to become the legal parent without going through adoption has only been introduced very recently and only in nine of the 23 jurisdictions analysed. And while the Belgian legislature took the opportunity to equalize the rights of different-sex and same-sex couples,²⁸⁹ the other eight still have distinctions based more on social preconceptions than any convincing practical or legal reasons.

5.3 Adoption

Before joint legal parentage was made available for female same-sex partners by way of presumption, legal recognition or court order, these partners were dependent on (second-parent) adoption and male same-sex couples still are solely dependent on adoption (or surrogacy where this does not require adoption).

Joint adoption has only started to become available for different-sex cohabitants from the late 1990s²⁹⁰ and is still not available in all jurisdictions. In fact, as can be seen below in *Figure*

²⁸⁷ Ytterberg 2017c (question 3.4).

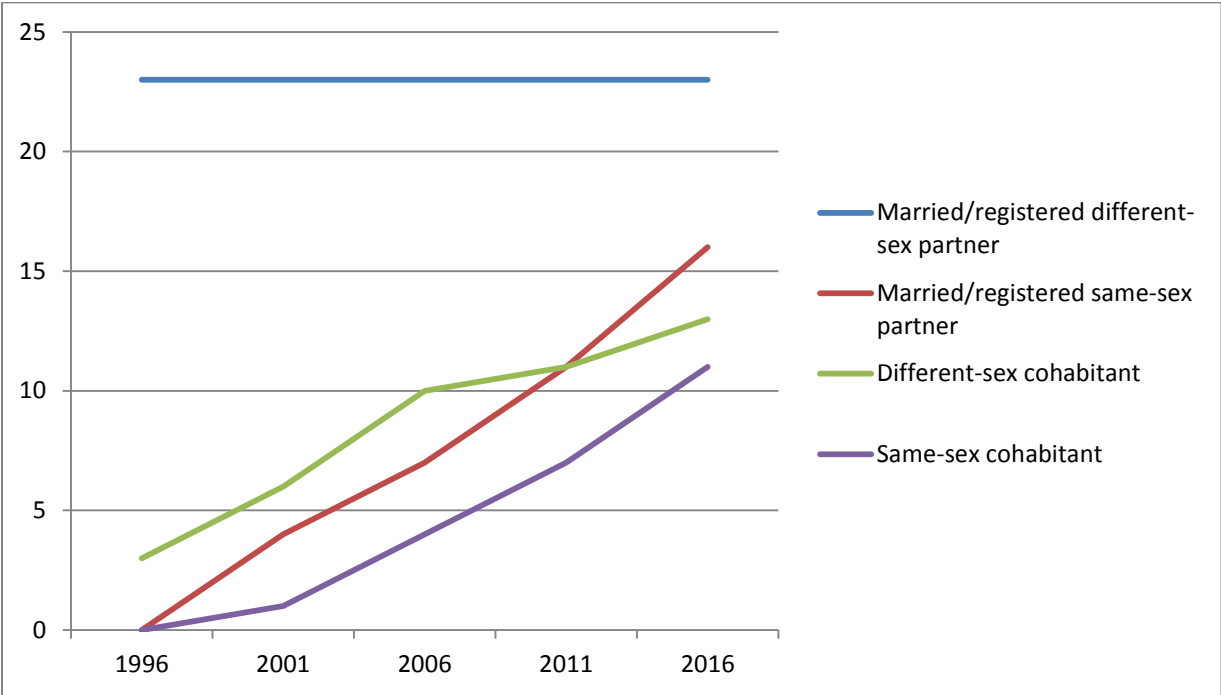
²⁸⁸ Ytterberg 2017c (question 3.4).

²⁸⁹ Borghs 2017c (question 3.4).

²⁹⁰ With the Netherlands being the first of the 23 jurisdictions to allow different-sex cohabitants to jointly adopt in 1998 (see Nikolina 2017c, question 3.10), followed closely by Iceland in 1999 (see Friðriksdóttir 2017c, question 3.10).

5.2 (second-parent adoption) and *Figure 5.3* (joint adoption), the development of adoption legislation for same-sex cohabitants (lines in purple) has undergone a similar development as the development of adoption legislation for different-sex cohabitants (lines in green) – it only happened a few years later.²⁹¹ Adoption by same-sex spouses or registered partners (lines in red), however, had a somewhat different development: Once the first jurisdictions had started to introduce adoption for formalised same-sex partners, the number of such jurisdictions grew to overtake the number of those that allow adoption by different-sex cohabitants.

*Figure 5.2: Number of jurisdictions for which the legal expert answered “Yes” or “Yes, but” to the question if second-parent adoption was possible for certain partners (question 3.9)*²⁹²

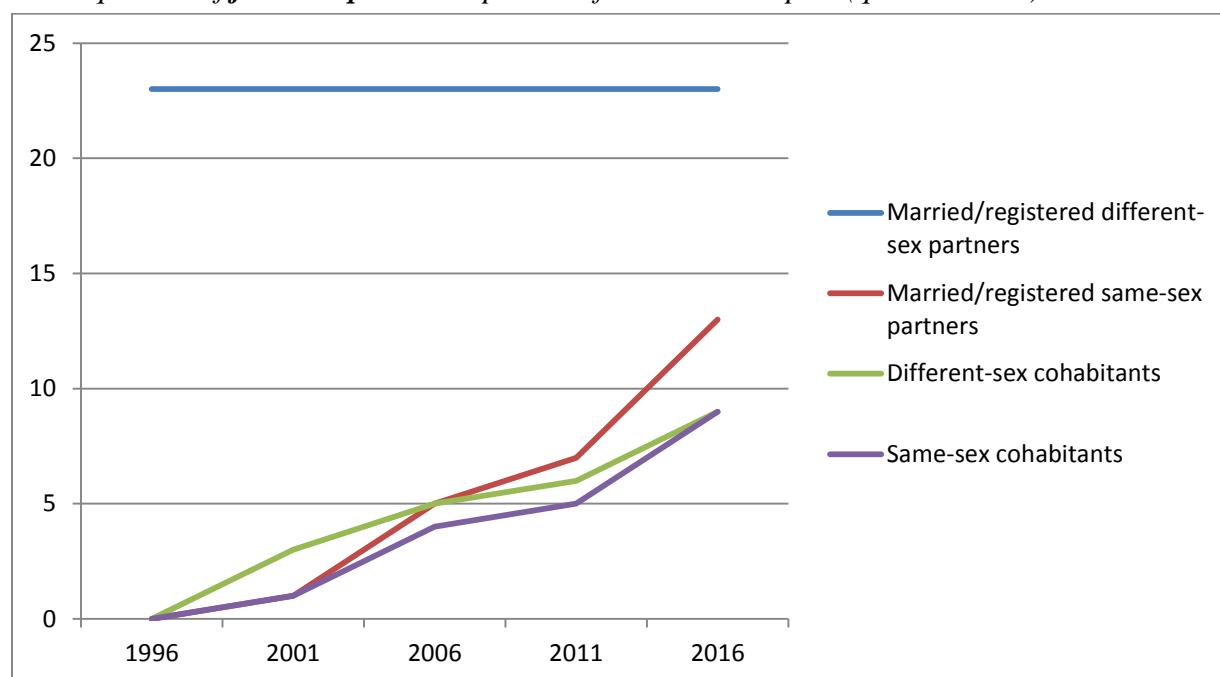


Source: *The LawsAndFamilies Database 2017*

²⁹¹ Iceland was the first jurisdiction to make second-parent adoption available to same-sex registered partners (see Friðriksdóttir 2017c, question 3.9), closely followed by the Netherlands, which extended second-parent adoption to same-sex cohabitants (see Nikolina 2017c, question 3.10) and introduced joint adoption for same-sex partners, married, registered or cohabiting (see Nikolina 2017c, question 3.9).

²⁹² For the meaning of these answer-codes, see paragraph 1.4.3 above. This figure uses only the answers given for 1996, 2001, 2006, 2011 and the most recent year for which an expert has answered this question (2015 or 2016).

Figure 5.3: Number of jurisdictions for which the legal expert answered “Yes” or “Yes, but” to the question if **joint adoption** was possible for certain couples (question 3.10) ²⁹³



Source: *The LawsAndFamilies Database 2017*

There are a few interesting developments that can be observed from the data of the 23 jurisdictions analysed. Second-parent adoption legislation tends to precede joint adoption legislation. This is not surprising as second-parent adoption is a less controversial issue. It is more about formalising existing parental bonds than creating new ones. The exception in 2001 and 2006 when an equal amount of legal jurisdictions allowed second-parent and joint adoption to same-sex cohabitants can perhaps be explained by the fact that same-sex cohabitants were the last to gain the right to adopt and by that time it was much more about creating equality with the other adoption rights holders (different-sex cohabitants and same-sex partners in formalised relationships) than creating new, controversial rights. It is also evident from the *X and others v. Austria* case that the European Court of Human Rights sees a violation of article 8 of the European Convention on Human Rights in different treatment of same-sex cohabitants as opposed to different-sex cohabitants.²⁹⁴ While this case dealt with second-parent adoption, it would be interesting to see if the Court would extend the principle to joint adoption as well.

²⁹³ For the meaning of these answer-codes, see paragraph 1.4.3 above. This figure uses only the answers given for 1996, 2001, 2006, 2011 and the most recent year for which an expert has answered this question (2015 or 2016).

²⁹⁴ ECtHR, 19 February 2013, *X and others v. Austria*, App. No. 19010/07,.

When it comes to non-traditional couples and adoption the legislatures of most jurisdictions seem to favour formalised relationships, even if they are same-sex.²⁹⁵ This can be explained by the perceived need for stability and permanence of the future family, for which the willingness of the partners to formalise their relationship is seen as an indicator.

5.4 Parental authority

Parental authority is a complicated matter. There are three possible ways in which parental authority is regulated in a legal system: (1) (legal) parentage and parental authority are synonymous, because only legal parents can be holders of parental responsibility (e.g. Belgium²⁹⁶); (2) parental authority is strongly linked to legal parentage, but it is possible for someone who is not the legal parent to hold parental authority in special cases (e.g. the Netherlands²⁹⁷); (3) while legal parentage and parental authority mostly coincide *de facto*, they are separate legal concepts and it is possible to be a holder of parental authority without being the legal parent and vice versa (e.g. UK²⁹⁸). The last two ways of regulating parental authority may give persons who cannot become legal parents due to their relationship format (cohabitation as opposed to marriage or registered partnership) or their sex (same-sex as opposed to different-sex) some rights with regard to their children. This was for example the case in the Netherlands: parental authority for a same-sex partner of a legal parent became possible in 1998, three years prior to the introduction of (second-parent and joint) adoption for same-sex partners.²⁹⁹

Additionally, in jurisdictions in which parental authority is not linked to legal parentage (Finland,³⁰⁰ Iceland,³⁰¹ Ireland³⁰² and the UK jurisdictions³⁰³), there often is no strict limit as

²⁹⁵ This is the case in Malta (Attard 2017c, question 3.10) and Sweden (Ytterberg 2017c, question 3.10): in these jurisdictions married or registered same-sex partners can jointly adopt while different-sex cohabitants cannot. In Finland (Valleala 2017c, question 3.9), Germany (Markard 2017c, question 3.9) and Sweden (Ytterberg 2017c, question 3.9) same-sex registered partners may adopt their partner's child, while different-sex cohabitants may not.

²⁹⁶ Borghs 2017c (question 3.5).

²⁹⁷ Nikolina 2017c (question 3.5).

²⁹⁸ Norrie 2017c (question 3.5), Sloan 2017d and 2017e (question 3.5) and Tobin 2017c (question 3.5).

²⁹⁹ Nikolina 2017c (question 3.5).

³⁰⁰ Valleala 2017c (question 3.5).

³⁰¹ Friðriksdóttir 2017c (question 3.5).

³⁰² Tobin 2017c (question 3.5).

³⁰³ Norrie 2017c (question 3.5), Sloan 2017d and 2017e (question 3.5) and Tobin 2017c (question 3.5).

to the maximum number of holders of parental authority. This means that three or even more people can have parental authority over one child. This of course would be very useful for second-parents, but also for example for same-sex parents with a known donor who is involved in the child's life, or for polyamorous parents.³⁰⁴

When a legal or biological parent wishes to gain parental authority, the European Court of Human Rights is very unwilling to accept laws that preclude a parent who has never been in a formal relationship with the mother from applying for parental authority,³⁰⁵ or to accept national judicial decisions that deny parental authority based on a parent's sexual orientation.³⁰⁶

5.5 Conclusion

It is obvious from this analysis that European jurisdictions are not at all homogenous when parenting is concerned. In most jurisdictions there exists a hierarchy of family formats when it comes to parental rights, with different-sex spouses having all the possible parenting rights and same-sex cohabitants having few to none. The *tables 5.4 to 5.7* below give an overview of the current situation in the 23 jurisdictions, as regards the four aspects of parenting discussed in the case study.

The biggest changes and improvements to the position of non-traditional parents have been introduced fairly recently, in the last 20 years. In this period of time more and more jurisdictions made second-parent adoption and joint adoption possible for married and registered same-sex partners, to the point that now more jurisdictions allow adoption by same-sex partners in a formalised relationship than by different-sex partners in cohabitation. On the other hand, legal parentage without adoption is impossible for the female partner of the legal mother in most jurisdictions, while it is possible for the male cohabitant of the mother in all jurisdictions. And then there is the issue of parental authority which is not only dependent on the social attitude towards non-traditional parents, but also on the legal system itself: several jurisdictions make it impossible to grant parental authority to anyone other than the legal parents. So far there has been a steady increase of parenting rights in non-traditional family

³⁰⁴ Polyamory has been defined as “the state or practice of having more than one open romantic relationship at a time” (*Merriam-Webster Dictionary*, <https://www.merriam-webster.com>, 21 March 2017).

³⁰⁵ See ECtHR, 3 March 2010, *Zaunegger v. Germany*, App. No. 22028/04.

³⁰⁶ See ECtHR, 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96.

formats. Whether this increase is likely to continue until all non-traditional parents throughout Europe will have the same rights as different-sex spouses, is hard to tell. The lines in *figures 5.2 and 5.3* do not yet show a slowing down of the trend, so it may be possible, but a period of stagnation is also likely, considering that many of the more liberal jurisdictions are already granting equal parenting rights to non-traditional parents while socially more conservative jurisdictions might not be willing to follow their example.

*Table 5.4: Answers of the legal experts to question 3.4 (Legal parenthood), for the most recent year for which they answered this question*³⁰⁷

Question 3.4 – When one partner gives birth, will (or can) the other partner then also become legal parent of the child, without having to go through adoption? (For example automatically, or by way of recognition/acknowledgement.)							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	2016	Yes	N/A	N/A	Yes	Yes	Yes
Belgium	2015	Yes	Yes	Yes	Yes	Yes	Yes
Bulgaria	2015	Yes	N/A	N/A	N/A	Yes	No
Czech Republic	2015	Yes	N/A	N/A	No	Yes	No
Finland	2015	Yes	N/A	N/A	No	Yes	No
France	2015	Yes	No	Yes	No	Yes	No
Germany	2015	Yes	N/A	N/A	No	Yes	No
Greece	2016	Yes	N/A	Yes	No	Yes	No
Hungary	2015	Yes	N/A	N/A	No	Yes	No
Iceland	2015	Yes	No, but	N/A	No, but	Yes	No, but
Ireland	2016	Yes	No	N/A	No	Yes, but	No
Italy	2016	Yes	N/A	N/A	No	Yes	No
Malta	2015	Yes	N/A	Yes	Doubt	Yes	Doubt
Netherlands	2015	Yes	Yes	Yes	Yes	Yes	Yes
Norway	2015	Yes	Yes, but	N/A	Yes, but	Yes, but	Yes, but
Poland	2015	Yes	N/A	N/A	N/A	Yes	No
Portugal	2016	Yes	Yes, but	N/A	N/A	Yes	Yes, but
Romania	2015	Yes	N/A	N/A	N/A	Yes	No
Slovenia	2015	Yes	N/A	N/A	No	Yes	No
Sweden	2015	Yes	Yes, but	N/A	Yes, but	Yes	Yes, but
England&Wales	2016	Yes	Yes, but	N/A	Yes, but	Yes	Yes, but
Northern Ireland	2016	Yes	N/A	N/A	Yes, but	Yes	Yes, but
Scotland	2016	Yes	Yes, but	N/A	Yes, but	Yes	Yes, but

Source: *The LawsAndFamilies Database 2017*.

³⁰⁷ For the meaning of these answer-codes, see paragraph 1.4.3 above.

Table 5.5: Answers of the legal experts to question 3.5 (**Parental authority**), for the most recent year for which they answered this question ³⁰⁸

Question 3.5 – Is joint parental authority/responsibility possible for the couple, while only one of the partners is the legal parent of the child?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	2016	No	N/A	N/A	No	No	No
Belgium	2015	No	No	No	No	No	No
Bulgaria	2015	No, but	N/A	N/A	N/A	No	No
Czech Republic	2015	No, but	N/A	N/A	No, but	No, but	No, but
Finland	2015	Yes	N/A	N/A	Yes	Yes	Yes
France	2015	Yes	Yes	Yes	Yes	Yes	Yes
Germany	2015	No, but	N/A	N/A	No, but	No, but	No, but
Greece	2016	No	N/A	No	No	No	No
Hungary	2015	No, but	N/A	N/A	No, but	No, but	No, but
Iceland	2015	Yes	Yes	N/A	Yes	Yes, but	Yes, but
Ireland	2016	Yes, but	Yes, but	N/A	Yes, but	Yes, but	Yes, but
Italy	2016	No	N/A	N/A	No	No	No
Malta	2015	No	N/A	No	No	No	No
Netherlands	2015	Yes	Yes	Yes	Yes	Yes, but	Yes, but
Norway	2015	No	No	N/A	No	No	No
Poland	2015	No	N/A	N/A	N/A	No	No
Portugal	2016	Yes	Yes	N/A	N/A	Yes	Yes
Romania	2015	No	N/A	N/A	N/A	No	No
Slovenia	2015	No	N/A	N/A	No	No	No
Sweden	2015	No, but	No, but	N/A	No, but	No, but	No, but
England&Wales	2016	Yes	Yes	N/A	Yes	Yes	Yes
Northern Ireland	2016	Yes	N/A	Yes	Yes	Yes, but	Yes, but
Scotland	2016	Yes	Yes	N/A	Yes	Yes	Yes

Source: The LawsAndFamilies Database 2017

³⁰⁸ For the meaning of these answer-codes, see paragraph 1.4.3 above.

Table 5.6: Answers of the legal experts to question 3.9 (*Second-parent adoption*), for the most recent year for which they answered this question ³⁰⁹

Question 3.9 – When only one partner is the legal parent of a child, does the other partner then have the possibility of becoming the child’s second parent by way of adoption?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	2016	Yes	N/A	N/A	Yes	Yes	Yes
Belgium	2015	Yes	Yes	Yes	Yes	Yes, but	Yes, but
Bulgaria	2015	Yes	N/A	N/A	N/A	No, but	No, but
Czech Republic	2015	Yes	N/A	N/A	No	No	No
Finland	2015	Yes	N/A	N/A	Yes	No	No
France	2015	Yes, but	Yes, but	No	No	No	No
Germany	2015	Yes	N/A	N/A	Yes	No	No
Greece	2016	Yes	N/A	No, but	No	No	No
Hungary	2015	Yes	N/A	N/A	No	No	No
Iceland	2015	Yes	Yes	N/A	Yes	Yes	Yes
Ireland	2016	Yes, but	Yes, but	N/A	No, but	No, but	No, but
Italy	2016	Yes	N/A	N/A	Yes, but	Yes	Yes, but
Malta	2015	Yes, but	N/A	Yes, but	Yes, but	?	?
Netherlands	2015	Yes, but	Yes, but	Yes, but	Yes, but	Yes, but	Yes, but
Norway	2015	Yes	Yes, but	N/A	Yes, but	Yes	Yes, but
Poland	2015	Yes	N/A	N/A	N/A	Yes	No
Portugal	2016	Yes	Yes	N/A	N/A	Yes	Yes
Romania	2015	Yes	N/A	N/A	N/A	Yes, but	No
Slovenia	2016	Yes	N/A	N/A	Yes	Yes, but	Yes, but
Sweden	2015	Yes	Yes	N/A	Yes	No	No
England&Wales	2016	Yes	Yes	N/A	Yes	Yes	Yes
Northern Ireland	2016	Yes, but	N/A	N/A	Yes, but	Yes, but	Yes, but
Scotland	2016	Yes	Yes	N/A	Yes	Yes	Yes

Source: *The LawsAndFamilies Database 2017*

³⁰⁹ For the meaning of these answer-codes, see paragraph 1.4.3 above.

