

Chapter 2

What First, What Later? Patterns in the Legal Recognition of Same-Sex Partners in European Countries



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Abstract Among the 21 European countries surveyed for the *LawsAndFamilies Database*, there is a clear trend (fortified by European law) of offering same-sex couples the opportunity to formalise their relationship as marriage and/or as registered partnership, and of attaching more and more rights and responsibilities to the informal cohabitation, the registered partnership and/or the civil marriage of two people of the same sex. This chapter focusses on the timing of all these changes. In a *five periods* analysis, it establishes whether major partnership rights were extended to same-sex couples at the time of the introduction of registered partnership, or before, or at the time of the opening up of marriage, or between those two moments, or after the opening up of marriage. Thereby, and by calculating the *same-sex legal recognition consensus* among the countries surveyed for each of 26 selected rights,

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it finds nine *typical sequences*: Attitudes before rights; Rights before status; Bad-times rights before good-times rights; Responsibilities before benefits; Individual partner rights before couple rights; Partnership before marriage; Immigration rights among the first to be gained; Parenting rights among the last to be gained; Legal recognition before social legitimacy.

Keywords Marriage · Registered partnership · Cohabitation · Same-sex couples · Comparative family law · European law

2.1 Detailed Picture of an Ongoing Process

Through the institute of marriage, the law of all European countries has been giving rights and responsibilities to different-sex couples. By excluding same-sex couples from marital status, it also excluded them from all those rights and responsibilities that – exclusively – came with being married.

Over the last few decades an emerging trend in Europe (and in some other parts of the world) has been to reduce this exclusion. On the one hand this is done by offering same-sex couples the opportunity to formalise their relationship as marriage or at least as registered partnership. And on the other hand more and more rights and responsibilities are being given to same-sex couples who live together in informal cohabitation and/or who formalise their relationship (by marrying each other or by registration of their partnership). These developments have taken place primarily at national level, but, as we will see, international human rights law and the law of the European Union (EU) have also played a role.

The *LawsAndFamilies Database* has documented major legal changes over a 50-year period. The legal survey of this project has traced how in 21 European countries, same-sex (and different-sex) partners started and continued to receive (some) legal recognition. It looked at marriage, registered partnership and cohabitation, and how these three legal family formats became available to same-sex couples (and/or to different-sex couples).

Of the 21 countries surveyed, 19 are members of the EU, and all (including Iceland and Norway) are part of the European Economic Area (EEA). Between them the 21 countries are a fairly representative sample for the 31 countries that are part of EEA, but less so for the 47 member states of the Council of Europe (Waaldijk 2017, p. 25). As regards the United Kingdom, the questions have been answered separately for its three component jurisdictions (England & Wales, Scotland, Northern Ireland). So in total 23 jurisdictions have been covered.

The legal survey focussed on 60 different rights and responsibilities that can be attached to these legal family formats. The methodology used for the creation of this database, including the introduction of the term “legal family format”, the definition

of the distinction between the concepts of cohabitation and registered partnership,¹ the selection of 60 closed and 9 open questions, their distribution over six main categories (Formalisation, Income and troubles, Parenting, Migration, Splitting up, and Death), the definition of the answer codes for the closed questions (“Yes”, “Yes, but”, “No, but”, “No”, “Doubt” etc.), the selection of two legal experts from all countries, and the organisation of the peer review of their answers to the questionnaire, are all described in the first chapter of the report *More and more together*.²

The result is an online interactive database (www.LawsAndFamilies.eu) with an enormous amount of legal information (about more than 60 legal topics, for two types of couples, in up to three legal family formats, in 23 jurisdictions, for the years 1965–2016). This offers a very detailed picture of major legal developments in European societies. It is not a snapshot, but a movie that is still running. This chapter aims to give a synopsis of the movie so far. The focus will be on the emerging European patterns, and specifically on the *typical sequences* that are characteristic for the legal developments captured in the database.

The process of legal recognition of same-sex couples in Europe is ongoing. During the 4 years of the project (2013–2017), among the sample of 23 jurisdictions in 21 countries, no less than four opened up marriage to same-sex couples (France, Scotland, England & Wales, Ireland), and three made registered partnership available to them (Malta, Greece, Italy). And soon after the project ended in January 2017, also Finland opened up marriage (Hiltunen 2017; Valleala 2017), and Slovenia strongly increased the range of rights and responsibilities attached to same-sex registered partnership (Kogovsek Salamon 2017). And since then also Germany, Malta and Austria opened up marriage, while various countries continued to attach more and more rights and responsibilities to the marriage, the registered partnership and/or the informal cohabitation of same-sex couples.

Since 2013 also more European countries outside the project have introduced registered partnership for same-sex couples (Croatia, Cyprus, Estonia, San Marino),³ or have opened up marriage to them (Luxembourg). A full list of all European countries (and their dependencies in Europe) that now allow same-sex partners to formalise their relationship through marriage and/or registered partnership is given in Table 2.1.

The following sections will first compare the 21 countries, and then compare 26 selected substantive rights that have been extended to same-sex couples in those countries – or not.