Table 5.7: Answers of the legal experts to question 3.10 (*Joint adoption*), for the most recent year for which they answered this question ³¹⁰

Question 3.10 – Can partners jointly adopt a child?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	2016	Yes	N/A	N/A	Yes	Yes	Yes
Belgium	2015	Yes	Yes	Yes	Yes	Yes, but	Yes, but
Bulgaria	2015	Yes	N/A	N/A	N/A	No	No
Czech Republic	2015	Yes	N/A	N/A	No	No	No
Finland	2015	Yes	N/A	N/A	No	No	No
France	2015	Yes, but	Yes, but	No	No	No	No
Germany	2015	Yes	N/A	N/A	No, but	No	No
Greece	2016	Yes	N/A	No	No	No	No
Hungary	2015	Yes	N/A	N/A	No	No	No
Iceland	2015	Yes	Yes	N/A	Yes	Yes, but	Yes, but
Ireland	2016	Yes	Yes	N/A	No, but	No, but	No, but
Italy	2016	Yes	N/A	N/A	No	No	No
Malta	2015	Yes	N/A	Yes	Yes	No	No
Netherlands	2015	Yes, but	Yes, but	Yes, but	Yes, but	Yes, but	Yes, but
Norway	2015	Yes	Yes, but	N/A	Yes, but	Yes	Yes, but
Poland	2015	Yes	N/A	N/A	N/A	No	No
Portugal	2016	Yes	Yes	N/A	N/A	Yes	Yes
Romania	2015	Yes	N/A	N/A	N/A	No	No
Slovenia	2016	Yes	N/A	N/A	No	No, but	No
Sweden	2015	Yes	Yes	N/A	Yes	No	No
England&Wales	2016	Yes	Yes	N/A	Yes	Yes	Yes
Northern Ireland	2016	Yes	N/A	N/A	Yes	Yes	Yes
Scotland	2016	Yes	Yes	N/A	Yes	Yes	Yes

Source: The LawsAndFamilies Database 2017

³¹⁰ For the meaning of these answer-codes, see paragraph 1.4.3 above.

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Chapter 6:

Recognition of foreign same-sex marriages and registered partnerships – a comparative case study about questions in section 4 of the LawsAndFamilies Database

by Kees Waaldijk ³¹¹

6.1 The problem of recognition of foreign legal family formats

The introduction of registered partnership and the opening up of marriage to same-sex couples, gave rise to the question whether such family formats would be recognised in other countries, especially in other countries where such family formats were not (yet) available.³¹² In fact, it did not give rise to one question, but to several, because it is quite possible that a foreign legal family format would be recognised in the context of some legal issues, but not in the context of other legal issues. And it is also possible that a foreign legal family format would be recognised as something else (a registered partnership as cohabitation, for example, or a same-sex marriage as registered partnership, or a registered partnership as marriage).

Table 6.1: Four questions about recognition of foreign marriages and registered partnerships in Section 4 (Migration)

4.2 – Partner of national citizen (foreign status)	When one partner is a residing national citizen, while the other partner is a foreigner from another continent, <i>and this couple married/registered in the country of the foreigner</i> , will the foreign partner then have a residence entitlement/eligibility?
4.4 – Partner of EU citizen (foreign status)	When one partner is a foreign EU citizen who is residing in the country, while the other is a foreigner from another continent, <i>and this couple married/registered/cohabited in the country of the EU citizen</i> , will the non-EU partner then have a residence entitlement?
4.5 – Foreign status as impediment to marry	<i>When the couple got married or registered abroad</i> , will this relationship then be recognised as an impediment to marry someone else?
4.6 – Foreign status and inheritance	<i>When the couple got married or registered abroad</i> , will this relationship then be recognised as regards inheritance in the absence of a testament?

Source: Waaldijk e.a. 2016

³¹¹ Professor of comparative sexual orientation law, Leiden Law School, www.law.leidenuniv.nl/waaldijk. Kees Waaldijk is the main author of the LawsAndFamilies questionnaire on legal family formats, and principal editor of the law content of the resulting LawsAndFamilies Database (www.LawsAndFamilies.eu). His report *More or less together* was published in 2005.

³¹² There is an extensive literature trying to answer this and related questions, see for example Curry-Sumner 2005 and Biagioni 2014.

Therefore the questionnaire at the basis of the LawsAndFamilies Database contained several questions (in section 4, “Migration”) about the recognition of foreign family status. Four of these questions are about the recognition of foreign (same-sex) marriages and registered partnerships (see *Table 6.1* above).³¹³

6.2 Strongly growing recognition

To assess the degree of recognition of foreign family status, *tables 6.2, 6.3 and 6.4* (below) give a summary of the results for these four questions. The sources for the information in these tables are the 23 source papers by the legal experts who answered section 4 (Migration) of the LawsAndFamilies questionnaire.³¹⁴

In each of these three tables, “2015/16” stands for the most recent year for which a legal expert has answered a question, which was either 2015 or 2016. *Table 6.2*, on foreign same-sex marriages, starts in 2005, because same-sex marriages for the first time became possible in 2001 (in the Netherlands). *Table 6.3*, on foreign same-sex registered partnerships, starts in 1995, because these were introduced for the first time in 1989 (in Denmark). And *Table 6.4*, on foreign different-sex registered partnerships, starts in 2000, because such partnerships for the first time became possible in 1998 (in the Netherlands, and since then only in four other countries in the survey).³¹⁵

In the tables the answers “Yes” and “Yes, but” are added up, also because the answer “Yes, but” in these four questions often means that a foreign same-sex marriage is recognised *as registered partnership* or that a foreign registered partnership is recognised *as cohabitation*. As indicator for the number of jurisdictions that do offer recognition, the tables use the number of jurisdictions with “Yes” or “Yes, but” as an answer, out of the total number of jurisdictions for which the answer was “No”, “No, but”, “Yes” or “Yes, but” (so all possible answers except “?” and “Doubt”).³¹⁶

³¹³ Two other questions were about the recognition of foreign adoptions (by different categories of partners), but these questions (4.8 and 4.9) are not covered in this comparative case study.

³¹⁴ See the list of references (to the source papers authored by the legal experts) at the end of this chapter.

³¹⁵ For an overview, see also paragraphs 2.1, 2.2.1 and 2.3.1 above.

³¹⁶ For the meaning of these answer-codes, see paragraph 1.4.3 above.

Table 6.2: Recognition of **foreign same-sex marriages** for four purposes (numbers of jurisdictions for which the legal expert answered “Yes” or “Yes, but”, out of the number of jurisdictions for which relevant question was not answered with “?” or “Doubt”)

		4.2 Residence entitlement for non-European partner of national citizen	4.4 Residence entitlement for non-European partner of foreign EU citizen	4.5 Impediment to marry someone else	4.6 Inheritance without testament
“Yes” or “Yes, but”	2005	9 out of 20	11 out of 21	11 out of 21	9 out of 18
	2010	14 out of 22	15 out of 22	14 out of 20	13 out of 21
	2015/16	16 out of 23	17 out of 23	17 out of 22	17 out of 22
“Doubt” or “?”	2015/16	-	-	Slovenia	Slovenia
“No, but”		Greece Hungary	Greece Hungary Poland	Greece Hungary Romania	Greece Hungary
“No”		Bulgaria Czech Republic Poland Romania Slovenia	Czech Republic Romania Slovenia	Czech Republic Poland	Czech Republic Poland Romania

Source: The LawsAndFamilies Database 2017

Table 6.3: Recognition of **foreign same-sex registered partnerships** for four purposes (numbers of jurisdictions for which the legal expert answered “Yes” or “Yes, but”, out of the number for which relevant question was not answered with “?” or “Doubt”)

		4.2 Residence entitlement for non-European partner of national citizen	4.4 Residence entitlement for non-European partner of foreign EU citizen	4.5 Impediment to marry someone else	4.6 Inheritance without testament
“Yes” or “Yes, but”	1995	4 out of 17	3 out of 17	2 out of 11	2 out of 15
	2000	10 out of 18	9 out of 18	4 out of 13	4 out of 16
	2005	12 out of 21	14 out of 20	11 out of 18	10 out of 19
	2010	15 out of 20	18 out of 20	14 out of 20	15 out of 22
	2015/16	20 out of 22	22 out of 23	18 out of 21	20 out of 23
“Doubt” or “?”	2015/16	Bulgaria	-	Slovenia Portugal	-
“No, but”		Romania	Poland	Romania	-
“No”		Poland	-	France Poland	France Poland Romania

Source: The LawsAndFamilies Database 2017

Table 6.4: Recognition of **foreign different-sex registered partnerships** for four purposes (numbers of jurisdictions for which the legal expert answered “Yes” or “Yes, but”, out of the number for which relevant question was not answered with “?” or “Doubt”)

		4.2 Residence entitlement for non-European partner of national citizen	4.4 Residence entitlement for non-European partner of foreign EU citizen	4.5 Impediment to marry someone else	4.6 Inheritance without testament
“Yes” or “Yes, but”	2000	9 out of 18	8 out of 18	2 out of 11	4 out of 17
	2005	10 out of 19	12 out of 20	5 out of 14	5 out of 18
	2010	12 out of 19	15 out of 20	5 out of 14	6 out of 18
	2015/16	16 out of 21	18 out of 22	8 out of 14	9 out of 18
“Doubt” or “?”	2015/16	Austria Iceland	Iceland	Austria Iceland Ireland Portugal Slovenia Sweden UK (3x)	Austria Iceland Scotland Slovenia Sweden
“No, but”		Romania	Poland	Germany Hungary Romania	Finland Hungary
“No”		Czech Republic Germany Italy Poland	Czech Republic Germany Italy	Czech Republic France Poland	Czech Republic France England&Wales Northern Ireland Ireland Poland Romania

Source: *The LawsAndFamilies Database 2017*

The three tables show the general trend of increasing recognition.

Table 6.2 shows that recognition of foreign same-sex marriages has increased considerably over the last decade (from circa 50% to circa 75%). Table 6.3 shows that recognition of foreign same-sex registered partnerships has increased even more over the last *two* decades (from circa 20% to circa 90%), while Table 6.4 also shows a considerable increase in the recognition of foreign different-sex registered partnerships. And all this is true for each of the four issues examined.

A second conclusion from all three tables is that the number of countries for which the experts have a clear answer (as opposed to “?” or “Doubt”), has also gone up for all four issues. Apparently law and lawyers now know better how to deal with such foreign legal family formats than before, although for a large minority of jurisdictions it is still unclear if a foreign

different-sex registered partnership would be recognised for inheritance purposes (question 4.6), or as an obstacle to a marriage with someone else (question 4.5).

Thirdly, a comparison of the tables shows that currently recognition of foreign same-sex registered partnerships is more widespread in Europe than recognition of foreign same-sex marriages (especially as regards immigration rights), and that recognition of foreign different-sex registered partnerships is weaker (especially as regards rules on bigamy and inheritance).

Finally, it can be noted that the recognition of foreign same-sex marriages is particularly limited in Central and Eastern European countries, even among those that themselves allow same-sex couples to register their partnership (such as the Czech Republic, Greece, Hungary and Slovenia³¹⁷). Recognition of foreign registered partnerships is (as was to be expected) particularly limited in countries that themselves do not allow partnership registrations (such as Poland and Romania³¹⁸), and in countries that attach a limited set of consequences to partnership registration (such as France³¹⁹). As regards different-sex partnerships, the recognition is particularly limited in countries that do not allow different-sex partners to be registered (such as the Czech Republic, Germany, Hungary and Italy³²⁰).

It should be noted, however, that some of the countries that do not allow partnership registrations themselves (Portugal and Bulgaria),³²¹ apparently do recognise foreign same-sex registered partnerships for most purposes. And foreign same-sex marriages are recognised by many jurisdictions that themselves (by 2015/2016) did not (yet) allow same-sex couples to marry (Finland, Germany, Italy, Malta and Northern Ireland, and as regards rules on bigamy and inheritance also Slovenia).³²²

6.3 Increasing European impact on the recognition of foreign legal family formats

The three tables above suggest that recognition of foreign registered partners and same-sex spouses is strongest for the one issue (among the four) that is regulated by EU law – the right

³¹⁷ See Plesmid 2017d, Lima 2017d, Dombos 2017d, and Kogovsek Salamon 2017d.

³¹⁸ See Pudzianowska 2017d and Cojocariu 2017d.

³¹⁹ See Kouzmine 2017d.

³²⁰ See Plesmid 2017d, Markard 2017d, Dombos 2017d, and Winkler 2017d.

³²¹ See Katchaunova 2017d and Freitas 2017d.

³²² See Hiltunen 2017d, Markard 2017d, Winkler 2017d, Attard 2017d, Sloan 2017f, and Kogovsek Salamon 2017d.

of an EU citizen to freely move to another EU country together with his or her spouse/partner (question 4.4).³²³ This is a good example of how the operation of EU law can advance the recognition among European countries of each other's legal family formats.

Recognition of foreign family status is a complicated field.³²⁴ Historically, such recognition turns on the interaction between family law, private international law,³²⁵ and the rules that apply to the issue at hand (such as immigration or inheritance). Increasingly, however, one or two other areas of law are starting to have an impact: EU law (as in the example of question 4.4),³²⁶ and human rights law (see for example two important judgments of the European Court of Human Rights that require a country to recognise a foreign single-parent adoption, although the country itself does not allow adoption by a single individual).³²⁷ In both areas further developments can be expected.

The Court of Justice of the EU has recently been asked by the Constitutional Court of Romania, to rule on the question whether a member state may deny recognition (in its immigration law) to the foreign same-sex marriage between an EU-citizen and a non-EU citizen.³²⁸ Meanwhile the legislative bodies of the EU could (and probably should) include non-traditional families in more of their directives and regulations.³²⁹

³²³ This is regulated in Directive 2004/38/EC “on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States”. Art. 2(2) of this Directive speaks of “registered partnership”, and art. 3(2) speaks of “dependants or members of the household” and of “durable relationship, duly attested”. However, the text of the Directive also limits the scope of the potential rights of partners in such non-marital relationships; see Waaldijk 2014, p. 49. On free movement of same-sex partners, see also Jessurun d’Oliveira 1993, Waaldijk 1999, Bell 2004, Toner 2004, the 2015 FRA report *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU* (p. 79-96), and especially the thorough analysis by Rijpma & Koffeman 2014.

³²⁴ For a useful exploration of this field, with references to the law of many countries, see Biagioni 2014. See also, for example, the comparative study by Curry-Sumner 2005.

³²⁵ The only international treaty that specifically deals with the recognition of registered partnership is the Convention on the Recognition of Registered Partnerships (Convention 32 of the International Commission, adopted 22 March 2007, opened for signature 5 September 2007, not yet in force, see <http://www.ciecl.org>). And January 2019 will see the entry into force of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

³²⁶ Especially EU rules on freedom of movement (including Directive 2004/38/EC mentioned above), but also various EU rules on private international law (see for example Regulation (EU) 2016/1104 mentioned above).

³²⁷ ECtHR, 28 June 2007, *Wagner v. Luxembourg*, App. No. 76240/01, par. 132-133; and ECtHR, 3 May 2011, *Negrepontis-Giannisis v. Greece*, App. No. 56759/08, par. 61-76.

³²⁸ Case C-673/16, *Coman and Others*. The Romanian Constitutional Court decided on 29 November 2016 to ask the Court of Justice of the EU for a preliminary ruling in this case. It has submitted four questions about the interpretation and application of the terms “spouse”, “any other family members” [who are “dependants or members of the household”], and “partner with whom the Union citizen has a durable relationship, duly attested” in articles 2(2)(a), 3(2)(a) and 3(2)(b), respectively, of Directive 2004/38/EC (mentioned above). About these words in that Directive, see Rijpma & Koffeman 2014, and see Waaldijk 2014a, p. 49, and generally Toner 2004. By March 2017, only the Dutch version of the four

As regards human rights, it will increasingly become more difficult for any European country to come up with an objective and reasonable justification for the non-recognition of a couple's foreign family status, because on first sight such non-recognition would appear as discriminatory (on grounds of sexual orientation, gender, civil status and/or nationality)³³⁰ and as infringing the fundamental right to respect for one's family life.³³¹ Already in two recent cases, the European Court of Human Rights has ruled that it was not justified to refuse a residence permit to a person's informal same-sex partner.³³² No doubt the Court will soon have to decide similar cases where the same-sex partners got married or registered abroad.

6.4 Conclusion

Most of the 21 countries surveyed recognise foreign same-sex marriages and foreign registered partnerships. And the number of countries that do so is going up – at least for the four specific purposes that were covered in the questionnaire: immigration of partner of national citizen, immigration of partner of foreign EU citizen, obstacle to marry someone else, and inheritance when there is no testament. The recognition of foreign same-sex registered partnerships is more widespread than the recognition of foreign same-sex marriages and also than foreign different-sex registered partnerships.

Several countries that themselves do not allow same-sex couples to marry and/or to register as partners, do recognise same-sex spouses and same-sex registered partners from other countries. Interestingly, this seems to be especially true for the one issue (of the four) that is regulated by EU law (residence entitlement for non-European partner of foreign EU citizen). With further EU legislation and case law under way (including the important test case of

preliminary questions had been published online, see www.minbuza.nl/ecer/hof-van-justitie/nieuwe-hofzaken-inclusief-verwijzingsuitspraak/2017/c-zaaknummers/c-673-16.html. All language versions of the questions should become available at <http://curia.europa.eu>. About this case, see Cojocariu 2017 and Tryfonidou 2017.

³²⁹ For an overview of the main examples in existing EU legislation until three years ago, see Waaldijk 2014a, p. 48-49.

³³⁰ As guaranteed in art. 14 of the European Convention on Human Rights, in art. 20 and 21 of the Charter of Fundamental Rights of the European Union, and in various other binding legal texts.

³³¹ As guaranteed in art. 8 (and arguably 12) of the European Convention on Human Rights, in art. 7 (and arguably 9) of the Charter of Fundamental Rights of the European Union.

³³² ECtHR, 23 February 2016, *Pajic v. Croatia*, App. No. 68453/13; and ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, App. No. 51362/09.

Coman and Others on recognition of a foreign same-sex marriage),³³³ chances are that in the future even more countries will extend recognition to foreign same-sex partnerships and marriages. Human rights law can also be expected to further strengthen non-discriminatory respect for the foreign family status of same-sex couples.

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Chapter 7:

Compensation for wrongful death in Europe –

a comparative case study of question 6.6 in the LawsAndFamilies Database

by Daniel Damonzé³³⁴

7.1 Introduction

This chapter analyses the legal situation in 23 jurisdictions regarding question 6.6 (wrongful death) of the LawsAndFamilies Database:³³⁵ “*In case of wrongful death of one partner, is the other partner then entitled to compensation from the wrongdoer?*” The analysis evaluates all three family formats – Marriage, Registered partnership and Cohabitation – of both different-sex and same-sex couples for the period 1989 – 2015/2016.³³⁶ The jurisdictions are: Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, England and Wales, Northern Ireland, and Scotland. The sources for the information in this chapter are the 23 source papers by the legal experts who answered section 6 (Death) of the LawsAndFamilies questionnaire.³³⁷

In the jurisdictions surveyed, the data reveal that the wrongful death of one partner could be cause for a compensation entitlement for the other partner. According to general principles of tort law, both the primary victim (the deceased partner) and the secondary victim (the surviving spouse/partner) through the wrongful act that leads to the death suffer a violation of their rights.³³⁸ The rights violated include, among others, the right to life, and the secondary victim suffers a violation to livelihood because he/she may have been dependent on the

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³³⁵ Waaldijk et al. (Eds.) (2017).

³³⁶ For some countries 2015 was the latest year for which this question was answered by the legal experts, for others it was 2016.

³³⁷ See the list of references (to the source papers authored by the legal experts) at the end of this chapter.

³³⁸ De Kezel 2003, at p. 49.

primary victim for support/maintenance.³³⁹ Wrongful death is a violation of the right to a family relationship³⁴⁰ and constitutes a relational loss.³⁴¹

General tort principles are based on strict causation rules because of the risk of a potential flood of claims when economic losses are concerned.³⁴² In some jurisdictions surveyed, this caution is clearly illustrated by the strict criteria attached to compensation entitlements.

The data reveal that compensation entitlements recorded in this survey are mainly divided into two categories, *i.e.* entitlement for pecuniary losses (financial/economic/property) and for non-pecuniary losses (pain/suffering/moral damage). The jurisdictions surveyed carefully regulate the type of claims and the beneficiaries entitled to compensation. Compensation varies across the jurisdictions surveyed and across the legal family formats. In all 23 jurisdictions the married/registered different-sex surviving partner is entitled to compensation. In 19 jurisdictions this is also the law for the married/registered same-sex surviving partner. In 18 jurisdictions cohabiting different-sex surviving partners have a claim for compensation, while 17 jurisdictions allow this for cohabiting same-sex surviving partners. Almost all jurisdictions surveyed initially provided this right to claim compensation exclusively to married different-sex partners (see *Figure 7.2* below); however, a few jurisdictions provided this right to claim compensation in the 1960s and 1970s also to different-sex cohabitants (see *Figure 7.1* below). By the mid-1990s more jurisdictions started to recognise also the right of same-sex cohabitants to claim compensation for the wrongful death of their partner. However, in two jurisdictions recorded in this survey, cohabitants are excluded from specific damages for bereavement, which are allowed to married/registered different-sex and same-sex partners (see paragraph 7.2.3 below).³⁴³

³³⁹ Koziol 2006, at p. 885.

³⁴⁰ Bona 2003, at p. 551.

³⁴¹ Van Boom 2004, at p. 3.

³⁴² *Idem*, at p. 25.

³⁴³ Hayward 2017f (question 6.6); Sloan 2017i (question 6.6).

7.2 Cohabiting different-sex and same-sex partners

7.2.1 Developments until 1995

Figure 7.1 shows that in 1989 the entitlement to claim compensation was non-existent for cohabiting same-sex partners in all jurisdictions except one. According to the legal expert for Malta, a (qualified) compensation claim for both cohabiting same-sex and different-sex partners was a possibility already since before 1965.³⁴⁴ This is very unusual, since homosexuality was only decriminalised there in 1973.³⁴⁵ The Maltese Civil Code gives the court the power to award damages for injury only if the surviving cohabiting partner was also the heir in the deceased's will.³⁴⁶ This rule is also applicable to the surviving different-sex spouse in Malta since before 1965.³⁴⁷ The result is that if the surviving spouse or cohabiting partner is excluded from inheritance in the will then the other heirs will have a compensation claim. The gender-neutral language in the Maltese Civil Code theoretically therefore made such a claim possible; however, whether this was applied in practice to same-sex cohabitants already since before 1965 was not elaborated upon by the expert. In contrast to Malta, the legal experts for Norway³⁴⁸ and France³⁴⁹ listed the illegality of homosexuality (until 1972 in Norway) and certain criminal provisions relating to homosexuality (until 1981 in France) as potential disqualifying factors for compensation claims by cohabiting same-sex partners.

Figure 7.1 also shows that in 1989 most jurisdictions (65%) excluded cohabiting different-sex partners from having a compensation claim. Apart from Malta, other jurisdictions that allowed a compensation claim for cohabiting different-sex partners by 1989 were Belgium (since 1967),³⁵⁰ France (since 1970),³⁵¹ Hungary (since 1978),³⁵² Slovenia (since 1978),³⁵³ Scotland (since 1980),³⁵⁴ England & Wales (since 1983),³⁵⁵ and Northern Ireland (since

³⁴⁴ Galea Borg 2017f (question 6.6).

³⁴⁵ Caroll 2016, at p. 36.

³⁴⁶ Galea Borg 2017f (question 6.6).

³⁴⁷ Galea Borg 2017f (question 6.6).

³⁴⁸ Eeg 2017f (question 6.6).

³⁴⁹ Ronzier 2017f (question 6.6).

³⁵⁰ Willems 2017f (question 6.6).

³⁵¹ Ronzier 2017f (question 6.6).

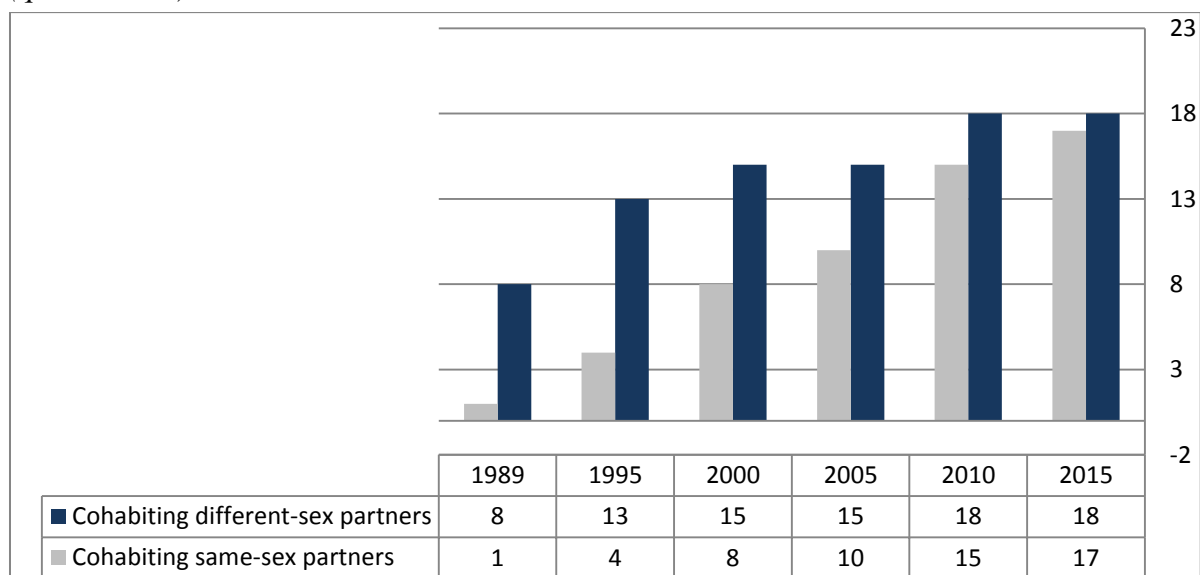
³⁵² Polgari 2017f (question 6.6).

³⁵³ Kogovsek 2017f (question 6.6).

³⁵⁴ Norrie 2017f (question 6.6).

1983).³⁵⁶ In the other 15 jurisdictions this compensation entitlement was reserved for married different-sex spouses. However from the 1990s onwards it became increasingly available for both different-sex and same-sex cohabiting partners.

*Figure 7.1: Number of jurisdictions (out of 23) for which the legal expert answered “Yes” or “Yes, but” for six selected years to the question if, in case of **wrongful death of a cohabiting partner**, the other partner then is entitled to compensation from the wrongdoer (question 6.6)*



Source: *The LawsAndFamilies Database 2017*

The condition existing in Malta that only a cohabiting partner (same-sex or different-sex) who is also an heir of the deceased has a compensation claim, does not apply in the Netherlands, Norway and Sweden. These were the other three jurisdictions that by 1995 recognised a compensation claim also for cohabiting same-sex partners – the Netherlands since 1992,³⁵⁷ Norway since 1995³⁵⁸ and Sweden since 1993.³⁵⁹ The Netherlands allows both different-sex and same-sex cohabiting partners to be compensated for “financial loss or other support”.³⁶⁰ The expert for Sweden stated that compensation could be claimed by the same-sex and

³⁵⁵ Hayward 2017f (question 6.6).

³⁵⁶ Sloan 2017i (question 6.6).

³⁵⁷ Nikolina 2017f (question 6.6).

³⁵⁸ Eeg 2017f (question 6.6).

³⁵⁹ Walleng 2017f (question 6.6).

³⁶⁰ Nikolina 2017f (question 6.6).

different-sex cohabiting partner if the personal injury of the surviving partner is proved.³⁶¹ Norway allows for compensation claims including non-economic damage if the victim actually supported the surviving partner at the time of death; non-economic damage in Norway becomes an entitlement, if severe negligence/intention of the wrongdoer is proved.³⁶² The statutory duty of support that exists between spouses is therefore not necessarily the deciding factor for compensation entitlement. The actual economic support by the victim in Norway is the deciding factor.³⁶³ This seems to be required also in Sweden across all legal family formats.³⁶⁴ Also in Belgium, judges in practice will limit the possibility to claim non-pecuniary damages caused by the wrongful death to avoid a flood of claims.³⁶⁵

Besides actual economic support from the victim, other factors could also affect whether compensation can be claimed, for example, in some jurisdictions the duration of the relationship of cohabitation must be proven to have been at least two years (England & Wales³⁶⁶ and Northern Ireland³⁶⁷). In Ireland three years is required and it must have been an intimate and committed relationship.³⁶⁸ Only once such criteria are met, the surviving partner will be entitled to compensation. Judges in Belgium before the year 2000 have also considered the stability of the relationship between cohabiting partners in evaluating compensation claims.³⁶⁹ A compensation claim by a *de facto* different-sex cohabitant was recognised in a 1967 judgment, regardless of the adulterous nature of the relationship.³⁷⁰

7.2.2 Developments until 2005

By the year 2000 compensation entitlements for same-sex cohabiting partners also existed in the Czech Republic (from 1996), Hungary (from 1996), France (from 1999) and Belgium (from 2000). Among these four jurisdictions, only in Czech Republic did different-sex and

³⁶¹ Walleng 2017f (question 6.6). It is not clear whether this includes compensation for both pecuniary and non-pecuniary damages.

³⁶² Eeg 2017f (question 6.6).

³⁶³ Eeg 2017f (question 6.6).

³⁶⁴ Walleng 2017f (question 6.6).

³⁶⁵ De Kezel 2003, at p. 57.

³⁶⁶ Hayward 2017f (question 6.6).

³⁶⁷ Sloan 2017i (question 6.6).

³⁶⁸ Ryan 2017f (question 6.6).

³⁶⁹ Willems 2017f (question 6.6).

³⁷⁰ Willems 2017f (question 6.6).

same-sex cohabiting partners simultaneously became entitled to a compensation claim for pecuniary and non-pecuniary damages through a criminal law amendment in 1996.³⁷¹ In the other three jurisdictions, as with most jurisdictions surveyed, a compensation claim for the surviving different-sex cohabiting partner developed first. In the absence of clear legislative provisions in Hungary, courts have previously interpreted the loss of a close relative (a term including, but not limited to, parent, child or partner) within the scope of the right to private life and awarded compensation to the surviving different-sex cohabiting partner.³⁷² However, same-sex cohabiting partners can also claim non-pecuniary damages as close relatives since 1996 after the Constitutional Court struck down gender specific provisions that only recognized different-sex cohabitation.³⁷³ In the Czech Republic, the death of a cohabiting partner can be cause for a compensation claim for non-material loss.³⁷⁴ Previously in France,³⁷⁵ the informal nature of cohabitation did not establish a legal bond between the cohabiting partners for purposes of compensation. However, this had been remedied in 1970 for different-sex cohabiting partners and in 1999 was remedied for same-sex cohabiting partners.³⁷⁶ The first two UK jurisdictions granting this entitlement to same-sex cohabitants were England & Wales (2005) and Northern Ireland (2005).

7.2.3 Developments until 2015

Scotland (only since 2006) was the last UK jurisdiction to recognise a compensation claim for the same-sex cohabiting partner. Comparing the UK jurisdictions, Scotland alone allows cohabitants compensation for both pecuniary loss of support and non-pecuniary loss (a bereavement award),³⁷⁷ while England & Wales³⁷⁸ and Northern Ireland³⁷⁹ exclude cohabitants specifically from such bereavement damages. The remaining jurisdictions to recognise compensation for cohabiting same-sex partners were Finland (2006), Iceland (2006), Bulgaria (2007), Portugal (2008), Ireland (2011) and Italy (2011). This brings the total

³⁷¹ Plesmid 2017f (question 6.6).

³⁷² Polgari 2017f (question 6.6).

³⁷³ Polgari 2017f (question 6.6).

³⁷⁴ Plesmid 2017f (question 6.6).

³⁷⁵ Ronzier 2017f (question 6.6).

³⁷⁶ Ronzier 2017f (question 6.6).

³⁷⁷ Norrie 2017f (question 6.6).

³⁷⁸ Hayward 2017f (question 6.6).

³⁷⁹ Sloan 2017i (question 6.6).

number of jurisdictions allowing cohabiting same-sex partners a compensation claim to 17 while 18 jurisdictions allow different-sex cohabitants such a claim. In Bulgaria, like in Malta (see paragraph 7.2.1), the heir since 2007 has the right to claim compensation, but the cohabiting same-sex or different-sex partner could also claim financial compensation in terms of the Crime Victim Assistance and Financial Compensation Act.³⁸⁰ By 2015 Slovenia stood out in this regard, since it allows cohabiting different-sex partners a compensation claim while denying it to cohabiting same-sex partners. In fact Slovenia until 2017 also excluded registered same-sex partners. Upon proof that the cohabiting different-sex partners have been together for “a long period of time”³⁸¹ courts in Slovenia may award them compensation. The other jurisdictions excluding different and same-sex cohabiting partners are Austria, Germany, Greece, and Romania, whereas in Poland³⁸² legal doubt exists due to a lack of court practice on this issue. However, in Poland the law is broad enough to allow a compensation claim by “close persons” who were supported by the deceased and who suffered economic loss as a result of the wrongful death.³⁸³ This however has never been applied to a surviving same-sex cohabiting partner and courts in Poland could still seize the opportunity to clarify this. Germany,³⁸⁴ Greece³⁸⁵ and Austria³⁸⁶ do provide a compensation claim for registered same-sex partners. However, in Germany a cohabiting partner may have a care-giver’s claim for the maintenance of small children (under 3 years old) of the deceased partner.³⁸⁷ Romania³⁸⁸ however limits compensation entitlement to partners in different-sex marriage. The latter five jurisdictions almost force people into more formal family format (marriage or registered partnership) if they wish to become entitled to this (and other) legal entitlements.

³⁸⁰ Katchaunova 2017f (question 6.6).

³⁸¹ Kogovsek Salamon 2017f (question 6.6); Kogovsek Salamon 2017a (questions 1.1 and 1.16, where she mentions a new Civil Unions Act that was to enter into force in 2017).

³⁸² Smiszek 2017f (question 6.6).

³⁸³ Smiszek 2017f (question 6.6).

³⁸⁴ Adamietz 2017f (question 6.6).

³⁸⁵ Lima 2017f (question 6.6).

³⁸⁶ Graupner 2017f (question 6.6).

³⁸⁷ Adamietz 2017f (question 6.6).

³⁸⁸ Smiszek 2017f (question 6.6).

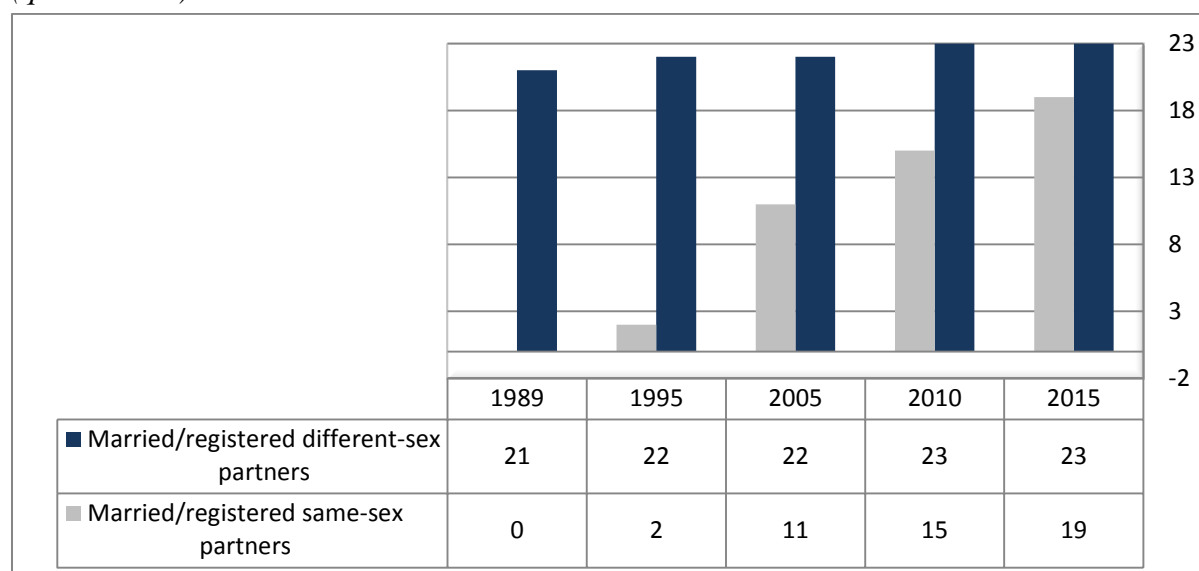
7.3 Marriage/registered partnership different-sex and same-sex partners

7.3.1 Developments until 1995

As *Figure 7.2* shows, 21 of the 23 jurisdictions surveyed already gave surviving spouses compensation for wrongful death by 1989.

Data on Romania and Sweden reveal that these two jurisdictions were the last to do so. The legal expert for Romania was unsure what the legal situation was for the period before 2009, since no specific legislation regulated the issue until a new Civil Code was adopted in 2009.³⁸⁹ This was probably left to the discretion of the courts (like in Sweden until 2002).³⁹⁰

*Figure 7.2: Number of jurisdictions (out of 23) for which the legal expert answered “Yes” or “Yes, but” for five selected years to the question if, in case of **wrongful death of a married or registered partner**, the other partner is then entitled to compensation from the wrongdoer (question 6.6)*



Source: *The LawsAndFamilies Database 2017*

Before 1993, Swedish law provided no such compensation claim for married different-sex partners. However, case law in Sweden has since 1993 made it possible for married different-sex partners and since 1995 for registered same-sex partners to receive compensation upon proof that personal injury was suffered because of the partner’s death.³⁹¹ This made Sweden

³⁸⁹ Ionescu 2017f (question 6.6).

³⁹⁰ Ytterberg & Waaldijk 2005 at p. 174.

³⁹¹ Walleng 2017f (question 6.6).

one of the first jurisdictions to allow compensation claims to registered same-sex partners, as did other Scandinavian jurisdictions – Norway (since 1993)³⁹² and Iceland (since 1996).³⁹³ In Iceland damages include both non-material and pecuniary damages, such as loss of support and funeral expenses.³⁹⁴ It seems that the statutory duty of support in Iceland is enough to establish compensation entitlement, whereas in Norway and Sweden it is more about the actual provision of support by the victim to the surviving partner. If this condition is not met in Norway then the surviving partner could still claim for non-pecuniary loss, on condition that severe negligence or intention is proven by the wrongdoer.³⁹⁵

7.3.2 *Developments until 2005*

By 2005, the total number of jurisdictions providing a compensation entitlement to married/registered same-sex partners had increased to 11 jurisdictions. Apart from Norway, Sweden, Finland, Iceland and Belgium, the other jurisdictions included were Netherlands (1998), France (1999), Germany (2001), England & Wales (2005), Northern Ireland (2005) and Scotland (2005).