¹ 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, on the basis of his expertise on Spanish legislations, that he gained and developed for his PhD thesis: *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 2015; defended April 2016). See also Waaldijk 2014.

² Waaldijk 2017, p. 7–24; for the text of the questionnaire, see Waaldijk et al. 2016.

³ About the implementation problems regarding the still incomplete Estonian legislation on registered partnership, see Roudik 2016.

Table 2.1 Access for same-sex partners to marriage or registered partnership – since when

	Registered partnership	Marriage
Denmark	no longer (1989–2012)	2012
Norway	no longer (1993–2009)	2009
Sweden	no longer (1995–2009)	2009
Iceland	no longer (1996–2010)	2010
Greenland (DK)	no longer (1996–2016)	2016
Netherlands	1998	2001
France	1999	2013
Belgium	2000	2003
Germany	no longer (2001–2017)	2017
Finland	no longer (2002–2017)	2017
Luxembourg	2004	2015
Spain	no (regionally since 1998)	2005
England & Wales (UK)	2005	2014
Scotland (UK)	2005	2014
Northern Ireland (UK)	2005	2020
Slovenia	2006	no
Andorra	2006	no
Czech Republic	2006	no
Switzerland	2007 (regionally since 2001)	no
Hungary	2009	no
Portugal	no	2010
Austria	2010	2019
Ireland	no longer (2011–2015)	2015
Liechtenstein	2011	no
Jersey (UK)	2011	2018
Isle of Man (UK)	2011	2016
Malta	2014	2017
Gibraltar (UK)	2014	2016
Croatia	2014	no
Cyprus	2015	no
Greece	2016	no
Estonia	2016	no
Italy	2016	no
Faroe Islands (DK)	no	2017
Guernsey (UK)	no	2017
Alderney (UK)	no	2018
San Marino	2019	no

Source: Mendos (2019), ILGA Europe (2019), Waaldijk et al. (2017), and Wikipedia

2.2 Comparing Countries: Partnership Before Marriage – Rights Before Status – Attitudes Before Rights

In Western Europe now all countries surveyed allow same-sex couples to marry or to register as partners,⁴ and in all those 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 partnership registrations (Poland, Bulgaria, Romania).⁵ However, these three countries already provide some legal recognition to same-sex couples (see below), on a similarly limited scale as Greece, Italy and Malta did until very recently (see Table 2.2). And several countries in Central Europe offer same-sex couples registered partnership (Slovenia, Czech Republic, Croatia, Hungary), and for example Hungary attaches a wide range of rights and responsibilities to these partnerships (Polgari 2017; Dombos 2017). Of the countries surveyed the Czech Republic attaches a more limited range of legal consequences to its registered partnership (Otáhal 2017, Plesmid 2017), as did Slovenia until 2017 (Kogovsek Salamon 2017; Rajgelj 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 (Borghs 2017, Kouzmine 2017).

In short, there has been great convergence in the legal situation of same-sex couples in Western and Central Europe. At the same time, this has led to more divergence with countries in Eastern Europe (Waldijk 2018a).

From Table 2.1 it can be concluded that in European countries the opening up of marriage to same-sex couples comes almost always after the introduction of same-sex registered partnership. The only independent European countries where there was no national registered partnership scheme in existence when marriage was opened up to same-sex couples, are Portugal and Spain. In Portugal extensive cohabitation recognition preceded same-sex marriage (Pamplona Côrte-Real 2017), while in Spain some form of partnership registration in several regions preceded same-sex marriage. In all other 14 independent countries that now allow same-sex marriages, the road had been paved by the nationwide introduction of registered partnership. This typical sequence is very strong. All 11 countries that introduced registered partnership before 2005, have now moved on to open up marriage. And of the 22 independent European countries that introduced registered partnership before 2015, 16 have already opened up marriage.

Yet, “partnership before marriage” is not the only typical sequence that characterises the developments in European countries. In most countries where same-sex couples gained access to formal family status (registered partnership or marriage), already before this happened some rights had been made available to informally

⁴In Western Europe the only member state of the Council of Europe without either possibility is Monaco.

⁵A total of 19 member states of the Council of Europe in Central or Eastern Europe (those not listed in Table 1.1) do not yet offer at least one of these two options.

Table 2.2 Public attitudes and levels of substantive legal recognition

Ranking of countries according to surveys of public attitudes			Country	Level of substantive legal recognition of same-sex couples	
2004–2012	2004–2008	2009–2013		2006	2015/2016
–	6.02	7.37	Iceland	98%	98%
98%	5.84	6.67	Netherlands	96%	100%
94%	5.80	6.55	Sweden	100%	100%
91%	5.26	5.92	Norway	88%	100%
84%	5.24	5.92	Belgium	96%	100%
74%	5.05	5.74	France	63%	92%
68%	5.17	5.68	Ireland	26%	92%
73%	4.97	5.62	Germany	82%	94%
75% (GB)	5.01 (GB)	5.59 (GB)	UK	88%	100%
64%	4.76	5.26	Finland	83%	90%
42%	4.64	5.08	Malta	15%	95%
53%	4.46	4.77	Italy	10%	88%
42%	4.51	4.74	Portugal	46%	100%
45%	4.34	4.72	Czech	48%	64%
65%	4.35	4.55	Austria	38%	100%
51%	4.22	4.43	Slovenia	41%	75%
25%	4.09	4.26	Greece	16%	86%
29%	3.98	3.99	Poland	4%	19%
24%	3.91	3.90	Hungary	46%	85%
26%	3.78	3.79	Bulgaria	7%	11%
14%	3.52	3.25	Romania	9%	9%