France allows compensation claims for both non-pecuniary and pecuniary loss, which includes direct financial loss and indirect financial support.³⁹⁶ Finland³⁹⁷ and Belgium³⁹⁸ allow claims for both material and non-pecuniary damages. Similarly, in the Netherlands both “financial loss and loss of other support” could be claimed.³⁹⁹ In the three UK jurisdictions, apart from pecuniary losses, compensation for bereavement (loss of society) is an entitlement for surviving partners. Bereavement damages in England & Wales and Northern Ireland are limited to married/registered different-sex and same-sex partners, whereas Scotland makes bereavement compensation available across all legal family formats (including for cohabitants).⁴⁰⁰ Non-pecuniary damages in Germany also include compensation for psychological or shock damages sustained through the wrongful death. Marital alimony could

³⁹² Eeg 2017f (question 6.6).

³⁹³ Friðriksdóttir 2017f (question 6.6).

³⁹⁴ Friðriksdóttir 2017f (question 6.6).

³⁹⁵ Eeg 2017f (question 6.6).

³⁹⁶ Ronzier 2017f (question 6.6).

³⁹⁷ Hiltunen 2017f (question 6.6).

³⁹⁸ Willems 2017f (question 6.6).

³⁹⁹ Nikolina 2017f (question 6.6).

⁴⁰⁰ Hayward 2017f (question 6.6); Sloan 2017i (question 6.6); Norrie 2017f (question 6.6).

also be claimed in Germany by the surviving married/registered different-sex and same-sex partners.⁴⁰¹ In Poland, apart from alimony entitlement the surviving different-sex spouse may also claim for medical and funeral expenses, and compensation for “significant deterioration” in economic circumstances.⁴⁰²

7.3.3 Developments until 2015

By 2015 there is still a small difference in the total number of jurisdictions allowing compensation claims for married/registered different-sex partners (all 23 jurisdictions) and for married/registered same-sex partners (19 jurisdictions). In jurisdictions where the law allows compensation claims for married/registered different-sex partners (with or without qualifying factors) the same is applied to married/registered same-sex partners, except (until 2017) in Slovenia. The four exceptions are three countries where registered partnership has not been introduced (Bulgaria, Poland and Romania) and Slovenia (where before February 2017 registered same-sex partners were denied certain benefits reserved for spouses). This changed in 2017 when a new Civil Unions Act came into force in Slovenia, which equalised registered same-sex partners with spouses.⁴⁰³ This means that the exclusion of a surviving registered same-sex partner from compensation has ended in Slovenia in 2017. *Figure 7.2* shows that compensation entitlements that were traditionally mostly allowed within different-sex marriage, now also benefit married/registered same-sex partners in a growing number of jurisdictions.

7.4 Conclusion

Compensation entitlement for the wrongful death of one’s partner has developed through both case law and legislation. *Table 7.3* below, gives an overview of the current situation.

⁴⁰¹ Adamietz 2017f (question 6.6)

⁴⁰² Smiszek 2017f (question 6.6)

⁴⁰³ Kogovsek Salamon 2017a (question 1.16).

Table 7.3: Answers of the legal experts to question 6.6 (**Wrongful death**), for the most recent year for which they answered this question⁴⁰⁴

Question: 6.6 – In case of wrongful death of one partner, is the other partner then entitled to compensation from the wrongdoer?							
Jurisdiction	Year	Marriage		Registered partnership		Cohabitation	
		diff.-sex	same-sex	diff.-sex	same-sex	diff.-sex	same-sex
Austria	2016	Yes	N/A	N/A	Yes	No	No
Belgium	2015	Yes	Yes	Yes	Yes	Yes	Yes
Bulgaria	2015	Yes	N/A	N/A	N/A	Yes	Yes
Czech Republic	2015	Yes	N/A	N/A	Yes	Yes	Yes
Finland	2015	Yes	N/A	N/A	Yes	Yes, but	Yes, but
France	2015	Yes	Yes	Yes	Yes	Yes	Yes
Germany	2015	Yes	N/A	N/A	Yes	No, but	No, but
Greece	2016	Yes	N/A	Yes	Yes	No	No
Hungary	2015	Yes	N/A	N/A	Yes	Yes	Yes
Iceland	2015	Yes	Yes	N/A	Yes	Yes	Yes
Ireland	2016	Yes	Yes	N/A	Yes	Yes, but	Yes, but
Italy	2016	Yes	N/A	N/A	Yes	Yes	Yes
Malta	2015	Yes	N/A	Yes	Yes	Yes, but	Yes, but
Netherlands	2015	Yes	Yes	Yes	Yes	Yes	Yes
Norway	2015	Yes, but	Yes, but	N/A	Yes, but	Yes, but	Yes, but
Poland	2015	Yes, but	N/A	N/A	N/A	Doubt	Doubt
Portugal	2015	Yes	Yes	N/A	N/A	Yes	Yes
Romania	2015	Yes	N/A	N/A	N/A	No	No
Slovenia	2015	Yes	N/A	N/A	No	Yes	No
Sweden	2015	Yes, but	Yes, but	N/A	Yes, but	Yes, but	Yes, but
England&Wales	2016	Yes	Yes	N/A	Yes	Yes, but	Yes, but
Northern Ireland	2016	Yes	N/A	N/A	Yes	Yes, but	Yes, but
Scotland	2016	Yes	Yes	N/A	Yes	Yes	Yes

Source: The LawsAndFamilies Database 2017

The jurisdictions surveyed divide compensation for wrongful death broadly into two categories: pecuniary damages (for actual financial loss) and non-pecuniary damages (for pain and suffering).

⁴⁰⁴ For the meaning of these answer-codes, see paragraph 1.4.3 above.

Upon the death of the primary victim, the secondary victims may have a compensation claim. However, some jurisdictions have strict requirements as to who may bring such a claim, for example: heirs, close persons, close relatives, married spouses, registered partners, cohabitants, or children. Some jurisdictions require proof of actual economic support by the victim regardless of a statutory duty of support.

All jurisdictions surveyed (see *Table 7.3* above) provide a compensation entitlement to married surviving partners. All jurisdictions, except Bulgaria, Poland, Portugal, Romania, and Slovenia (the latter until 2017), also provide such an entitlement to registered partners. In Portugal, however, where registered partnership is not a legal family format, married same-sex partners can claim compensation. In Bulgaria, Poland and Romania neither marriage nor registered partnership is available to same-sex partners, but in Bulgaria cohabiting same-sex partners have a compensation entitlement on a par with different-sex cohabitants. Only in Romania and Slovenia, and possibly in Poland, same-sex surviving cohabitants are still treated unequally. In Austria, Germany, Greece and Romania, both same-sex and different-sex cohabitants do not have a compensation entitlement, although in Germany certain compensation can be claimed where surviving small children under three years old are concerned.⁴⁰⁵ However, registered same-sex surviving partners in Austria, Germany and Greece are entitled to compensation.

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Chapter 8:

Laws, sexual orientation and intimate lives in France, Iceland, Italy and Spain: a synthetic view from a sociological survey

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8.1 Introduction

Significant changes have occurred over the last twenty years in how same-sex sexualities are regulated in European countries, ever since Denmark became the first country to offer a legal framework for recognizing same-sex couples in 1989. Countries have followed different paths at different paces. This research uses semi-structured interviews⁴¹³ with lesbian and gay respondents in France, Iceland, Italy and Spain – four European countries with different social contexts and legal frameworks.⁴¹⁴ Through a series of key points (mainly: coming out, homophobia, coupling and parenting) in different areas of life courses, it examines how the presence (or absence) of laws in each country are perceived to impact their intimate lives.

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⁴¹³ The sociological research methodology (sample and comparative framework) and main findings have been described in Deliverable D2.7 of the FamiliesAndSocieties project. See Digoix, M., Franchi, M., Pichardo Galán, J.I., Selmi, G., de Stéfano Barbero, M., Thibeaud, M., & Vela, J.A.M. (2016). Sexual orientation, family and kinship in France, Iceland, Italy and Spain. *FamiliesAndSocieties Working Paper* 54(2016), www.familiesandsocieties.eu. See also *The LawsAndFamilies Database*, www.LawsAndFamilies.eu.

⁴¹⁴ The four countries studied in this sociological research have been chosen because of their different legal frameworks regarding couples and families. During the course of this project, France broadened their registered partnership law by fully legalizing marriage for same-sex couples in 2013.

8.2 France – Equal rights beyond same-sex marriage

Over recent decades, French society's attitude towards homosexual conjugality and parenting has improved, namely in terms of legal and social recognition. This situation is akin to other European countries. In 1999, France adopted the law on PACS, a same-sex partnership. This civil contract, which deals only with the material aspects of cohabitation, was the first step toward legal recognition of homosexual conjugality. It was not until 2013 that the marriage law was amended to allow same-sex couples to marry and adopt children. However, this recent law still lacks collateral parenting rights: access to surrogacy and ART (Assisted Reproductive Technologies) are still illegal for gay couples in France and they must turn to foreign countries. Recent decades have also been characterized by growing social acceptance of homosexuality, as evidenced by the latest major survey on sexuality in France.⁴¹⁵ Yet, levels of tolerance differ within the society: women, young people and citizens with higher education tend to be more open-minded. It is worth noting that parenting is less accepted than conjugality for homosexuals. This fact illustrates the strong heteronormative representations that still shape French families. Although French society is not as divided as it may seem from the media coverage and numerous 2013 massive anti-gay-marriage street demonstrations, resistance from conservative groups against recognition of family rights for LGBT people is still a reality. The legalization of same-sex marriage sparked a major campaign that was started and fuelled by Catholic groups, institutions and conservative citizens who were protesting against the so-called "gender ideology". This opposition is part of a larger international campaign that is also active in Italy and, to a lesser extent, in Spain.

Regarding conjugal relationships, two situations are highlighted: the strategies of being visible as a gay couple and the meaning, given by the interviewees, to two legal options: PACS or marriage. Our sample addresses couples using visibility strategies, specifically in regard to friends, family members and at the workplace. The narrative of their coming-out is particularly telling. If disclosing a same-sex relationship to friends does not really present any challenge, coming out to families may create problems. A few interviewees reported it having sometimes generated anger and rejection from parents. Even if these extreme situations remain uncommon for the majority, most parents often need time to adjust to the sexual orientation of their child, which is frequently associated with thwarting their hopes of ever

⁴¹⁵ Bajos, N., & Beltzer, N. (2008). Chapitre 12: Les sexualités homo-bisexuelles : d'une acceptation de principe aux vulnérabilités sociales et préventives. In N. Bajos & M. Bozon (Eds.), *Enquête sur la sexualité en France: pratiques, genre et santé*. Paris: La découverte.

becoming grandparents as well as with fear of what people might say. Some relational distancing may result, but this generally fades over time. However, being in a couple-relationship or becoming a gay parent facilitates acceptance. It seems to reduce the homosexual stigma within the family circle. That said, homosexuality is rarely mentioned without embarrassment, and often remains unspoken in most families. In some cases, sexual identity in general may even never be discussed. In this situation, moving in or buying a house with one's partner is a way for some interviewees to come out to their family. Concerning visibility within the workplace, some respondents' narratives evidenced that being openly gay can create some difficulties within the hierarchy. In this case, it is possible to resort to the existing legal provisions to oppose discrimination on the grounds of sexual orientation as well as to receive appropriate support from trade-unions. In a working environment, colleagues may exhibit latent homophobia through blocking or avoidance, thus cultivating a sense of isolation and workplace malaise. In some professions, being openly gay is easier, especially for the interviewees working in creative industries. For other respondents, in particular teachers and social workers, one's sexual orientation is perceived as something that needs to be confined to the private sphere. This concern appears to spring from their particular working environment and their relationships with children and teenagers.

The question of visibility is closely linked to the legal recognition of same-sex relationships, as suggested by the way the interviewees perceive marriage. Some of them describe marriage as a way to legitimize and improve the image of their same-sex relationship, primarily in the eyes of their families. In their opinion, a wedding somehow deters the usual, negative clichés of being gay, and it offers legitimate visibility. Marital status also facilitates social exchanges, since it is a meaningful milestone for everyone in the room. Marriage not only offers symbolic and social support in terms of visibility, but it also leads to economic and social benefits. The decision to marry can be linked to tax advantages, but the interviewees insist mostly on their desire for mutual protection (obligation to respect, help and assist) and inheritance issues if one of the partners dies. Marriage also implies obtaining certain social rights that are not available through a PACS, such as a foreign partner obtaining a long-term visa in France. If opening adoption to gay married people is not the perfect answer to the multiplicity of homoparental realities, one advantage lies in the filiation aspect available to lesbian couples. Just as for a marriage, respondents explain their choice of a PACS by citing the financial and social benefits. For some interviewees, there is nonetheless a symbolic dimension to PACS. A civil union offers the opportunity to display one's commitment to

his/her lover. It can also be used to publicize a relationship by means of a party with family and friends. However, perceptions differ between PACS and marriage. Some of the interviewees considered the former to be a “trial run”. It is a necessary step in a couple’s life before diving into a marriage, which itself has much stronger and more symbolic values. For others, a PACS is not a road to a gay wedding but an alternative lifestyle to marriage.

In regard to same-sex parenting, our study focuses on the procreation process (through the analysis of adoption, ART and surrogacy) and one’s daily life as a parent. Although filiation was legalized for gay people in 2013, it remains a complicated process. Adoption is now extended to homosexuals, but there are too few orphan children in France, and the process is long and difficult. In looking abroad, they find that essentially every country with an adoption program shuns candidates that are openly gay. ART and surrogacy are not legal in France for gay couples, and they have to turn to foreign countries. In a foreign-based ART situation, gay marriage now allows the female partner of the biological mother to officially become the second mother, but the bureaucratic procedures are more complex in comparison with heterosexual couples. In the case of surrogacy, the French nationality of a child born abroad is still a murky issue. With many roads leading to parenthood, one key aspect of same-sex parenting is the legal recognition of the partner’s status and obligations. Signing the civil registrar and bequeathing one’s surname are crucial and symbolic elements for the parents and their families. But the lack of a legal framework can create an awkward situation for “non-statutory parents” in cases of unusual family configuration (more than one mother and father). Despite the law, each same-sex parenting situation is a bit of a “makeshift job”, i.e., a legal and societal grey area. As for the experience of parenting, we analyse the way childcare facilities are dealing with such unusual family structures. Only a few interviewees had to face antagonistic facilities. Mostly, homophobia is a subtle game of avoiding and distancing from such gay families. The way same-sex parents are presenting themselves to child-care institutions is noteworthy. Some interviewees briefly mentioned the unusual parental configuration, with no further explanation: a “don’t hide it, don’t flaunt it” homo-parental situation. The general idea is to make homosexuality banal. And show that they are parents like any others, expecting a “right to indifference”. A second option, chosen by a few interviewees, is to hide their sexual orientation. Depending on their gay family configuration, they may not mention it at all to facilities that still perceive old parental configurations as the norm.

Although the French social and legal context has been more supportive of homosexuality for a few decades, obstacles remain for gay/lesbian couples and families. The 2013 same-sex marriage and adoption law led to improved acknowledgement of same-sex couples and families. But details of same-sex parenting still reside in a legal and societal grey area. Gay-parenting configurations still require that French family laws be adjusted in order to provide better statutory recognition to parents regardless of their gender, sexual orientation or number (up to 4 parents per child).

8.3 Iceland – An inclusive and egalitarian society based on belief in law

Iceland has experienced a rapid evolution regarding homosexual rights, which is on par with the contextual evolution of the country. After gaining independence from Denmark in 1944, the population grew rapidly and shifted from mainly rural to a highly urbanized concentration around the capital area during the latter half of the 20th century – although it remains relatively small (from 125,000 in 1944 to 330,000 in 2016). In 1996, Iceland followed the Nordic countries in adopting a legal device called *staðfest samvist*, which was presented as an equivalent to marriage for same-sex couples. However, it did not grant the same rights as marriage: a church wedding was not possible (Iceland has a State Church); parenting was not sanctioned; registered cohabitation (a particular legal disposition in Iceland) was not opened to same-sex couples. Fighting for access to these rights led to partial success in 2006, when Iceland granted same-sex couples the right to adoption, medically assisted reproduction and cohabitation, and with a 2008 amendment allowing the church to bless their registered partnerships. However, research showed that only the full opening of marriage was satisfactory in the matter of equality (of rights, treatment and perception). This was obtained in 2010 when the National Church of Iceland agreed to marry same-sex couples and marriage law was made gender neutral. Our survey takes place five years after equality is established between hetero- and homosexual couples by expanding the marriage law.

In practice, access to marriage law is highly praised even if the law is often associated with heterosexual patterns. At the time of the survey, the oldest people in the sample were accustomed to organising their lives in a very stigmatizing environment, doing so by either hiding their situations or campaigning for normalization, both of which are very different yet equally difficult ways of life. Although the *staðfest samvist* law marked progress for most of the respondents, only a marriage law that affirms their equality with different-sex couples would be acceptable. They also clearly distinguish between the possibility of having access to

material rights through registered cohabitation (but with fewer rights than marriage) and a universal law which is both symbolic and material. Marriage conveys not only the recognition of society but also a willingness to adopt the same rules for all citizens. Among the new generations, the importance of achieving equality prevails over the defence of specific homosexual patterns.

Iceland is a country where family ties are important. With a high fertility rate in comparison to other European countries, children are at the core of Icelandic society. Parenthood is still under discussion, because it is difficult for the law to cover all areas. Iceland's willingness to ensure the child's best interest is not enough. It seems that lesbian access to ART is well managed, and respondents are satisfied with both this experience as well as the process for adopting their partner's child. However, the lack of available children is the same everywhere in the world, and joint-adoption is more difficult to obtain. Surrogacy is prohibited. Overall, respondents would like to see a law that covers the different grey areas associated with this method, particularly with an ethical point of view towards the biological mother; however, most of them would prefer to have children with an acquaintance in Iceland. In our sample, multi-parent families identified problems with the law being unable to cover their parental structures. Such a law would be highly desirable for guaranteeing the security of both parents and children, as well as the rights of the extended family (especially grandparents).

In both marriage and parenthood, homosexuals deal with their own relationships to their life choices. In everyday life, homophobia and discrimination still persist. There is a clear feeling that – while society seems more open nowadays – thorough monitoring is still required in order to avoid suffering a backlash, as might be suggested by the (bad) situations that transgender people experience. People are coming out younger, parents are more open and people can easily receive counselling. Role models have appeared as more people are out in different strata of the population. Discrimination protection and wider media coverage have helped decrease visible homophobia, but it seems that there is still a fragile line that can be easily crossed. More education is needed for improving the situation.

While the situation for homosexuals in society has been ameliorated over time, the importance of the legal system in supporting equality must still be stressed. The law remains a necessary basis for associations and individuals to enforce human rights in every particular situation where prejudices are still at work.

8.4 Italy – Difficult tensions between societal inclusion and political exclusion

At the time when interviews were conducted (2014-2015), the Italian legislative system still lacked any legal recognition of forms of unions other than heterosexual marriage, as well as any law that addressed homophobic violence. Since then, the Renzi Government approved in May 2016 the so-called Cirinnà bill, which legally recognizes same-sex relationships. In its original version, the bill aimed to also legally recognize step-child adoption. However, just before the vote in February 2016, the provision on step-child adoption was stripped from the bill – allegedly as a move to gain a solid majority and grant its full approval. While the Italian legislation has formally changed since 2015 (when most of the interviews were collected), LG couples in Italy still face challenges. The mayors in some municipalities are boycotting the law either by making the registration procedures cumbersome or by excluding LG couples from the main registrar offices. Most crucially, parental relationships are still far from being recognised. The interviews collected therefore still provide a contemporary snapshot of the concerns of LGBT citizens in Italy.

Although the research relies on a limited number of interviews, it still illuminates the current situation in Italy as well as the challenges that the informants faced and the strategies they enact to compensate for the lack of legal protection. Due to the ongoing refusal to legally recognise homophobia as the cause of violence against LGBT individuals and partial access to citizenship rights, the increasing acceptance of LGBT identities continue to be offset within Italian society. Against this background, the interviewees negotiate their visibility as gays, as lesbians and as part of LG couples. Different strategies are used within families, circles of acquaintances and in the workplace. The decision to come out within one's family of origin is often predicated on perceptions of how relatives will handle the news. Similarly to what has emerged in other research,⁴¹⁶ older members of the family are often presumed to be unable to deal with definitions such as gay or lesbian, which have so often been stigmatised and imbued with negative meanings. In the collected narratives, however, that rarely means hiding or lying about one's relationship. The lack of a clearly defined moment for coming out is often perceived as a means for preventing tensions, but an underlying acceptance of one's identity and relationship is also perceived.

⁴¹⁶ Bertone, C., & Franchi, M. (2008). The experiences of family members of gay and lesbian young people in Italy. In C. Bertone & M. Franchi (Eds.), *Family Matters. Supporting families to prevent violence against gay and lesbian youth*; Conference Proceedings, Florence June 20-21, 2008.

The arrival of children nevertheless shapes one's strategies enormously. Indeed, as the respondents state, children make the couple visible not only to one's extended family but, paradoxically, also to all those institutions that are routinely unable to recognise parenting if it is not that of a heterosexual couple. It is in these encounters that we collected narratives of never-ending acts of resistance aimed at being recognised as the parent of one's child.

As already mentioned above, the interviews informing this report were collected before the Cirinnà bill on civil unions was approved. Undoubtedly, the new law reduces the discrimination gap by granting same-sex couples with some of the rights that civil marriage traditionally grants to heterosexual couples: assistance to incapacitated partners, a survivor's pension, inheritance rights, the possibility of accessing certain welfare benefits and a different taxation regime. While the narratives of our respondents still identified these aspects as highly discriminatory, we can reasonably suppose that the full implementation of the law will gradually eliminate these forms of discrimination. However, these same narratives also indicate that the majority of our respondents identifies equal marriage as the one and only desired form of recognizing their unions, and the Cirinnà bill falls far short of their requirements. In fact, they perceive it as the institutionalization of a partial and hierarchically reduced citizenship for LGBT people. While the rights granted through the bill technically mirror the rights associated with heterosexual marriage, the public and political debate obsessively stressed the symbolic difference between this form of legal provision and heterosexual marriage, underlining an everlasting distinction between LG and straight citizens.

In the interviews collected, the respondents often expressed a desire to overcome this distinction and routinely pointed out the ways in which they feel they are relegated to second-class citizenship, specifically regarding their rights, while they still assume the same obligations as everyone else. This distinction is epitomised by the last-minute removal from the bill of the step-child adoption provision, which left hundreds of parents and children without rights and recognition. However, according to the interviews collected, the lack of parental rights is exactly what makes same-sex families more vulnerable both in terms of daily micro-practices (e.g., the non-legally recognized parent's relationship with health and educational services) and in terms of legal custody and kinship ties.

The interviewees did not report explicit episodes of homophobic discrimination against LG parents or their children, and it seems that Italian society is becoming more inclusive of family diversity. However, removing the stepchild adoption provision testifies to how

homophobic institutional narratives continue to take centre stage in the public debate. As a counterbalance to Parliament's inability to legally recognise and regulate familial forms other than those of heterosexual couples, jurisprudence often compensates via court rulings. As reported by the informants, this was and remains the Trojan horse that lesbian couples in particular will be able to use for accessing those rights that they have been routinely denied.

It is, however, important to stress that even though taking the path of a court ruling gives some hope to the couples interviewed, it also has an impact on their parenting. The couples interviewed had two extra burdens that distinguish them from heterosexual parents: on the one hand, there is the constant demand of having to 'leave a trail' that proves their presence in the child's life; whereas, on the other hand, there is the ongoing scrutiny and perception of being judged for one's parenting skills. In a sort of paradox, the lesbian couples we interviewed had to constantly demonstrate that their families were as happy as anyone else's while at the same time making preparations in case of death or break-up and also protecting their children from societal homophobia.

The arrival of a child is often described as eye-opening in regard to the level of acceptance received from the family, groups of acquaintances, neighbours, health practitioners and school staff. Nevertheless, it is also a moment of truth in terms of the lack of protections and legal recognitions. In conclusion, while the approval of the Cirinnà bill undoubtedly testifies to Italy's enhanced social and political views toward LGBT rights and citizenship, it still falls far behind full equality.

8.5 Spain – From legal changes to cultural acceptance of same-sex families

Spain has an array of different laws related to legal recognition of same-sex sexuality, relationships and kinship. Following the arrival of democracy, homosexuality was decriminalized in 1979. The 1980s Law on Adoption (*Ley de Adopción*) allowed any single person to adopt individually, and the Assisted Reproduction Law (*Ley de Reproducción Asistida*) granted any woman over 18 years of age the right to use assisted reproductive techniques. Since 1998, 12 of the 17 Spanish autonomous regions have passed "registered partnership" laws that include same-sex partners. Finally, in 2005, Spain became the third country in the world to legalize same-sex marriage with equal rights for heterosexual and homosexual couples.

The legal recognition of same-sex marriage sparked a vivid controversy in Spanish society, with the Catholic Church and the conservative People's Party (*Partido Popular*) campaigning against it during parliamentary and social debates. However, there is no significant split in public opinion concerning same-sex marriage: 68% agree with labelling the union of two same-sex people as "marriage", 22% say same-sex marriage should be legal but with a different name, and only 4% consider that it should not be legal at all. Of the survey sample, 74% consider that same-sex couples should be allowed to adopt children jointly. The acceptance rate of same-sex marriage rises to 90% among young people (aged 18-34).

Despite this positive outlook, LGBT people and families still encounter certain difficulties and challenges. There is no free access to assisted reproductive technique (ART) services in the public health system for single women and lesbian couples. Moreover, surrogacy remains illegal in Spain, forcing some single men and same-sex male couples to travel to other countries (mainly the USA) to become parents. This is expensive and often unaffordable. Surrogacy has become a controversial issue within the LGBTQ and feminist movements. Concerning adoption, the Spanish Parliament has signed an international agreement with Russia explicitly forbidding LGBT people from adopting Russian children, setting a dangerous homophobic precedent. Finally, trans people are still fighting for the depathologization of their gender identity.

While legal advances have been made, homophobia and transphobia are still present in Spanish society: according to the Ministry of Home Affairs, they were the main reason for hate crimes in 2013 and 2014. In fact, 38% of LGBT people reported having felt personally discriminated against or harassed on the grounds of their sexual orientation in the previous twelve months (FRA, 2012⁴¹⁷).

Family of origin plays a crucial symbolic, affective and material role in Spanish society. Coming out to one's family is critical for lesbian, gay, bi and trans people. In general, there is no rupture between families of origin and the rainbow families they create. Though there is often an initial period of tension and even estrangement, this is generally followed by the willingness on both sides to work towards recognition and integration. Neither the LGBT person nor the biological family can afford a split in material, social or practical terms. During this reconciliation period, there is a process of "educating" significant people in one's life

⁴¹⁷ FRA (2012). *LGBT Survey 2012*, <http://fra.europa.eu/DVS/DVT/lgbt.php>.

(family, friends, colleagues and neighbours) in order to instil respect for sexual diversity and gender identity.

The legal recognition of same-sex marriage has meant not only recognition of certain rights (i.e., inheritance, filiation, citizenship, social security, company fringe benefits and taxation), but a means to achieving social recognition. Marriage is not only a legal contract, but a social ritual for obtaining recognition as a couple from one's community. The Catholic Church holds a quasi-monopolistic control over life-span rituals such as baptisms, first communions, marriages, funerals, Christmas and local festivities. Religious rituals play an important role in the lives of everyone in Spain, including LGBT people, whether they are Catholic or not. LGBT people and their families are therefore finding ways to overcome resistance from the Catholic Church in order to participate in those rituals.

There are very different ways to become parents (heterosexual sexual intercourse, adoption, home insemination, ART, stepparent-adoption and fostering, to name a few) and each of them has its own peculiarities. However, the situation for a same-sex couple is unlike that of a heterosexual couple in that marriage is a requirement for legal joint filiation. The same is true for lesbian couples hoping to obtain access to ART. This is one of the main reasons for marriage that our sample identified.

Except for some specific and isolated situations, most Spanish LGBT couples and their children do not suffer significant or on-going situations of discrimination. This is even the case in schools, which has been one of the main concerns for LGBT parents and future parents. As such, Spain has become a kind of Mecca for some LGBT people and couples that have migrated to the country. They have settled both in large cities and in smaller rural areas, where the community can act as a protective environment against homophobia and transphobia.

The main change that same-sex marriage has brought to Spanish society has been cultural. Children and teenagers (heterosexual and non-heterosexual) have lived their whole lives with the knowledge that two men or two women can get married. When asked by the media about the controversy surrounding the 2005 legalization of same-sex marriage in Spain, a 16-year-old boy named Jorge, who identified as gay, responded by saying: "What can I tell you? I don't remember anything about it. I grew up knowing that you could marry anyone you wanted to".

8.6 Conclusion – The law as an essential starting point

Although the laws adopted in the various countries reflect heteronormative ideals that are not always in line with all the situations in which LGBTQ people find themselves, all respondents to the national surveys support these laws because of the undebatable principle of equal citizenship.

Respondents from France and Iceland who have gone through specific legal channels for same-sex couples (though to varying degrees of equality) have indicated their preferences for strict equality in access to marriage laws.

When people know they are supported by the law, it affects their behaviour; the legal framework in Italy is also considered crucial because, at the time of the survey, there was no guarantee for same-sex couples. Without access to laws, people generally feel more vulnerable, even if they have no intention of using them. From an external point of view, the existence of laws also has a favourable effect on public perceptions of homosexuals.

The law not only produces a known and recognized model of a life course that brings material benefits and economic equality per se, but it also has a symbolic aspect in regard to recognition within social spheres, at work or in the family. It is a tool for social integration. For this reason, access to marriage is very often used to ease coming out in everyday life. Coming out is an ongoing lifetime process that is often delicate. Younger generations seem less reluctant to use marriage as such. To present or speak of one's "husband" or "wife" is convenient, it reassures both sides and it allows skipping over the obvious way of coming out by using the words "homosexual" or "homosexuality", which bring to people's minds sexuality more than sexual orientation.

Despite the differing legal situations in all four countries, which range from no legal mechanisms at all to extended legal protection, the parents in our survey feel well accepted in everyday life. Difficulties in the heteronormative way that society has shaped parenting often lead to practical solutions, which, though they are not ideal due to being often complicated, they facilitate the lives of children by providing support from social actors. Similarly, the family environment is conducive to a child's arrival, which in turn normalizes the couple as they meet society's expectations of reproduction.

Although the laws are different in the four countries studied, there is some consistency regarding social constraints. In a heteronormative society, the situation for homosexuals is based on not just legal but social and economic inequality. Appeals to resolve specific issues

for homosexuals are emerging in every aspect of parenting (access to ART, discussions around ethical surrogacy, etc.). In countries whose laws facilitate access to parenthood, the situation is more favourable to individuals, even if their dissimilar social and economic circumstances can generate other inequalities. It is desirable that the law ensures equal access for all citizens, as this is not the case of ART in the Spanish health care system, for example. ART is completely banned in France and Italy, forcing French and Italian lesbians to go abroad (mostly to Belgium and Spain). This increases the inequality of access, depending on their economic possibilities, while the psychological conditions of future parents are not optimal because of the disparity between their social and working environments.

The inequality with heterosexual couples increases in regard to parenting by adoption, even when this is permitted by law, as many countries willing to allow international adoption are reluctant to grant adoption to homosexuals or same-sex couples. This is viewed as an injustice and occurs in all the countries in our survey, including Iceland. Furthermore, it is especially the case for male couples, whose parental choices are limited.

Surrogacy is illegal in all the countries we surveyed. Although some couples interviewed in France have chosen this path, it is only accessible to wealthy persons. However, for ethical reasons, this is not the preferred means to access parenthood.

Much remains to be done for multi-parent families, even in Iceland, where a law on children rigidly protects the best interest of the child. By making it impossible for a child to have more than two legal parents, a barrier is imposed on the wellbeing of these family structures that actually do exist and which the respondents seem to appreciate. From a practical and emotional point of view, framing these structures in the law is desirable.

In all areas studied, it is clear that a lack of access to the law generates inequalities. In the more legally advanced countries, equal access to marriage and parenting rights have been described as a necessity in the process of achieving equity. Equal treatment is an essential legal, social and economic basis for pursuing further ideals.

As access to marriage brings homosexual couples and families face to face with heteronormative structures, their inclusion in society adds to diversity by actually de-standardising heterosexual family forms.

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Chapter 9:

Conclusion

by Kees Waaldijk ⁴¹⁸

9.1 More and more together

This working paper concludes a four-year project (“LawsAndFamilies”) documenting major legal changes over a 50-year period. The project traces how – in 21 European countries, since the 1960s – same-sex and/or unmarried couples started and continued to receive (some) legal recognition. It looks at marriage, registered partnership and cohabitation, and how these three legal family formats became available to same-sex and/or different-sex couples.

The legal survey focusses on 60 different rights and responsibilities that can be attached to these legal family formats. One of the conclusions is that more and more legal rights and responsibilities are now applicable to more and more types of couples in more and more European countries, but that European minimum standards are not met in all countries. The interviews in the sociological survey highlight the importance of these legal recognitions in the lives of same-sex families (in four European countries). The statistical survey presents the search for numbers of same-sex couples, and especially those (in twelve European countries) that have chosen to formalise their relationship through marriage or partnership registration.

This working paper offers a comparative analysis on the basis of:

- 143 papers (one sociological paper, two statistical papers, one comparative legal paper, one paper presenting the text of the legal questionnaire, and 138 legal source papers presenting the answers to that questionnaire);⁴¹⁹

⁴¹⁸ Professor of comparative sexual orientation law, Leiden Law School, www.law.leidenuniv.nl/waaldijk. Kees Waaldijk is the main author of the LawsAndFamilies questionnaire on legal family formats, and principal editor of the law content of the resulting LawsAndFamilies Database (www.LawsAndFamilies.eu). His report *More or less together* was published in 2005. See also the acknowledgments at the beginning of this working paper.

⁴¹⁹ See, respectively, Digoix et al. 2016, Cortina & Festy 2014a and 2014b, Waaldijk 2014a, Waaldijk et al. 2016, and the 138 legal source papers listed in the references to Chapter 2. All 143 papers (plus this comparative analysis) are available online, at or via www.LawsAndFamilies.eu.

- more than 200.000 data points in the interactive legal database;⁴²⁰
- the work of more than 60 experts in sociology, demography, informatics, and law.⁴²¹

The wide scope and remarkable speed of the legal developments covered in this project, and the amount of information that has been collected, both make it impossible to fully compare and analyse everything in this working paper. Therefore chapter 1 gave an overview of the project, and especially of the interactive legal database, chapters 2 and 8 gave an overview of the results of the legal and sociological surveys, while the other chapters offered a comparative case study on specific issues covered in the legal survey.

The focus has been more on the legal recognition of same-sex couples (see chapters 2, 6 and 8), than on the legal recognition of unmarried different-sex couples (although they are covered in the extensive overview in paragraph 2.2, and in the case studies of chapters 3, 4, 5 and 7). In a way, this discrepancy in attention reflects the legal politics of the last few decades: it seems that in many countries, since around the turn of the century, more legislation has been devoted to the rights and responsibilities of same-sex couples than to the legal situation of unmarried different-sex couples.⁴²² This is, for example, illustrated⁴²³ by the fact that by 2016 more countries allow adoptions by same-sex (registered or married) partners than adoptions by cohabiting (different-sex) partners.

This concluding chapter aims to bring together the main results presented in the earlier chapters (see especially paragraphs 9.3 and 9.5), to make some connections between law and sociology (paragraph 9.2) and between statistics and law (paragraph 9.4), and to highlight aspects of gender (paragraph 9.6), potentials for further research (paragraph 9.7), and some recommendations for policy and law (paragraph 9.8).

It should be borne in mind that this research is still ongoing – and so is its object (the process of legal recognition of same-sex and unmarried couples). More jurisdictions will be covered in the legal database, and more analysis will be published. During the four years of the project, among the sample of 23 jurisdictions in 21 countries, no less than four opened up marriage to same-sex couples, and three made registered partnership available to them.⁴²⁴

⁴²⁰ Online at www.LawsAndFamilies.eu.

⁴²¹ See the team pages at www.LawsAndFamilies.eu.

⁴²² About the legal recognition of cohabitation in Europe in general, see Perelli-Harris & Sánchez Gassen 2012, and Boele-Woelki, Mol & Van Gelder (Eds.) 2015.

⁴²³ See *figures 5.2 and 5.3* in Chapter 5 by Nikolina.

⁴²⁴ See paragraph 2.1 and *Table 2.15*.

And within two months after the project ended in January 2017, also Finland opened up marriage,⁴²⁵ and Slovenia strongly increased the range of rights and responsibilities attached to same-sex registered partnership.⁴²⁶

In Western Europe now all countries surveyed allow same-sex couples to marry or to register as partners, and in all these countries these legal family formats trigger a very broad range of legal consequences. In Central and Eastern Europe, the picture is more mixed, with three of the surveyed countries allowing neither same-sex marriages nor registered partnerships (Poland, Bulgaria, Romania). However, these three countries already provide some legal recognition to same-sex couples, on a similarly limited scale as Greece, Italy and Malta did until very recently (see paragraph 2.3.3). And several countries in Central Europe offer same-sex couples registered partnership, and for example Hungary attaches a wide range of rights and responsibilities to these partnerships. Of the countries surveyed only the Czech Republic attaches a rather limited range of legal consequences to its registered partnership (see *Table 2.19*), as did Slovenia until February 2017 (and as do Belgium and France, but there same-sex couples also have access to a fuller range of rights and responsibilities by entering into marriage).

In short, there has been great convergence in the legal situation of same-sex couples in Western and Central Europe.⁴²⁷ At the same time, this has led to more divergence with the most Eastern countries of the EU (and with countries beyond the EU).⁴²⁸

At the start of this project Lorenzo Villaverde and I presented 17 hypotheses regarding the possible outcomes of the legal survey.⁴²⁹ At least the first hypothesis has been fully confirmed by the results:

Hypothesis 1. There has been a trend of legal recognition of same-sex couples – by creating registration schemes, by opening up marriage, and/or by attaching more legal consequences to these schemes.

The other hypotheses will be discussed below in paragraphs 9.3 and 9.4.

⁴²⁵ Per 1 March 2017, see Hiltunen 2017a (questions 1.1 and 1.16).

⁴²⁶ Per 24 February 2017, see Kogovsek Salamon 2017a (questions 1.1 and 1.16).

⁴²⁷ The situation has changed a lot since 2003, when the report “More or less together” was prepared (Waldijk (Ed.) 2005), and when only nine (Western) European countries had introduced registered partnership.

⁴²⁸ See paragraph 2.1, for an overview of the countries in the Council of Europe (and in the European Economic Area) that have not yet adopted legislation on same-sex marriage or registered partnership.

⁴²⁹ Waldijk et al. 2016, p. 4-5.