Sources: Smith et al. (2014a, p. 9; 2014b) for the ranking of countries by public attitude based on surveys of public attitudes to homosexuality conducted in the period 2004–2012; Flores and Park (2018, p. 27–30) for the ranking of countries according to their LGBT Global Acceptance Index based on surveys of public attitudes to LGBT issues conducted in the periods 2004–2008 and 2009–2012; and Waaldijk (2017, p. 51–53) for the level of substantive legal recognition of same-sex couples in 2006 and in 2015/2016 (based on the *LawsAndFamilies Database*). In this table the order of countries is that of the figures in the third column

cohabiting same-sex couples. Among the 21 countries surveyed for the *LawsAndFamilies Database*, only five countries (Iceland, France, Germany, Slovenia, Greece) had hardly given any rights to same-sex cohabitants before the introduction of registered partnership (Waaldijk 2017, p. 43). All countries where by 2011 same-sex cohabitants were enjoying legal recognition as regards more than one or two legal issues, had by 2016 allowed same-sex couples to formalise their relationship through marriage and/or registered partnership (idem).

In the three countries surveyed where such formalisation is not yet available (Poland, Bulgaria, Romania), same-sex couples are already starting to enjoy some legal recognition as cohabitants (Waaldijk 2017, p. 51). In Romania there is for example some recognition for the right to leave to care for a same-sex partner or for

a parent of that partner, and same-sex partners are possibly seen as next of kin and possibly protected by legislation on domestic violence (Cojocariu 2017). Since a recent judgment of the Court of Justice of the EU (CJEU), Romania also has to recognise foreign same-sex marriages for the purpose of free movement of persons.⁶ In Poland there is for example recognition as next of kin and some as regards partner immigration (Pudzianowska 2017), and for a surviving same-sex partner as regards tenancy continuation, and possibly as regards compensation for wrongful death (Smiszek 2017). Also in Bulgaria there is for example recognition as regards compensation for wrongful death, and possibly as regards *simple* second-parent adoption or partner immigration (Furtunova 2017; Katchaunova 2017).

All this supports the conclusion that apart from “partnership before marriage” also “rights before status” is a typical sequence in the process of legal recognition of same-sex couples in European countries.

While rights typically precede status, it seems also possible that substantive rights are more important than formal status. Knowing which family formats 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. For tracking this development some of the 69 questions in the questionnaire seemed less useful. In fact, only 26 of the 69 questions have been used to assess the substantive legal recognition of same-sex couples.⁷ These 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. On the basis of the answers given by the legal experts to these 26 questions, a ranking of countries can be made according to what can be called their “level of substantive legal recognition of same-sex couples”.⁸ This is a measure that does not look at whether or not access has been given to marriage or registered partnership, but only at the amount of substantive rights to which same-sex couples have access, irrespective of these rights being made available through marriage, through registered partnership, or through recognition of informal cohabitation. The ranking of the 21 countries surveyed according to their “level of substantive legal recognition of same-sex couples” can be found in the last two columns of Table 2.2.

It is interesting to note that some recent rankings of countries according to public attitudes towards homosexuality, gay rights or LGBT issues (based on various pub-

⁶CJEU, 5 June 2018, *Coman and Others*, Case C-673/16. See also Ionescu 2017.

⁷The 26 questions are presented in Tables 2.3, 2.4 and 2.5 in Sect. 2.3 below. For the various reasons for excluding the other questions from this analysis, see Waaldijk 2017, p. 44–45.

⁸For an explanation of how this measure has been constructed, see Waaldijk 2017, p. 51–53.

lic attitude surveys conducted since 1981)⁹ correlate quite well (though not perfectly) with this legal ranking, as is also shown in Table 2.2.

One possible explanation for correlation is that public attitudes towards homosexuality may well be an important factor contributing to the emergence of legal rights for same-sex partners. The *legal* process may typically start with rights, but it seems quite probable that *non-legal* phenomena (such as public attitudes) normally pave the way for extending such rights to same-sex couples.