9.2 Laws matter socially

9.2.1 *The social importance of laws for same-sex families*

Statistics show that there is real demand among same-sex couples to be able to formalise their relationships. The statistics collected by Cortina and Festy,⁴³⁰ and presented in paragraph 9.4 below, indicate that each year tens of thousands of same-sex couples in European countries choose to marry or to register as partners. The initial peaks in *figures 9.2 and 9.3* indicate that in the relevant countries there was already a pent-up demand for such legal formalisation of same-sex relationships. The *sustained* annual rates of male/male marriages and partnership registrations, and the *growing* annual rates in most countries for female/female marriages and partnership registrations, are evidence that the relevant legislation is not just symbolically important, but also practically important in the lives of the people concerned.

And such legislation shapes these lives.⁴³¹ Many of the laws that attach rights or responsibilities to different legal family formats, shape the interdependence between partners, and between them and their parents, children, etc.⁴³² See for example the questions in the legal survey on loss of social benefits (2.2), leave to care for partner (2.4), leave to care for parent of partner (2.5), next of kin provisions (2.6), parental authority (3.5 and 5.11), parental leave (3.6 and 3.7), visiting rights of grandparents (3.8), alimony (5.10), inheritance (6.3) and survivor's pension (6.5).⁴³³ A recent study showed how legislation can mandate, block, generate or lighten intergenerational interdependence (directly or indirectly),⁴³⁴ “by defining rights and duties towards old and young in the family, and by reinforcing or lightening the reliance on older and younger family members”.⁴³⁵

The social importance of laws for same-sex families is further evidenced in the interviews conducted in Italy, Spain, Iceland and France by Digoix and her sociological colleagues (see Chapter 8). They emphasise that – apart from the actual practical use that couples make of the legal possibilities for marriage, partnership and parenting – the interviewees support these laws “because of the undebatable principle of equal citizenship” (paragraph 8.6). And these

⁴³⁰ Cortina & Festy 2014b.

⁴³¹ Digoix et al. 2016, p. 24. Neyer 2017, p. 21.

⁴³² Dykstra & Hagestad 2016.

⁴³³ For text of questions, see Waaldijk et al. 2016.

⁴³⁴ Dykstra & Hagestad 2016, p. 15-16.

⁴³⁵ Dykstra & Hagestad 2016, p. 17.

authors point out that “the practical consequences of laws shape everyday life”,⁴³⁶ and that “the existence of laws also has a favourable effect on public perceptions of homosexuals” (paragraph 8.6). Interestingly, they illustrate the combination of these two aspects, with the practical effects that parenting by same-sex families can have on others and on society in general: “the visibility of parenting seems to facilitate an implied social insertion of homosexuals who are seen as parents and thus not simply reduced to their sexuality”.⁴³⁷ This is very similar to what Takács, Szalma and Bartus argue: “In countries having legal institutions allowing for non-heteronormative family practices, people are more likely to directly encounter manifestations of same-gender family and partnership forms as ordinary facts of everyday life” and “in addition to the normative message of the state [...] the introduction of these legal institutions can have longer-term socialization effects that can potentially contribute to increasing levels of acceptance toward non-heteronormative family forms.”⁴³⁸

Digoix *et al.* also conclude from their research findings that the enactment of laws is extra important for promoting social change in this field, precisely because there are such strong “persisting heteronormative culture models across societies”.⁴³⁹ Politically, the enactment of laws is often seen as the end of a process, but these sociological findings make us aware that laws are often just a “first step” in a social process;⁴⁴⁰ the interviewees apparently often see legal support “as essential for *initiating* social inclusion”.⁴⁴¹

It seems that the – practical and symbolic – social relevance of legal recognition of same-sex family life, is now also being acknowledged in European law. Various EU rules now refer to registered partnership, to non-marital partners, to persons living in a committed intimate relationship, etc.⁴⁴² Meanwhile both the Court of Justice of the EU and the European Court of Human Rights have recognised that distinctions between same-sex and different-sex partners amount to sexual orientation discrimination.⁴⁴³ The latter Court has also ruled that non-marital

⁴³⁶ Digoix et al. 2016, p. 24.

⁴³⁷ Digoix et al. 2016, p. 26.

⁴³⁸ Takács, Szalma & Bartus 2016.

⁴³⁹ Digoix et al. 2016, p. 26.

⁴⁴⁰ Digoix et al. 2016, p. 24.

⁴⁴¹ Digoix et al. 2016, p. 24 (emphasis added).

⁴⁴² See the list of legislation in Waaldijk 2014a, p. 49.

⁴⁴³ See the lists of case law in Waaldijk 2014a, p. 50-55.

partnerships are also covered by the right to respect for “family life”,⁴⁴⁴ and that this includes same-sex partnerships.⁴⁴⁵ It has acknowledged that for a same-sex couple “an officially recognised alternative to marriage (would) have an intrinsic value”, apart from its legal effects.⁴⁴⁶ And that such recognition would further bring “a sense of legitimacy to same-sex couples”.⁴⁴⁷

9.2.2 Public attitudes and levels of (substantive) legal recognition of same-sex couples

In Chapter 2, a rough ranking of countries was made according their “level of substantive legal recognition of same-sex couples” (*Table 2.19*). It is interesting to note that a recent ranking of countries according to “public attitudes towards homosexuality and gay rights”⁴⁴⁸ correlates quite well (though not perfectly) with that legal ranking in Chapter 2, as is shown in *Table 9.1*.

One conclusion that can be drawn from *Table 9.1*, is that the few countries where legal recognition in 2006 was still lagging far behind public attitudes (especially Ireland and Italy), have made up for that by 2015/2016. However, also several countries where legal recognition in 2006 was in line with public attitudes (Greece, Malta and Portugal), have strongly increased their level of legal recognition by 2015/2016. This also happened in Austria, where legal recognition in 2006 was lagging behind public attitudes, and in Hungary, where legal recognition in 2006 was well ahead of public attitudes.⁴⁴⁹

The result is, that public attitudes 2004/2012 correlate rather less with legal recognition 2015/2016 than with legal recognition 2006. This can be read as an indication that perhaps public attitudes in several countries have developed much further since 2004/2012.⁴⁵⁰

⁴⁴⁴ ECtHR, 18 December 1986, *Johnston v Ireland*, App. No. 9697/82, par. 55-56.

⁴⁴⁵ ECtHR, 24 June 2010, *Schalk & Kopf v Austria*, App. No. 30141/04, par. 94.

⁴⁴⁶ ECtHR, 7 November 2013, *Vallianatos v Greece*, App. No. 29381/09, 32684/09, par. 81.

⁴⁴⁷ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/1, par. 174.

⁴⁴⁸ Smith, Son & Kim 2014b, p. 9.

⁴⁴⁹ The fact that in Hungary legal recognition of same-sex cohabitation has been ahead of public attitudes, may in part be the result of an early important ruling by the Hungarian Constitutional Court in 1995 (see Polgari 2017a, questions 1.1 and 1.16).

⁴⁵⁰ There are already some more recent public attitude surveys, but not yet a ranking of countries on the basis of several recent surveys.

Table 9.1: *Public attitudes and levels of substantive legal recognition*

Ranking of countries according to surveys (in 2004 to 2012) of public attitude to homosexuality		Country	Level of substantive legal recognition of same-sex couples in 2006	Level of substantive legal recognition of same-sex couples in 2015/2016
Rank ⁴⁵¹	Percentage ⁴⁵²			
1	98%	Netherlands	96%	100%
2	94%	Sweden	100%	100%
4	91%	Norway	88%	100%
6	84%	Belgium	96%	100%
9	75% (GB)	UK	88%	100%
10	74%	France	63%	92%
11	73%	Germany	82%	94%
12	68%	Ireland	26%	92%
13	65%	Austria	38%	100%
14	64%	Finland	83%	90%
15	53%	Italy	10%	88%
16	51%	Slovenia	41%	75%
17	45%	Czech	48%	64%
18	42%	Portugal	46%	100%
19	42%	Malta	15%	95%
22	29%	Poland	4%	19%
23	26%	Bulgaria	7%	11%
24	25%	Greece	16%	86%
26	24%	Hungary	46%	85%
31	14%	Romania	9%	9%
Not included		Iceland	98%	98%

Source: Table 2.19 above for the level of substantive legal recognition of same-sex couples (based on the LawsAndFamilies Database 2017); and Smith, Son & Kim (2014a, p. 9) for the ranking of countries by public attitude (based on five major public attitude surveys conducted between 2004 and 2012). Colours: **Green** highlights legal recognition more than 30 percent points higher than public attitude (light green: more than 20). **Pink** highlights legal recognition at least 30 percent points lower than public attitude (light pink: at least 20).

⁴⁵¹ Smith, Son & Kim also included twelve countries that are not included in the LawsAndFamilies survey: Denmark, Switzerland, Luxembourg, Spain, Cyprus, Estonia, Slovakia, Russia, Lithuania, Croatia, Ukraine, Latvia (these twelve are listed here according to the ranking calculated by Smith, Son & Kim 2014a, p. 9). They did not include Iceland. And instead of the UK they included Great Britain.

⁴⁵² Smith, Son & Kim (2014a, p. 9, “Mean Rank Position of European Countries”) describe the method they used for this ranking as follows: “A country’s rank was converted to a percentage so that the topped ranked country in a particular list had a score of 100% and the bottom ranked country a score of 0%. Intermediate countries were given the percentage corresponding to their rank. The mean rank scores were calculated across eight measures: 1) ESS – Live life (2010), 2) EB – gay friends (2012), 3) EB – gay marriage (2006), 4) EB – adoptions (2006), 5) EB – gay elected official (2012), 6) ISSO – same-gender sex (2008), 7) WVS – homosexuality justified (2004-08), and 8) WVS – not objecting to gay neighbor (2004-08). Countries were included if they were ranked on at least four measures.” For details on the public attitude surveys that they looked at, and outcomes of the relevant questions therein, see Smith, Son & Kim 2014b.

However, this can also be read as confirmation of the theory that legislation is not only influenced by public opinion, but also one of the factors influencing public opinion. Indeed, on the specific topic of adoption by same-sex couples, a recent study of 22 European countries found that the existence of legislation permitting same-sex adoption, is one of the factors with the strongest impact on levels of agreement with the statement: “Homosexual couples should be able to adopt children”.⁴⁵³

Of course many more correlations – and outliers – between levels of legal recognition and public attitudes can be found and analysed. The dataset in the LawsAndFamilies Database, covering more than 50 years and more than 60 different legal issues, together with the various surveys on public attitudes towards homosexuality that have been done since the late 1980s, should make it possible to test and develop many hypotheses about the relationship between law and public opinion. Similarly, the dataset should make it possible to analyse more closely the possible interactions between legal inclusion (of same-sex or unmarried couples) and economic, political or other developments.⁴⁵⁴

For future interdisciplinary research, it would be useful to develop several specific indicators on the basis of legal data in the LawsAndFamilies Database. And maybe also an indicator that combines legal data with public attitude data – because in combination they may give a better overall assessment of the inclusion of lesbian and gay individuals/couples in different countries over time.

9.3 Increasing legal recognition is the trend – but European legal standards are not always met

There is a clear and rapid trend, among a large majority of the 21 countries surveyed, of offering same-sex couples the opportunity to formalise their relationship as marriage and/or as registered partnership (see *tables 2.1, 2.2 and 2.15*). The absence of any such opportunity in three of the countries may well be against the 2015 judgment of the European Court of Human Rights in the case of *Oliari and others v. Italy* (see paragraphs 2.1 and 2.2.1).

And there is a clear and rapid trend among all 21 countries surveyed of attaching more and more rights and responsibilities to the cohabitation, the registered partnership and/or the

⁴⁵³ Takács, Szalma & Bartus 2016. See paragraph 9.2 above, for a brief indication of how this impact of law on public acceptance might work according to these authors.

⁴⁵⁴ For an example regarding economic develop in relation to LGBT inclusion, see Badgett et al. 2014.

marriage of two people of the same sex (see *tables 2.2, 2.15 to 2.19 and 2.22 to 2.29*). This trend, too, has been strengthened by case law of the European Court of Human Rights, and it has been furthered by EU legislation and case law of the Court of Justice of the EU.⁴⁵⁵

Where same-sex *marriage* is available, the legal consequences of such marriages are the same or almost the same as those of different-sex marriages, with most exceptions in the field of parenting (see paragraph 2.2.3 and Chapter 5), and in a few jurisdictions with respect to survivor's pensions (see paragraph 2.2.6). Furthermore such marriages are not always recognised in other countries (see Chapter 6).

Where the legal recognition of same-sex couples is offered by way of *registered partnership*, mostly the legal consequences are similar to those of marriage, with most exceptions concerning parenting, migration, citizenship, and surnames, while there are also some exceptions in other areas, including income tax, property, inheritance, care leave and survivor's pensions (see paragraph 2.2). Because exceptions in the latter two areas relate to employment, they most probably amount to violations of EU law, in particular of the Employment Equality Directive 2000/78/EC (see paragraphs 2.2.2 and 2.2.6).

The trend of extending legal consequences of marriage to *cohabitation* is less uniform and somewhat slower.⁴⁵⁶

It is strongest with regard to domestic violence, care leave, social benefits, assisted insemination, paternity, second-parent adoption, tenancy continuation after death, and compensation for wrongful death, while the trend is much weaker with regard to surnames, cohabitation contracts, testifying in criminal procedures, immigration, citizenship, joint adoption, property, alimony, tax, inheritance, and survivor's pensions (see paragraph 2.2). In almost all areas one or more jurisdictions distinguish between same-sex and different-sex cohabitants, in particular as regards parenting, care leave, domestic violence, testifying in criminal procedures, immigration, inheritance tax, and property after death. Almost all of these exclusions of same-sex cohabitants, will amount to violations of the well-established *Karner* case law interpreting the European Convention on Human Rights (see paragraphs 2.2.2, 2.2.3, 2.2.4 and 2.2.6). And whenever they relate to employment (care leave, pensions) the exclusion could also amount to violations of the EU's Employment Equality Directive

⁴⁵⁵ For an inventory of relevant EU legislation, and of relevant case law of both courts, see Waaldijk 2014a, p. 48-54. See also Crisafulli 2014 and Orzan 2014.

⁴⁵⁶ See also chapters 3, 4, 5 and 7.

(see paragraphs 2.2.2 and 2.2.6). Exclusion of (same-sex) cohabitants from immigration may violate Directive 2004/38/EC on free movement, Directive 2003/86/EC on family reunification and Directive 2011/95/EU on asylum.⁴⁵⁷

Apart from the specific legal family formats through which couples are being recognised, this survey also suggests a core minimum of substantive rights and responsibilities that should at least be made available to same-sex partners. That same-sex couples should at least have access to such a minimum of rights, has been indicated repeatedly by the European Court of Human Rights (in the *Oliari* and *Taddeucci* cases, see paragraph 2.3.2).

Among the 21 countries surveyed, over the last 10 years, the *same-sex legal recognition consensus* has increased considerably for *each* of 26 selected substantive rights and responsibilities.⁴⁵⁸ Such a consensus is now very high as regards legal protections for times of death⁴⁵⁹ and for times of other great sadness,⁴⁶⁰ and also as regards the right to be able to live in the same country.⁴⁶¹ These (and a few other) rights and responsibilities, could form the core minimum of substantive legal consequences that should be made available to same-sex couples. Soon this core could also include one or more forms of parenting, because, although more controversial, the consensus also keeps growing on parenting issues. Already a large majority of the jurisdictions surveyed allow children through second-parent adoption to have two parents of the same sex.⁴⁶²

As to the hypotheses that Lorenzo Villaverde and I presented at the start of the project,⁴⁶³ at least one hypothesis probably needs to be *rejected* on the basis of the results for the 21 countries surveyed:

Hypothesis 2. Legal recognition of informal cohabitation plays a limited role in the trend towards further legal recognition of same-sex couples.

⁴⁵⁷ See the 2015 FRA report *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU*, especially p. 79-96, and see Waaldijk 2014a, p. 49.

⁴⁵⁸ See *tables 2.16 to 2.18*, and *tables 2.22 to 2.29* in the Annex to Chapter 2.

⁴⁵⁹ Tenancy continuation, inheritance, inheritance tax, survivor's pension, wrongful death compensation; see paragraph 2.3.2.

⁴⁶⁰ Accident, illness, domestic violence, criminal prosecution, splitting up; see paragraph 2.3.2.

⁴⁶¹ Immigration of foreign partner, citizenship; see paragraph 2.3.2.

⁴⁶² See *Figure 5.2 and Table 5.6* in Chapter 5, and see *Table 2.26* in the Annex to Chapter 2.

⁴⁶³ Waaldijk et al. 2016, p. 4-5.

This is so because *Table 2.15* shows that by now 18 out of the 21 countries surveyed (all except Bulgaria, Greece and Romania) now recognise same-sex cohabitation for more than one or two legal issues (often many more), and because in 14 of these 18 (all except France, Germany, Iceland and Slovenia) started to give such recognition already several years before registered partnership or same-sex marriage became possible (or in the case of Poland: might become possible).

Several other hypotheses have been clearly *confirmed* by the results:

Hypothesis 3. There is no general trend regarding the access of different-sex couples to registration schemes.⁴⁶⁴

Hypothesis 4. The introduction of same-sex marriage is never followed by the introduction of registered partnership.⁴⁶⁵

Hypothesis 6. Most introductions of same-sex marriage are preceded by introduction of registered partnership.⁴⁶⁶

Hypothesis 10. The standards developed in European Union law and by the European Court of Human Rights (ECtHR) are not met in all countries studied.⁴⁶⁷

Hypothesis 11. There is a number of legal consequences of marriage that are now so commonly available to same-sex couples, that the ECtHR could observe an existing or emerging consensus in Europe.⁴⁶⁸

Some other hypotheses *could now be tested* in a more detailed analysis of available data:

Hypothesis 5. Most introductions of same-sex marriage stop or slow down the attachment of more legal consequences to registered partnership.

Hypothesis 7. There is no general pattern in the attachment of legal consequences of marriage to informal cohabitation. The focus of such attachment varies from private law in some countries to public law in others. This variation may resemble different welfare models.

Hypothesis 8. In an increasing number of countries, informal cohabitation and/or registered partnership and/or same-sex marriage are – in their legal consequences – equivalent to the legal consequences of marriage.⁴⁶⁹

Hypothesis 9. There is a number of legal consequences of marriage that are typically among the first to be made available to same-sex couples or informal different-sex cohabitants.

⁴⁶⁴ Among the 21 countries surveyed, only Netherlands, France, Belgium, Greece and Malta allow different-sex partnership registrations. See *Table 2.2*.

⁴⁶⁵ See *Table 2.15*.

⁴⁶⁶ This has not been so in Portugal. See *Table 2.15*.

⁴⁶⁷ See above in paragraph 9.3, and see paragraph 2.2.

⁴⁶⁸ See above in paragraph 9.3, and see paragraph 2.3.2.

⁴⁶⁹ Hypothesis 8 has already been confirmed for registered partnership and same-sex marriage (see above in paragraph 9.3).

Hypothesis 12. There is a number of legal consequences of marriage that are now so commonly available to cohabiting different-sex couples, that the ECtHR could observe an existing or emerging consensus in Europe.

Hypothesis 13: The general trends mentioned above are (still) highly subject to variations because of the political and cultural context of each country.

9.4 Statistics and same-sex marriages/partnerships

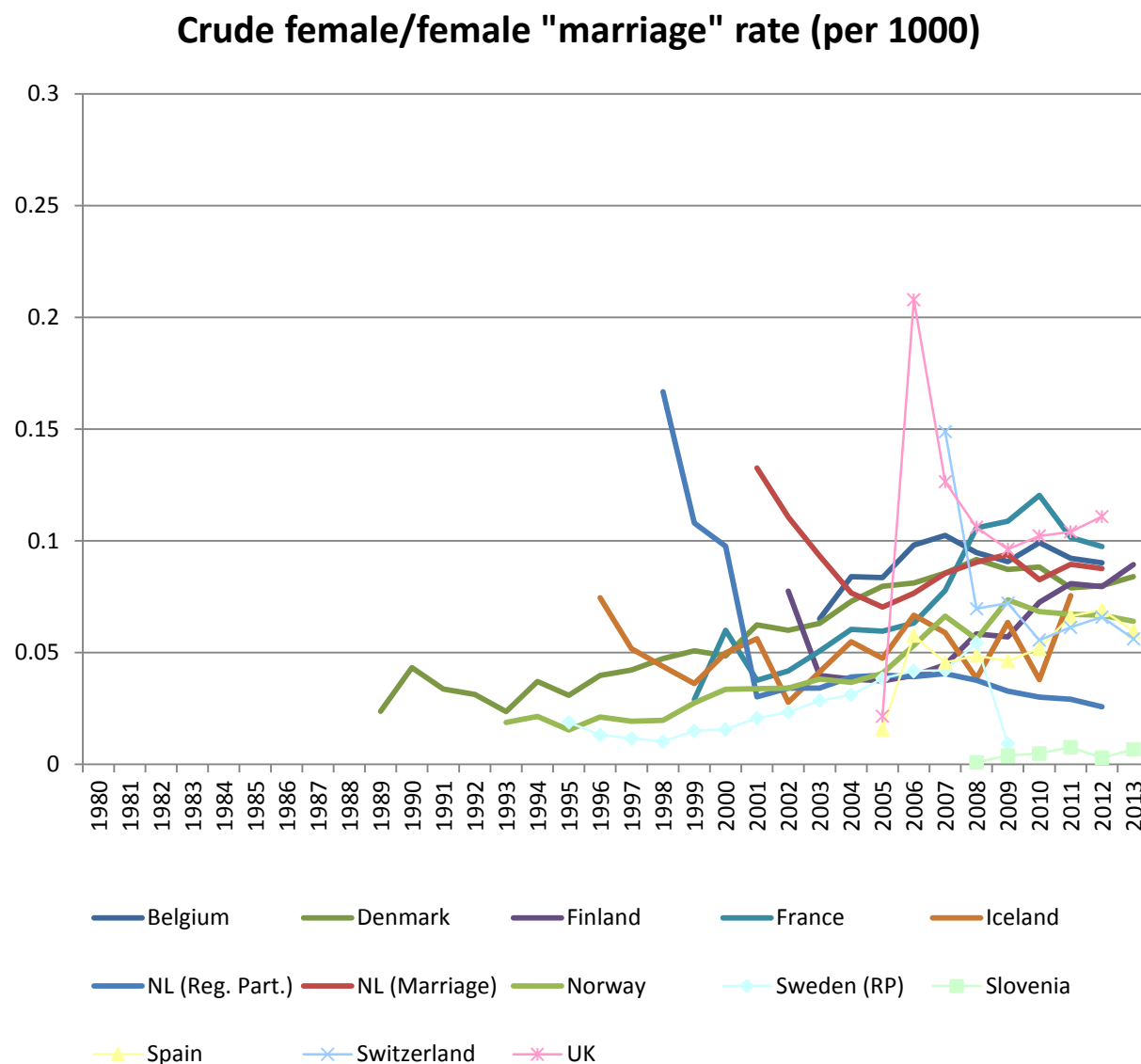
Same-sex couples are really making use of the legal options to formalise their relationship as marriage or registered partnership. The statistical dataset in the LawsAndFamilies Database demonstrates this:⁴⁷⁰ tens of thousands of same-sex marriages and same-sex partnership registrations take place in Europe each year. The statistical survey covered 12 countries, including 9 that are also covered by the legal survey. This makes it possible to see if statistical differences between these nine countries could possibly be explained by outcomes from the legal survey.

The crude rates for same-sex marriages and partnership registrations per year per country are brought together in *figures 9.2 and 9.3* below. Cortina and Festy have calculated these crude rates by dividing the number of new female/female marriages or new female/female registered partnerships by the midyear total female population, and by dividing the number of new male/male marriages or new male/male registered partnerships by the midyear total male population.⁴⁷¹

⁴⁷⁰ The data can be found at <http://lawsandfamilies-database.site.ined.fr/en/statistical-project/data2/>, and are presented and visualised in Cortina & Festy 2014b. See also Cortina & Festy 2014a.

⁴⁷¹ Cortina & Festy 2014b, p. 4.

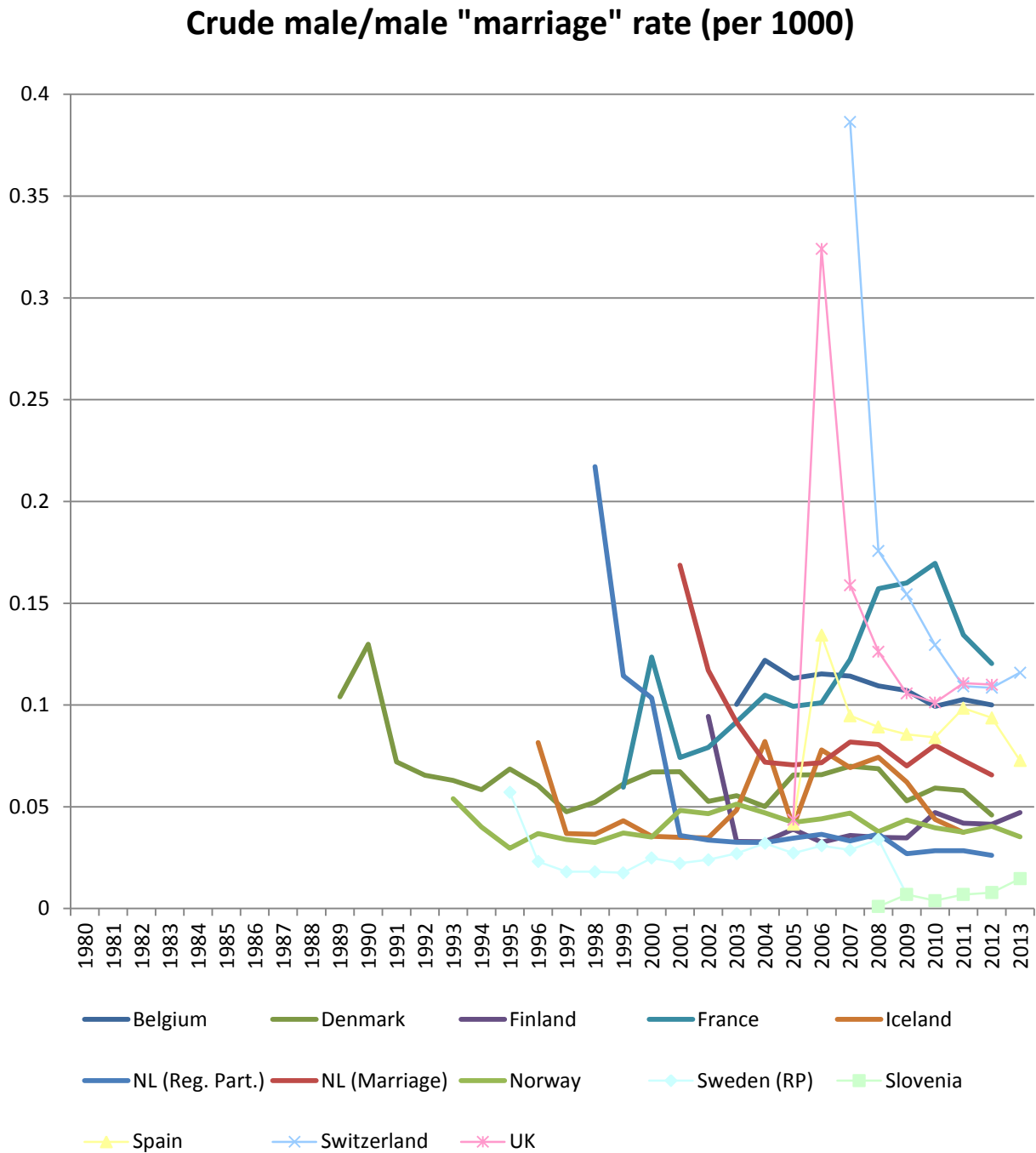
Figure 9.2: Annual numbers of *marriages and partnership registrations between two women* per 1000 female inhabitants



Source: This figure has been copied from Cortina & Festy 2014b, p. 5 (www.ined.fr/Xtradocs/lawsandfamilies/Cortina_and_Festy_2014b.pdf).

Notes: The word "marriage" has been put between inverted commas here, because the authors use it in the wide meaning of new marriages and partnership registrations. The numbers for Belgium and Spain are about marriages, the numbers for Norway about partnership registrations until 2008 and about marriages from 2009, the numbers for the other countries (except the red marriage line for the Netherlands) are for partnership registrations.

Figure 9.3: Annual numbers of *marriages and partnership registrations between two men* per 1000 male inhabitants



Source: This figure has been copied from Cortina & Festy 2014b, p. 5 (www.ined.fr/Xtradocs/lawsandfamilies/Cortina_and_Festy_2014b.pdf).

Notes: The word "marriage" has been put between inverted commas here, because the authors use it in the wide meaning of new marriages and partnership registrations. The numbers for Belgium and Spain are about marriages, the numbers for Norway about partnership registrations until 2008 and about marriages from 2009, the numbers for the other countries (except the red marriage line for the Netherlands) are about partnership registrations.

The figures do indeed show great differences in the crude rates: much higher rates in France, Belgium, the UK and the Netherlands,⁴⁷² on the one hand, than in Slovenia and the Nordic countries, on the other hand.⁴⁷³ In *Table 9.4* below, the nine countries are listed according to these rates. For each country the approximate range of the crude rates is given – ignoring the often extra high rates in the first two years of new legislation (see *figures 9.2 and 9.3*). Because in France, Finland, Norway and Sweden at least one of the two crude rates went up considerably in certain years, two or three periods are distinguished for those four countries.⁴⁷⁴

Table 9.4: Countries (and periods) ranked according to the annual numbers of marriages and partnership registrations between two people of the same sex

Country	Period	Range of crude female/female “marriage” rate	Range of crude male/male “marriage” rate
Slovenia	2010-2013	0.01 – 0.01	0.01 – 0.01
Sweden	1997-2002	0.01 – 0.02	0.02 – 0.02
	2003-2008	0.03 – 0.04	0.03 – 0.03
Norway	1995-2000	0.02 – 0.03	0.03 – 0.04
	2001-2008	0.03 – 0.06	0.04 – 0.05
	2009-2013	0.07 – 0.07	0.04 – 0.04
Finland	2004-2007	0.04 – 0.04	0.03 – 0.04
	2008-2013	0.06 – 0.08	0.04 – 0.05
Iceland	1998-2011	0.04 – 0.07	0.04 – 0.07
Belgium	2003-2012	0.09 – 0.10	0.10 – 0.11
United Kingdom	2007-2012	0.10 – 0.11	0.11 – 0.13
Netherlands ⁴⁷⁵	2003-2012	0.11 – 0.13	0.10 – 0.12
France	2001-2006	0.04 – 0.06	0.08 – 0.10
	2007-2012	0.10 – 0.11	0.12 – 0.16

Source: Own calculations on the basis of data provided by Cortina & Festy at <http://lawsandfamilies-database.site.ined.fr/en/statistical-project/data2/> (and as presented and visualised in Cortina & Festy 2014b; see figures 9.2 and 9.3 above).

Notes: The rates are per 1000 female or male inhabitants (see tables 9.2 and 9.3 above). Highlighted in yellow are rates that are clearly higher for one sex than for the other.

⁴⁷² For the Netherlands I have combined the rate for marriages with the rate for partnership registrations.

⁴⁷³ This difference between these two groups of countries, is largely also shown in the more refined rates (number of new marriages and/or new partnership registrations *per unmarried couple*) tentatively calculated by Cortina & Festy (2014b, p. 7-8).

⁴⁷⁴ To calculate the approximate range for each period without taking into account occasional peaks and lows, I have ignored the highest rate and the lowest rate in each period.

⁴⁷⁵ This table gives for the Netherlands a combined rate for marriages and partnership registrations (ignoring the years before 2003).

The considerable increase in the crude female/female “marriage” rate in Sweden from the year 2003, can most probably at least in part be explained by the fact that joint and second-parent adoption became available to registered partners that year.⁴⁷⁶ Perhaps this fact could also in part explain the slight increase in the male/male rate around that time.

In Norway the male/male rate increased considerably in 2001, followed by a slight increase of the female/female rate in 2003. These increases could perhaps in part be explained by (anticipation of) the opening up of second-parent adoption to registered partners in 2002,⁴⁷⁷ and perhaps also by the fact that in 2001 Norway started to allow partnership registrations by two foreigners (as long as they were Danish, Swedish or Icelandic, or as of 2002 Dutch or Finnish).⁴⁷⁸ The considerable increase of the female/female rate in 2009, could perhaps be explained by the opening up of marriage in that year and by the fact that simultaneously joint adoption became an option for married (or registered) same-sex couples.⁴⁷⁹ However, such an explanation raises the question why the male/male rate did not go up in 2009 in Norway. From the same year women in lesbian relationships also gained access to medically assisted procreation, and to the possibility to be regarded as legal co-mothers, but for this they did not have to be married or registered,⁴⁸⁰ so this also does not fully explain the increase.

The considerable increase of the female/female rate in Finland from 2008, could perhaps in part be explained by anticipation of the opening up of second-parent adoption to registered partners in 2009, and possibly partly by the fact that since 2007 parental leave had become possible for the registered partner of the parent of a child.⁴⁸¹

In France from 2007 both the female/female rate and the male/male rate increased considerably. Perhaps these increases could in part be explained by the fact that from 2006 it was clear that same-sex partners could jointly have parental authority over a child of one of them,⁴⁸² and that from 2008 same-sex partners would have a clear right to unpaid leave to care for each other.⁴⁸³ However, at the same time all this became also possible for non-

⁴⁷⁶ See Ytterberg 2017c (questions 3.9 and 3.10).

⁴⁷⁷ See Eeg 2017c (question 3.9).

⁴⁷⁸ See Eeg 2017a (questions 1.5, 1.6 and 1.7).

⁴⁷⁹ See Eeg 2017a (question 1.1) and 2017c (question 3.10).

⁴⁸⁰ See Eeg 2017c (questions 3.1, 3.2 and 3.4).

⁴⁸¹ See Valleala 2017c (questions 3.9 and 3.7).

⁴⁸² See Ronzier 2017c (question 3.5).

⁴⁸³ See Kouzmine 2017b (question 2.4).

registered same-sex partners.⁴⁸⁴ So maybe another possible explanation is more adequate: from 2005 it had become a little easier in France to obtain a residence permit for a foreign registered partner, and the position of registered partners as regards income tax (from 2005) and inheritance tax (from 2007) had also improved.⁴⁸⁵

Overall, it seems quite possible to explain *increases* in the frequency of same-sex marriages or registered partnership, by referring to increased legal consequences. However, the level of substantive legal recognition (see *Table 2.19* and *Table 9.1* above) does not really explain why same-sex partnership registration and/or marriage have been so much more popular in France, Belgium, the Netherlands and the UK on the one hand, than in Slovenia and in the Nordic countries on the other hand: in the relevant years registered partnership in Slovenia, Belgium and France had relatively low levels of legal consequences, and in the UK, the Netherlands and the Nordic countries it had relatively high levels.⁴⁸⁶ The availability of marriage (as opposed to only registered partnership) also does not fully explain the differences found: the three countries for which same-sex marriage statistics are available in the survey, are Norway (with low crude “marriage” rates) and Belgium and the Netherlands (both with high crude “marriage” rates).

Also when you take into account whether or not same-sex couples already enjoy many legal rights and responsibilities by simply living together, the differences between the countries do not make sense: Both in Sweden and the Netherlands same-sex couples do not gain many additional rights by formalising their relationship; in both countries cohabitation already triggers many rights.⁴⁸⁷ The opposite situation has applied in France and Slovenia, where same-sex cohabitation has triggered less rights.⁴⁸⁸ Nevertheless partnership registration has been far less popular in Slovenia and Sweden than in France and the Netherlands.

It has also been suggested that the higher frequency of partnership registration in France, Belgium and the Netherlands can be explained by the availability of contractual or administrative “divorce”.⁴⁸⁹ However, such an ending of registered partnership is also

⁴⁸⁴ Ronzier 2017c (question 3.5) and Kouzmine 2017b (question 2.4).

⁴⁸⁵ See Kouzmine 2017d (questions 4.1 to 4.4) and 2017b (question 2.1), and Ronzier 2017f (question 6.4).

⁴⁸⁶ See also Waaldijk 2005, p. 9, 41-43, 46-47.

⁴⁸⁷ Waaldijk 2005, p. 9 and 46-47.

⁴⁸⁸ See Kogovsek Salamon 2017a (question 1.1) and Waaldijk 2005, p. 9.

⁴⁸⁹ See Waaldijk 2005, p. 47. And see Borghs 2017e (on Belgium), Nikolina 2017e (on the Netherlands) and Ronzier 2017e (on France).

available in Slovenia,⁴⁹⁰ and it seems this has not made partnership registration more popular there.

Finally, public attitudes regarding homosexuality in these countries (see *Table 9.1* above) cannot explain why the rates are so low in the Nordic countries (where public attitudes are relatively same-sex friendly), although the low rates in Slovenia might possibly in part be a result of the less same-sex friendly public attitudes in that country.

The conclusion must be that other explanations are needed – maybe legal, maybe social or cultural. With additional statistical and legal data (about more countries and for more recent years), or with a more sophisticated analysis than is possible here, perhaps a fuller explanation of the differences between countries can be found.

As to the four hypotheses, presented at the start of the project,⁴⁹¹ about the frequency of marriage, partnership registration and cohabitation, the first one will not be easy to test, because of all the difficulties is correctly assessing the number of different-sex and especially same-sex cohabitants in different countries:⁴⁹²

Hypothesis 14. Attachment of a high level of legal consequences (LLC) to informal cohabitation does not necessarily correspond with a high percentage of couples living in informal cohabitation.

The analysis given above does offer (*some*) *support* for the other three hypotheses:

Hypothesis 15. The LLC of registered partnership, especially positive consequences, does not correlate much (on its own or in relation to the LLC of informal cohabitation) with the frequency of partnership registration.

Hypothesis 16. The frequency of partnership registration correlates to some degree with the availability of non-judicial termination of such partnerships.

Hypothesis 17. The frequency of same-sex marriages or same-sex partnership registrations can in part be explained by the (non-)availability of legal parenting consequences.

However, in hypothesis 16 the emphasis must be on “to some degree”, and hypothesis 17 needs to be nuanced: the availability of legal consequences concerning parenting seems a better explanation for increasing frequencies *within a given country* (as shown above for Sweden, Norway, Finland and perhaps France), than for frequency differences *between countries*.

⁴⁹⁰ See Rajgelj 2017e.

⁴⁹¹ Waaldijk et al. 2016, p. 5.

⁴⁹² About this issue, see Cortina & Festy 2014b (p. 6-7) and 2014a.

9.5 The five case studies

The case studies in this paper concern five very different areas of law that have in common that they are about rights or responsibilities that are often triggered by being married, by being registered as partners, or by cohabiting as partners. Some of these have been a legal consequence of different-sex marriage in many countries for many decades. This is true for legal parentage and adoption (Chapter 5 by Nikolina), for the right to refuse to testify against your partner in criminal proceedings (Chapter 4 by Zago), for the compensation that a surviving spouse may claim from the person who caused the death of the other spouse (Chapter 7 by Damonzé), and for the recognition that a foreign marriage would normally receive in such contexts as immigration or inheritance (Chapter 6 by Waaldijk).