Table 2.2 shows that higher rankings as regards public attitudes (for any of the three periods) correspond to higher rankings as regards legal recognition for 2015/2016, but less so as regards legal recognition by 2006. In fact, one conclusion that can be drawn from Table 2.2, is that the few countries where legal recognition in 2006 was still lagging far behind public attitudes (especially Ireland and Italy, but also Austria and Malta), have legally made up for that by 2015/2016. All this would suggest another typical sequence, that of “attitudes before rights”. There also other possible explanations for the remarkable increase in legal recognition that can be seen in some countries. For example, case law of the European Court of Human Rights (ECtHR) and of the Court of Justice of the EU (CJEU) has had a direct impact on several countries where the legal recognition of same-sex couples fell behind the minimum norms that these European courts have been developing (Waaldijk 2014, 2018b), especially in Germany,¹⁰ Greece,¹¹ France,¹² Croatia,¹³ Italy,¹⁴ Austria,¹⁵ Poland,¹⁶ and Romania.¹⁷

An additional explanation could be that the growing international trend of legal recognition of same-sex families in many countries (see Kollman 2007) can have a certain influence on national lawmaking in some other countries – even when national public attitudes there remain more hesitant on the topic.

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*, together with the various surveys on public attitudes towards homosexuality that have been done since the late 1980s, should make it possible to test various hypotheses about the relationship between law and public

⁹Smith et al. 2014a, p. 9; Flores and Park 2018, p. 27–30. The rankings by both teams of researchers are based on a range of major public attitude surveys (see also Smith et al. 2014b), and include more countries than listed here

¹⁰CJEU, 1 April 2008, *Maruko*, Case C-267/06.

¹¹ECtHR, 7 November 2013, *Vallianatos v. Greece*, 29381/09 & 32684/09.

¹²CJEU, 12 December 2013, *Hay*, Case C-267/12.

¹³ECtHR, 23 February 2016, *Pajić v. Croatia*, 68453/13.

¹⁴ECtHR, 21 July 2015, *Oliari v. Italy*, 18766/11 & 36030/11; ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, 51362/09.

¹⁵ECtHR, 24 July 2003, *Karner v. Austria*, 40016/98; ECtHR, 19 February 2013, *X and Others v. Austria*, 19010/07.

¹⁶ECtHR, 2 March 2010, *Kozak v. Poland*, 13102/02.

¹⁷CJEU, 5 June 2018, *Coman and Others*, Case C-673/16.

opinion. Similarly, the dataset should make it possible to analyse more closely the possible interactions between legal inclusion (of same-sex couples) and economic, political or other developments.¹⁸

2.3 Comparing Rights: Bad Times Before Good Times – Responsibilities Before Benefits – Partner Before Couple

For same-sex couples, rights and responsibilities, as argued above, have often come before status, and these rights and responsibilities say more about someone’s actual legal situation than the (marital or other) status through which they have become available. The question then is, which rights and responsibilities typically come first. To this end a comparative analysis can be made between the main substantive rights and responsibilities that have been extended to same-sex partners in European countries.

Using the same selection of 26 questions as was used above to calculate the “level of substantive legal recognition of same-sex couples” for each country, here a ranking of the 26 rights and responsibilities will be made. The text of the 26 questions is presented in Tables 2.3, 2.4 and 2.5, where the questions are ranked according to what can be called the “same-sex legal recognition consensus” for 2015 or 2016 (that is: for the most recent year for which the questions have been answered for the country concerned). The “same-sex legal recognition” for each question has also been calculated for the year 2006.

The *same-sex legal recognition consensus* for a year is a percentage that indicates how many of the surveyed jurisdictions have started to recognise same-sex partners by giving them full or limited access to a specific substantive right or responsibility. This quantitative indicator is introduced to assess if there is common ground between European countries about what rights and responsibilities should at least be made available to same-sex couples.¹⁹ So also in Tables 2.3, 2.4 and 2.5 it does not matter *how* a right or responsibility becomes available (through marriage, through registered partnership, through cohabitation, or through two or three of these legal family formats).

A first conclusions that can be drawn from Tables 2.3, 2.4 and 2.5 is that, among the 21 countries surveyed, the consensus on legal recognition for same-sex couples has increased considerably between 2006 and 2015/2016 for *each* of the 26 selected substantive rights and responsibilities (an increase of at least 20% points for each).

¹⁸On the relationship between legal LGB inclusion and economic development, see Badgett et al. 2019.

¹⁹For the exact methodology for calculating the “same-sex legal recognition consensus”, and for the actual calculations for each of the 26 questions, see Waaldijk 2017, p. 44–46 and 57–66.

Table 2.3 Eleven rights and responsibilities (out of 26 selected substantive questions) with in 2015/2016 the highest “same-sex legal recognition consensus” among 21 countries

Question	Same-sex legal recognition consensus	
	2006	2015/16
2.2 – <i>Loss of social benefit</i>	71%	93%
6.1 – <i>Tenancy continuation</i>	63%	93%
2.6 – <i>Next of kin</i>	53%	89%
4.1 – <i>Residence for partner of national citizen</i>	57%	88%
6.5 – <i>Survivor’s pension</i>	50%	88%
2.7 – <i>Domestic violence protection</i>	57%	86%
2.8 – <i>No testifying in criminal case</i>	57%	86%
6.6 – <i>Wrongful death compensation</i>	57%	86%
4.3 – <i>Residence for partner of (non-EU) foreigner</i>	50%	86%
5.10 – <i>Alimony at dissolution</i>	48%	86%
6.3 – <i>Inheritance</i>	43%	86%