The case study on specific statutory protection against domestic violence (Chapter 3 by Damonzé), however, highlights that the set of legal consequences of different-sex marriage is not static, but that it changes over time, and that new rights and responsibilities can get attached to it. By 1995 only a minority of the jurisdictions surveyed, had legislated specifically on domestic violence,⁴⁹³ but just 20 years later all of them have such legislation in force.⁴⁹⁴ Maybe the recent character of such legislation in most countries has contributed to the rapid extension of the protection to same-sex and non-marital relationships. Damonzé concludes: “All 23 jurisdictions now offer not only married and registered, but also cohabiting partners some specific protection against domestic violence, with the exception of same-sex cohabitants in Bulgaria and Greece (and possibly in Poland, Romania and Slovenia).”⁴⁹⁵

The recognition of same-sex and/or cohabiting couples is less inclusive as regards the right to refuse to testify against your partner (Chapter 4). Almost all jurisdictions surveyed give this privilege to spouses,⁴⁹⁶ but a few still exclude registered partners from this right (Ireland and France). And many jurisdictions exclude all cohabitants – an exclusion that has been accepted by the European Court of Human Rights. Some jurisdictions seem to exclude only same-sex cohabitants, but Zago suggests there is a general trend: “once the legislature or the judiciary

⁴⁹³ See paragraph 3.4 and *Table 3.3*.

⁴⁹⁴ See paragraph 3.4 and *Table 3.4*.

⁴⁹⁵ Paragraph 3.5.

⁴⁹⁶ The only exception is Scotland, see paragraph 4.2 and *Table 4.1*.

start including the testimonial privilege as a legal consequence of different-sex cohabitation, such right is later extended to same-sex couples.”⁴⁹⁷

The legal situation in the countries surveyed is also very mixed as regards parenting (Chapter 5), with different-sex spouses having rather more parenting rights than other non-traditional couples. Nikolina concludes: “The biggest changes and improvements to the position of non-traditional parents have been introduced fairly recently, in the last 20 years. In this period of time more and more jurisdictions made second-parent adoption and joint adoption possible for married and registered same-sex partners, to the point that now more jurisdictions allow adoption by same-sex partners in a formalised relationship than by different-sex partners in cohabitation. On the other hand, legal parentage without adoption is impossible for the female partner of the legal mother in most jurisdictions, while it is possible for the male cohabitant of the mother in all jurisdictions.”⁴⁹⁸ She also points out that the topic of parental authority (in situations where only one of the partners is the legal parent of the child) is also very mixed, because “several jurisdictions make it impossible to grant parental authority to anyone other than the legal parents”.⁴⁹⁹

In Chapter 7, Damonzé provides an example of a right that by now covers all or almost all types of surviving partners – the right to claim compensation from the wrongdoer in case of wrongful death of one’s partner. By 2015/2016 two partly overlapping groups were still excluded: *same-sex* partners in Romania and Slovenia (and possibly in Poland), and (all) *cohabiting* partners in Austria, Greece and Romania (and mostly also in Germany, and possibly in Poland).⁵⁰⁰

Finally, my case study in Chapter 6 shows that most of the 21 countries surveyed now recognise foreign same-sex marriages and foreign registered partnerships – at least for the four specific purposes covered in the questionnaire (immigration of partner of national citizen, immigration of partner of foreign EU citizen, obstacle to marry someone else, and inheritance when there is no testament). The recognition of foreign same-sex registered partnerships is more widespread than the recognition of foreign same-sex marriages, and also than foreign

⁴⁹⁷ Paragraph 4.5.

⁴⁹⁸ Paragraph 5.5. See also the overview in *tables 5.4, 5.6 and 5.7*. The fact that by now more countries allow adoptions by same-sex partners than adoptions by cohabiting (different-sex) partners, Nikolina has illustrated in *figures 5.2 and 5.3*.

⁴⁹⁹ Paragraph 5.5. See also the overview in *Table 5.5*.

⁵⁰⁰ See *Table 7.3*. The situation for registered partners in Slovenia changed in 2017 (see paragraph 7.3.3).

different-sex registered partnerships.⁵⁰¹ Several countries that themselves do not allow same-sex couples to marry and/or to register as partners, nevertheless do recognise same-sex spouses and same-sex registered partners from other countries.⁵⁰² In light of the human right to non-discriminatory respect for family life, and in light of a growing body of applicable EU rules, it seems probable that in the future even more countries will extend such recognition. Meanwhile, an important first (Romanian) test case on the recognition of a foreign same-sex marriage is pending at the Court of Justice of the EU.⁵⁰³

9.6 Gender aspects

A key feature of the whole (legal, statistical and sociological) survey has been to look at the gender-combination of couples: same-sex or different-sex. And although legal rules in many countries are becoming more and more gender-neutral, and more and more orientation-neutral, almost everywhere it still matters in law whether your partner is of the same sex or of different sex.⁵⁰⁴ The sociological survey showed how the people interviewed understood that both society and laws reflect heteronormative norms,⁵⁰⁵ and that even the new laws adopted “reflect heteronormative ideals that are not always in line with all the situations in which LGBTQ people find themselves” (paragraph 8.6).

For these legal and sociological reasons, it is important to keep in mind that even in countries where same-sex couples are widely recognised socially and legally, the law and its impact are (still) not fully gender-neutral. One indication for this is, that in most countries the crude female/female “marriage” rate is different from the crude male/male “marriage” rate (see paragraph 9.4).

In the legal survey only a few questions dealt specifically with issues that are not relevant to all same-sex couples, but only to *female* same-sex couples (and of course to different-sex couples): questions 3.1 (assisted insemination), 3.2 (IVF) and 3.4 (legal parenthood for the partner of the woman who gives birth). The survey has shown that as regards same-sex

⁵⁰¹ See *tables 6.2 to 6.4*.

⁵⁰² *Idem*.

⁵⁰³ Case C-673/16, *Coman and Others*. See paragraph 6.3.

⁵⁰⁴ Perhaps it would be more correct to say “of the same gender or of different gender”, but laws only rarely distinguish between someone’s sex and someone’s gender; see also Waaldijk 2013, p. 172-174.

⁵⁰⁵ Digoix et al. 2016, p. 24.

couples, these three issues are very controversial: they are among the questions with the lowest *same-sex legal recognition consensus* in the countries surveyed.⁵⁰⁶

Assuming that in most countries it is still more common for a woman in a same-sex relationship to be a parent, than for a man in a same-sex relationship, several questions are relevant for rather more *lesbian couples* than gay couples. One of these (question 3.9, on second-parent adoption) is also among the questions with the lowest *same-sex legal recognition consensus*,⁵⁰⁷ while the recognition is also limited as regards parental authority and parental leave (questions 3.5, 3.6 and 3.7).⁵⁰⁸

Because of the difficulties for men in same-sex relationships to have a child, a few questions can be of extra importance to *gay couples*: questions 3.3 (surrogacy) and 3.10 (joint adoption). These questions, too, are among the questions with the lowest *same-sex legal recognition consensus* among the countries surveyed.⁵⁰⁹

A few issues that in many countries have been historically gender-specific, including the right to use the surname of your spouse (1.13) and the right to acquire the citizenship of your spouse (4.7), are also among the questions with the lowest *same-sex legal recognition consensus* (see *Table 2.17*).

Finally, there are several questions about issues that in different-sex couples (because of economic and other disparities between men and women) have a greater impact on women than on men. It is telling that the issue with the highest *same-sex legal recognition consensus* (question 2.2, loss or reduction of social benefit because of the income of your partner, see paragraph 2.3.2) is one that (at least historically) has had a particularly negative impact on economically disadvantaged women. However, also some key protections, that at least in heterosexual relationships are mostly to the benefit of the female partner, are among the questions with the highest *same-sex legal recognition consensus*: questions 2.7 (domestic violence), 6.1 (tenancy continuation) and 6.5 (survivor's pension).⁵¹⁰ It is not clear if these protections are also of greater importance in lesbian relationships than in gay relationships.

⁵⁰⁶ See paragraph 2.3.2, and especially *Table 2.17*.

⁵⁰⁷ See *Table 2.17*, and see also question 4.9 on recognition of foreign second-parent adoptions.

⁵⁰⁸ See *Table 2.18*, and see also question 5.11 on parental authority in case partners split up.

⁵⁰⁹ As regards joint adoption, see *Table 2.17*; see also question 4.8 on recognition of foreign joint adoptions.

⁵¹⁰ See paragraph 2.3.2, and especially *Table 2.16*.

This is also unclear for issues like care (questions 2.4 and 2.5), property (5.9 and 6.2), or alimony (5.10). Further research and analysis is needed.

The legal survey did not look specifically at the impact of the legal rules on *bisexual*, *transgender*, *intersex* or *non-binary* individuals and their relationships. It seems evident that gender-neutral relationship laws will not only make life easier for lesbians and gays, but also for other gender minorities. Nevertheless, it would be of great importance to analyse the impact on such minorities of the growing legal recognition of same-sex and/or informal relationships.

Overall, it can be said that further socio-legal research is needed to assess the gender-impact of the growing but still incomplete recognition of same-sex partners in European countries. However, there are many indications that the pattern and impact of recognition have not been gender-neutral, especially (but not exclusively) in the field of parenting. More specifically, it can already be concluded that recognition has advanced less on some issues that are not relevant to all same-sex couples, but only to *lesbian* couples.⁵¹¹

Furthermore, it could be so that the opening up of family law to same-sex couples, and the resulting growing gender-neutrality of family law, will gradually also have an impact on gender aspects of *different-sex* families.

9.7 Further research

The story told in this working paper is one of great legal progress, but at the same time one of slowness. One common theme emerging from the available legal data, seems to be that all legal systems in Europe have been reluctant in three ways: a reluctance to recognise cohabiting couples that have not formalised their relationship, a reluctance to recognise same-sex partners, and a reluctance to recognise formalisation by something else than marriage. These three forms of reluctance overlap, but the weakening of one reluctance does not imply a weakening of the other two. It should be possible to analyse in what fields – and in what countries – one form of reluctance tends to be stronger than another. The many tables in Chapter 2, and *figures 5.1 and 5.2* in Chapter 5, give some starting points for this. But a better interdisciplinary analysis of the data seems necessary to fully understand how and why the legal recognition of same-sex or unmarried couples got as far as it did – and not yet further.

⁵¹¹ Questions 3.1, 3.2 and 3.4 (see above).

However, this project has also shown more specific possibilities for further research.

Paragraph 9.1 highlighted that the comparative analysis of this working paper is focussing mostly (though not exclusively, see paragraph 2.2 and chapters 3, 4, 5 and 7) on the recognition of same-sex couples. The dataset also contains a wealth of data on the legal recognition of different-sex couples (through marriage, often through cohabitation, and sometimes through registered partnership). A full comparative analysis of the data on different-sex marriage would be most relevant: How and when did marriage over the last five decades get more and more legal consequences beyond the classic terrain of family law? Similarly, a detailed comparative analysis of the data on different-sex cohabitation could help to bring more consistency in the somewhat chaotic process of attaching legal consequences to cohabitation.

Paragraph 9.2.2 suggested several more opportunities to search for correlations between levels of legal recognition on the one hand and non-legal data on the other, including results of public attitude surveys, but also economic and political data. To facilitate such research, it would be useful to develop several specific indicators on the basis of legal data in the LawsAndFamilies Database. And it could be useful to develop an indicator that combines legal data with public attitude data, because in combination they may give a better overall assessment of the inclusion of lesbian and gay individuals/couples in different countries over time.

In paragraph 9.3 it appeared that a much more detailed analysis of the now available legal data is necessary to test some of the hypotheses that were formulated at the start of this project and that have not yet been confirmed or rejected. Furthermore, the legal data in the LawsAndFamilies Database, and this comparative analysis, may offer useful material for studies on specific countries. The data for the country itself will highlight how same-sex and/or unmarried couples have gained legal recognition over time, and data on other countries may provide a good comparative background to assess developments in that country.

The available statistics of annual numbers of new marriages and partnership registrations reveal puzzling differences between different countries, over time, and also between women and men (see paragraph 9.4). More statistical data, on more countries and for more recent years, could help to find better explanations for these differences. Similarly, it would be great if the legal dataset could be expanded to all countries for which statistical data are (becoming) available.

Paragraph 9.5 briefly summarised the five comparative case studies that have so far been done on the basis of the very large legal dataset. Many other case studies could be undertaken, now that this dataset has become publicly available. For example on the four questions on care leave (care between partners, care for parent of partner, care for common children, care for children of partner; questions 2.4, 2.5, 3.6 and 3.7). Or on access to marriage and partnership registration for foreigners and/or non-residents (questions 1.3 to 1.7). On contracts, property and inheritance (questions 1.11, 1.12, 5.9, 6.2 and 6.3). On tax and social security (questions 2.1, 2.2 and 6.4). On immigration and citizenship law (questions 4.1 to 4.4 and 4.7). On recognition of foreign adoptions (question 4.8 and 4.9). On survivor's pension (question 6.5). And much more.

The need for further socio-legal research on the gender-impact of the growing but still incomplete recognition of same-sex partners in Europe, was signalled in paragraph 9.6. Are lesbian women and gay men similarly or differently affected by the remaining legal exclusions? And are they making similar use of the new legal possibilities? Or not (as is suggested by some of the statistical data in paragraph 9.4)?

And last but not least, it would be very useful if legal data on more and more countries (in the EU, in the Council of Europe, and beyond this continent) could be added to the interactive LawsAndFamilies Database over the coming years.⁵¹² And if the legal data that are already there, could be updated from time to time.

Hopefully this enormous legal dataset will also help researchers from other disciplines than law to better understand:

- what the actual legal content is of marriage, registered partnership or cohabitation of two people of the same sex or of two people of different sexes – in different countries at different times;
- that marriage (or cohabitation, or registered partnership) in one country can be legally very different from the corresponding legal family format in other countries; and
- how rapidly the legal aspects of family life have been changing and may well continue to change.

⁵¹² The editors of the LawsAndFamilies Database (www.LawsAndFamilies.eu) are open for suggestions, proposals and offers.

9.8 Recommendations for policy and law

The LawsAndFamilies Database and this comparative analysis show how much progress has already been realised in all 21 countries – also in the few countries where same-sex couples still do not have the possibility to marry or to register as partners, or where cohabitation still does not entail many rights and responsibilities. This study has also revealed many points and areas where legal recognition is falling behind the needs and desires of people in same-sex or unmarried relationships, and behind the fundamental right to non-discriminatory respect for family life.⁵¹³ The study has also highlighted the great social importance of legal recognition for same-sex families – both practically and symbolically (see Chapter 8 and paragraph 9.2).

The main recommendations can therefore be aimed at all authorities, officials and organisations that can play a role in ensuring that all families (whether based on marital or non-marital relationships, whether based on same-sex or different-sex love) have access to the necessary protections and benefits of the law.⁵¹⁴

The *European Union* has competence to legislate on free movement, equality, and employment.⁵¹⁵ Three areas that often intersect with family life – on such important issues as care leave, domestic violence, survivor's pensions, immigration, and recognition of foreign family status. The written EU rules on these issues are not always as clear and as inclusive as one would wish.⁵¹⁶ And this study has shown that laws and practice in several member-states fall short of the European requirements.

The most controversial aspects of family life, such as adoption, legal parenthood, access to assisted procreation, surnames, and access to marriage,⁵¹⁷ all seem to fall outside the scope of EU competence. It would be very difficult to find *any* area of EU competence where it would be justified to exclude same-sex or unmarried partners from legal protection. Therefore the political, administrative and judicial bodies of the EU should:

⁵¹³ See chapters 2 to 7, and paragraphs 9.1, 9.3 and 9.5.

⁵¹⁴ See also Neyer 2017, p. 20-21, and Vono de Vilhena & Oláh 2017.

⁵¹⁵ See also Oláh 2015, p. 21 and 24.

⁵¹⁶ See for example Waaldijk 2014a, p. 49.

⁵¹⁷ See *tables 2.2, 2.15 and 2.17*.

- clarify and ensure that all existing EU legislation and all proposals for new EU legislation shall apply equally to same-sex and different-sex partners, to married and unmarried partners, and to the children in any family;
- ensure that throughout the EU all relevant EU rules shall be applied equally to same-sex and different-sex partners, to married and unmarried partners, and to children in any family; and
- ensure and encourage that national authorities in the member-states recognise the foreign family status of all EU citizens – at the very least in the context of free movement.⁵¹⁸

At *national level*, the political, administrative and judicial bodies should:

- reform any laws that (without convincing justification) still exclude same-sex and/or unmarried partners;
- explicitly include a wider variety of families when introducing any new laws; and
- recognise more fully the foreign family status of same-sex and unmarried couples and their children.

In these tasks, the many (good) examples of inclusive legal recognition documented in the LawsAndFamilies Database may help to inform and inspire these national bodies. These examples and trends will also be useful to the non-governmental organisations influencing them. Similarly, the national bodies should feel spurred on by the growing body of case law of the Court of Justice of the EU and of the European Court of Human Rights, requiring equal treatment of same-sex and different-sex couples and their children.⁵¹⁹

The *European Court of Human Rights* should continue to take into account the “rapid evolution of social attitudes towards same-sex couples”,⁵²⁰ and the growing “consensus among European States in favour of assimilating same-sex relationships to heterosexual

⁵¹⁸ See also the 2015 FRA report *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU*, especially pages 79-96.

⁵¹⁹ See chapters 2 and 5.

⁵²⁰ ECtHR, 22 July 2010, *PB & JS v Austria*, App. No. 18984/02, par. 29. For an overview of such social attitudes, see *Table 9.1* above.

relationships”.⁵²¹ In this respect it can feel supported by the broadly growing consensus and clear trends, documented in this legal survey.⁵²²

As has been shown in paragraph 2.3.2,⁵²³ the consensus among the countries surveyed is particularly strong as regards:

- legal protections for times of death (such as: tenancy continuation; reduced inheritance tax; survivor’s pension);
- legal protections for times of other great sadness (such as: next of kin provisions; protection against domestic violence; leave from work in case the partner’s child or parent is in need of care); and
- the right to come and live in the same country as your partner.

The high levels of consensus on these particular issues, may assist the European Court of Human Rights in narrowing down the margin of appreciation that countries have had in deciding which rights and responsibilities to make available to same-sex couples.⁵²⁴ And the high levels of consensus found here, may assist the court in defining the “core rights relevant to a couple in a stable committed relationship”.⁵²⁵ Such a *core minimum of substantive rights*,⁵²⁶ can be important in several ways. It can help the European Court to decide on:

- the range of protections and benefits that should – at the very least – be made available to same-sex couples in all European countries (even in countries where same-sex couples are still not allowed to formalise their relationship as marriage or registered partnership; and even in countries where these protections and benefits are only available to different-sex partners after they have married);⁵²⁷

⁵²¹ ECtHR, 28 September 2010, *JM v United Kingdom*, App. No. 37060/06, par. 50.

⁵²² And especially in *tables 2.15 and 2.22 to 2.29*.

⁵²³ And especially in *tables 2.16 and 2.18*.

⁵²⁴ See ECtHR, 24 June 2010, *Schalk & Kopf v. Austria*, App. No. 30141/04, par. 98 and 109; and ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, App. No. 51362/09, par. 88.

⁵²⁵ ECtHR, 21 July 2015, *Oliari and others v. Italy*, App. No. 18766/11 and 36030/11, par. 174 (see also par. 172 and 185 of that judgment). In its later judgment in the case of *Taddeucci & McCall v. Italy*, the Court spoke of “droits essentiels” (ECtHR, 30 June 2016, App. No. 51362/09, par. 83 and 95).

⁵²⁶ See paragraph 2.3.2. A similar, but probably smaller set of substantive rights could probably be discerned as a core minimum for the legal recognition of (different-sex) cohabitants.

⁵²⁷ See the *Taddeucci* judgment.

- the range of protections and benefits for which foreign family status of same-sex couples should *always* be recognised in all European countries;⁵²⁸
- the range of protections and benefits that should – at the very least – be attached to any form of registered partnership that has been or will be introduced in European countries that do not allow same-sex couples to marry.⁵²⁹

Thereby the European Court of Human Rights would give much needed guidance to those countries that are only starting or considering to legally recognise same-sex couples.

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⁵²⁸ See Chapter 6.

⁵²⁹ See the *Oliari* judgment.

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