Source: Waaldijk 2017 (tables 2.21–2.29)

Table 2.4 Ten rights and responsibilities (out of 26 selected substantive questions) with in 2015/2016 the lowest “same-sex legal recognition consensus” among 21 countries

Question	Same-sex legal recognition consensus	
	2006	2015/16
4.7 – <i>Citizenship</i>	48%	81%
1.12 – <i>Statutory contract</i>	48%	81%
2.1 – <i>Lower income tax</i>	47%	80%
5.9 – <i>Joint property at dissolution</i>	50%	80%
6.2 – <i>Joint property at death</i>	50%	80%
1.13 – <i>Surname</i>	48%	79%
3.9 – <i>Second-parent adoption</i>	33%	74%
3.1 – <i>Assisted insemination</i>	43%	63%
3.10 – <i>Joint adoption</i>	21%	55%
3.4 – <i>Legal parenthood presumption</i>	7%	38%

Source: Waaldijk 2017 (tables 2.21–2.29)

Table 2.5 Five legal rights and responsibilities with a high “same-sex legal recognition consensus” in 2015/2016, but for which this is in part due to the low number of countries where these rights or responsibilities are applicable to married different-sex partners

Question	Same-sex legal recognition consensus	
	2006	2015/16
<i>2.4 – Leave to care for partner</i>	61% (11 of 18)	83% (15 of 18)
<i>3.7 – Parental leave for partner</i>	54% (7 of 13)	92% (12 of 13)
<i>3.5 – Joint parental authority</i>	67% (8 of 12)	92% (11 of 12)
<i>6.4 – Inheritance tax exemption</i>	50% (9 of 18)	88% (14 of 16)
<i>2.5 – Leave to care for parent of partner</i>	50% (8 of 16)	88% (14 of 16)

Source: Waaldijk 2017 (tables 2.21–2.29)

Overall, the recognition consensus is increasing, which may inspire more countries to broaden their legal recognition of same-sex families. And this growing consensus could provide the European courts with extra arguments to require European countries to make a core minimum of specific rights and responsibilities available to same-sex families (see Sect. 2.7).

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). Of all 26 rights and responsibilities selected, this is the only one that does not entail any benefit for either of the partners. It is as if legal systems did not need to think long before extending at least this burden of relationship recognition to same-sex couples.

Almost all of the rights and responsibilities in Table 2.3 with the highest recognition consensus, are about situations where one of the partners dies (tenancy continuation,²⁰ wrongful death compensation,²¹ survivor's pension,²² inheritance, inheritance tax exemption), or where the partners are hit by other seriously "bad times" (accident, illness, domestic violence,²³ criminal prosecution,²⁴ splitting up). It seems that lawmakers in a very large majority of countries now take the position that it would be unjust, unfair, non-compassionate to exclude same-sex partners from legal protections designed for such sad times.

The very high recognition consensus as regards residence entitlements for a foreign same-sex partner (questions 4.1 and 4.3), however, cannot be explained directly by the sadness factor. Probably here the common rationale is also one of compassion: without such a residence entitlement the two partners would not even be able to live together in the same country – let alone to have family life under the same roof.²⁵

About issues where the "sadness" factor is absent or may seem less prominent, the consensus is more limited. The issues with the lowest "same-sex legal recognition consensus" (in Table 2.4) have all in common that they are about *sharing* live in "good times" – sharing each other's name or citizenship, sharing properties or tax advantages, sharing responsibility for children.

²⁰ ECtHR, 24 July 2003, *Karner v. Austria*, 40016/98; ECtHR, 2 March 2010, *Kozak v. Poland*, 13102/02.

²¹ For a comparative analysis of the data regarding wrongful death compensation, see Damonžé 2017.

²² CJEU, 1 April 2008, *Maruko*, Case C-267/06.

²³ For a comparative analysis of the data regarding domestic violence protection, see Damonžé 2017.

²⁴ For a comparative analysis of the data regarding testifying in criminal procedures, see Zago 2017.

²⁵ A good example of this is the case of *Taddeucci & McCall v. Italy*, where the ECtHR required Italy to provide a residence entitlement; see its judgment of 30 June 2016, 51362/09. See also ECtHR, 23 February 2016, *Pajić v. Croatia*, 68453/13; and CJEU, 5 June 2018, *Coman and Others*, Case C-673/16.

The right to use your partner's surname, for example, is 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. Maybe in some countries it is (or was until recently) still too difficult to think of such a right outside the context of marriage.

Medically assisted insemination (question 3.1) and the 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 regarding these parenting issues, the same-sex legal recognition consensus has been growing considerably between 2006 and 2015/2016.²⁶ Interestingly, if you combine the information regarding the questions 3.5 (parental authority), 3.7 (parental leave) and 3.9 (second-parent adoption), there now seems to be a near-consensus that same-sex partners should at least be allowed to take *some* responsibility for each other's children. In only three of the 21 countries none of these three possibilities exists – precisely the three countries in this survey that still have not introduced any form of registered partnership (Bulgaria, Poland and Romania). More about developments in the recognition of parenting rights in Sect. 2.5.

It seems that the overall conclusion can be phrased with terms borrowed from classic wedding vows (such as “in good times and in bad, in sickness and in health” or “for better for worse, for richer for poorer, in sickness and in health”). As suggested in those vows, marriage (like other forms of relationship recognition) typically entails rights and responsibilities for good times, and rights and responsibilities for bad times. In gradually building up some legal recognition for same-sex couples, however, it seems that European countries have been much quicker and less reluctant in extending rights for *bad times* to them, than in extending rights for *good times*. This appears to be a fourth typical sequence (in addition to the three discussed in Sect. 2.2) that characterises the process of legal recognition of same-sex partners. The main exception to this “bad-times rights before good-times rights” pattern are the immigration rights of a foreign partner in a same-sex relationship, which are among the rights with the highest *same-sex legal recognition consensus*. It is therefore possible to point to another typical sequence: “immigration rights among the first to be gained”.

Dividing the legal consequences of marriage, partnership or cohabitation in rights for bad times and rights for good times, however, is not the only possible categorisation. The 26 issues listed in Tables 2.3, 2.4 and 2.5 can be further categorised, for example by distinguishing between benefits and responsibilities, and between rights benefitting an individual partner and rights benefitting the couple as a whole. An attempt to do so, while acknowledging the special character of immigration and parenting rights, has been made in Table 2.6, where for each category the average “same-sex legal recognition consensus” has been calculated.

From Table 2.6 it appears there are two further typical sequences, both partly overlapping with the “bad-times rights before good-times rights” pattern, and with each other. European countries have been more ready to extend benefits to an indi-

²⁶For a comparative analysis of the data regarding several parenting issues, see Nikolina 2017b.

Table 2.6 Possible categorisation of the 26 selected rights and responsibilities

Category	Rights and responsibilities	Average “same-sex legal recognition consensus”	
		2006	2015/16
Implied mutual responsibilities	<i>Loss of social benefit</i>	58%	88%
	<i>Leave to care for partner</i>		
	<i>Leave to care for parent of partner</i>		
	<i>Next of kin</i>		
	<i>No testifying in criminal case</i>		
Benefits for one partner, implying responsibility for the other	<i>Domestic violence protection</i>	53%	88%
	<i>Alimony at dissolution</i>		
	<i>Tenancy continuation</i>		
	<i>Inheritance</i>		
	<i>Inheritance tax exemption</i>		
	<i>Survivor’s pension</i>		
	<i>Wrongful death compensation</i>		
Immigration rights	<i>Residence for partner of citizen</i>	54%	87%
	<i>Residence for partner of foreigner</i>		
Benefits recognising the couple as a unit	<i>Statutory contract</i>	49%	80%
	<i>Surname</i>		
	<i>Lower income tax</i>		
	<i>Citizenship</i>		
	<i>Joint property</i>		
Parenting rights	<i>Assisted insemination</i>	38%	69%
	<i>Legal parenthood presumption</i>		
	<i>Joint parental authority</i>		
	<i>Parental leave for partner</i>		
	<i>Second-parent adoption</i>		
	<i>Joint adoption</i>		

Source: Tables 2.3, 2.4 and 2.5

vidual partner than to extend benefits to a couple as a unit; so the sequence typically is “individual partner rights before couple rights”. And European countries have been less reluctant and somewhat faster in extending (implied) responsibilities to same-sex partners, than in extending benefits to them; so “responsibilities before benefits”.

It does not seem surprising that it has been easier for countries to recognise responsibilities for individual partners than to recognise benefits for couples, because individual responsibilities typically are only between the partners (think of domestic violence protection, or alimony), whereas couple benefits typically are between the couple and wider society (think of lower income tax, or citizenship).

Furthermore, recognition of individual responsibilities is typically relevant in sad situations where someone needs support (think of tenancy continuation after death, or survivor’s pension), whereas recognising couples as units typically con-

cerns happier times (think of sharing a surname, or responsibility for children), echoing the “bad-times rights before good-times rights” pattern. Recognising couples as units (think of joint property, or common citizenship) also comes closer to extending family status to them; therefore the “individual partner rights before couple rights” sequence echoes the “rights before status” pattern.

2.4 Five Periods of Legal Recognition

Apart from a tentative “attitudes before rights” pattern, so far five general typical sequences could be distinguished that characterise the ongoing process of legal recognition of same-sex partners in European countries:

- Rights before status
- Partnership before marriage
- Bad-times rights before good-times rights
- Individual partner rights before couple rights
- Responsibilities before benefits

While several other typical sequences will be highlighted in the remainder of this chapter, the first five typical sequences may now help in taking a closer look at the process of legal recognition in each of the countries surveyed. In these countries, the legal recognition of same-sex families did not only come when a form of registered partnership was introduced for same-sex couples, or when marriage was being opened up to them, but also in the period before all that, in the period between those two moments, and/or in the period after all that. So often rights and responsibilities for same-sex partners came during *five periods*. This incremental process has been visualised in Tables 2.7, 2.8, 2.9 and 2.10.

The first two of these tables focus on five specific rights that can be important when one of the partners dies or when one of the partners is a foreigner (each with a shorthand name for the right in question):²⁷

- *Residence for partner of citizen* (Immigration)
- *Tenancy continuation after death* (Tenancy)
- *Wrongful death compensation* (Compensation)
- *Inheritance tax exemption* (InheriTax)
- *Inheritance without testament* (Inherit)

Tables 2.9 and 2.10 focus on six specific rights relating to parenting (also each with a shorthand name):²⁸

²⁷For the full text of the corresponding questions in the LawsAndFamilies questionnaire, see Tables 2.3 and 2.5 above.

²⁸For the full text of the corresponding questions in the LawsAndFamilies questionnaire, see Tables 2.4 and 2.5 above.

Table 2.7 Five rights for foreign or surviving same-sex partner – recognition per period (in countries that opened up marriage before 2017)

	Before partnership registration	At introduction of partnership registration	←Between→	At opening up of marriage	After opening marriage	Not yet by 2016
Norway*		1993		2009		
	Tenancy	Compensation	–	–	–	–
Sweden*	Immigration	Inherit		2009		
	Tenancy	Inherit	–	–	–	–
	Immigration					
Iceland	Compensation					
		1996		2010		
Netherlands	–	All five rights	–	–	–	–
		1998		2001		
	Tenancy	Inherit	–	–	–	–
	Immigration					
	Compensation					
InheriTax						
France		1999		2013		
	–	Tenancy	–	Inherit	–	–
		Immigration				
		Compensation				
	InheriTax					
Belgium		2000		2003		
	Immigration	Compensation	InheriTax	Inherit	Tenancy	–
GrBritain**		2005		2014		
	Tenancy	Compensation	–	–	–	–
	Immigration	Inherit				
Portugal		n/a		2010		
	Tenancy	–	n/a	Inherit	–	–
	Immigration					
	Compensation					
	InheriTax					
Ireland		2011		2015		
	Immigration	Tenancy	–	–	–	–
		Compensation				
		Inherit				
		InheriTax				

Source: Waaldijk 2017 (Tables 2.27–2.29). * The inheritance tax exemption had been equal for same-sex and different-sex surviving partners in Sweden from 1988 until this tax was abolished in 2005 (Walleng 2017), and in Norway from 1993 until this tax was abolished in 2014 (Eg 2017). There is also no inheritance tax in Austria (Graupner 2017) and Malta (Galea Borg 2017). ** No differences between Scotland on the one hand, and England & Wales on the other

Table 2.8 Five rights for foreign or surviving same-sex partner – recognition per period (in countries that before 2017 did not open up marriage)

	Before partnership registration	At introduction of partnership registration	After introduction of registration	Not yet by 2016
Germany		2001		
	Immigration	Tenancy & Inherit Compensation	InheriTax	–
Finland		2002		
	Immigration	Tenancy	–	–
		Compensation		
	Inherit & InheriTax			
North. Ireland		2005		
	Tenancy	Compensation	–	–
Immigration	Inherit & InheriTax			
Czech Rep.		2006		
	Compensation	Immigration	Tenancy	–
InheriTax	Inherit			
Slovenia		2006		
	–	–	Immigration Inherit & InheriTax	Tenancy* Compensation
Hungary		2009		
	Tenancy	Inherit	InheriTax	–
	Immigration			
Compensation				
Austria		2010		
	Tenancy	Compensation	–	–
Immigration	Inherit			
Malta		2014		
	Tenancy	Immigration	–	–
Compensation	Inherit			
Greece		2016		
	–	All five rights	–	–
Italy		2016		
	Immigration	Tenancy	–	–
	Compensation	Inherit & InheriTax		
Poland		n/a		
	Tenancy	–	n/a	Immigration** Compensation Inherit & InheriTax
Bulgaria		n/a		
	Compensation	–	n/a	Tenancy Immigration Inherit & InheriTax
Romania		n/a		
	–	–	n/a	All five rights

Source: Waaldijk 2017 (tables 2.27–2.29). * Limited aspect of this right already available (Kogovsek Salamon 2017). ** Limited aspect already available (Pudzianowska 2017)

- *Parental leave for partner* (Leave)
- *Joint parental authority* (JointAuthority)
- *Medically assisted insemination* (Insemination)
- *Second-parent adoption* (2ndP-Adoption)
- *Joint adoption* (JointAdoption)
- *Legal parenthood presumption* (Presumption)

The opening up of marriage in Finland, Malta and Germany (in 2017) and in Austria (in 2019), came after the *LawsAndFamilies Database* had been completed, so these and other recent developments have not been included in the four tables. Not always included in these tables, is the fact that limited aspects of some rights were already made available to same-sex couples before the period in which these rights were extended to a similar degree as to different-sex couples.²⁹ It should also be noted that in Austria, Malta, Norway and Sweden there is no inheritance tax. Therefore for those countries only four rights are listed in Tables 2.7 and 2.8. Furthermore, the questions about parental leave and about parental authority were only asked for the situation where only one of the two partners is the legal parent of a child. In such situations in several countries even a different-sex partner who is not a legal parent cannot have parental leave or parental authority. Therefore, in Tables 2.9 and 2.10 below, for some countries less than six parenting rights are listed.

Tables 2.7, 2.8, 2.9 and 2.10 illustrate the incremental build-up of the legal recognition of same-sex partners in European countries. The incremental character of this ongoing process is largely the result of the social and political controversies around the demand for equal treatment for same-sex families. The outcome of the resulting political and legal fights were almost always small legal steps in the direction of more equality, but hardly ever creating near-equality in one step, and rarely reaching full equality. This gradual character of legal recognition is further clarified in Table 2.11, which summarises the previous four tables.

In Table 2.11 it also becomes very clear that as regards the extension of substantive rights to same-sex partners, the opening up of marriage was mostly relatively unimportant: at the time of the opening up of marriage to same-sex partners only very few substantive rights were extended to them. Many more rights were extended at or even before the introduction of registered partnership, and in some countries some rights (especially rights that involve legal parental status) only were extended to same-sex couples after the opening up of marriage. So the opening up of marriage is rarely the beginning or the end – it typically is just one of the stages that countries go through on the road to full equality for same-sex families.

Interestingly, in the majority of countries surveyed, partner immigration became possible *before* the introduction of registered partnership. This confirms the pattern noted in Sect. 2.3: “immigration rights among the first to be gained”. Therefore it is not surprising, that immigration rights for foreign partners have also been the sub-

²⁹ See the bracketed years in tables 2.21 to 2.29 in Waaldijk 2017.

Table 2.9 Six parenting rights for same-sex partners – recognition per period (in countries that opened up marriage before 2017)

	Before partnership registration	At introduction of partnership registration	←Between→	At opening up of marriage	After opening marriage	Not yet by 2016
Norway		1993		2009		
	Leave	–	2 nd P-Adoption	JointAdoption Insemination Presumption	–	–
Sweden		1995		2009		
	Insemination	Leave JointAuthority	Adoptions Presumption	–	–	–
Iceland		1996		2010		
	–	JointAuthority	Adoptions Insemination Presumption	–	–	–
Netherlands		1998		2001		
	Insemination	JointAuthority	–	Leave Adoptions	Presumption	–
France		1999		2013		
	–	Leave	JointAuthority	Adoptions	–	Insemination Presumption
Belgium		2000		2003		
	Insemination	–	–	–	Leave Adoptions Presumption	–
Scotland		2005		2014		
	Leave	–	Adoptions	–	–	–
	JointAuthority		Presumption			
	Insemination					
England & Wales		2005		2014		
	Leave	Adoptions	Presumption	–	–	–
	JointAuthority					
	Insemination					
Portugal		n/a		2010		
	–	–	n/a	–	All five* rights	–
Ireland		2011		2015		
	Leave	–	–	JointAuthority	–	Presumption
	Insemination			Adoptions		

Source: Waaldijk 2017 (tables 2.25, 2.26). * Portugal is one of the countries where only *legal* parents can have parental leave (Freitas 2017)

Table 2.10 Six parenting rights for same-sex partners – recognition per period (in countries that before 2017 did not open up marriage)

	Before partnership registration	At introduction of partnership registration	After introduction of registration	Not yet by 2016
Germany		2001		
	Joint Authority	Leave Insemination	2 nd P-Adoption	Joint Adoption* Presumption
Finland		2002		
	Joint Authority Insemination	–	Leave 2 nd P-Adoption	Joint Adoption Presumption
Northern Ireland		2005		
	Leave	–	Adoptions	–
	Joint Authority Insemination	–	Presumption	–
Czech Republic		2006		
	–	Joint Authority	–	Adoptions Insemination Presumption
	–	–	–	–
Slovenia		2006		
	–	–	Leave 2 nd P-Adoption	Joint Adoption Insemination Presumption
	–	–	–	–
Hungary		2009		
	–	Leave	Joint Authority	Adoptions Insemination Presumption
Austria		2010		
	Leave	–	Adoptions Insemination Presumption	–
	–	–	–	–
Malta		2014		
	–	Adoptions	–	Insemination Presumption
Greece		2016		
	Insemination	–	–	Adoptions Presumption
Italy		2016		
	2 nd P-Adoption	–	–	Joint Adoption Insemination Presumption
Bulgaria		n/a		
	–	–	n/a	All five** rights
Poland		n/a		
	–	–	n/a	All five*** rights
Romania		n/a		
	–	–	n/a	All six rights

Source: Waaldijk 2017 (tables 2.25, 2.26). * But *successive* adoption already possible (Markart 2017). ** But *simple* second-parent adoption may already be possible; Bulgaria is one of the countries where only *legal* parents can have parental authority (Furtunova 2017). *** Poland is one of the countries where only *legal* parents can have parental leave (Pudzianowska 2017)

Table 2.11 Number of countries that extended rights to same-sex partners – per period

	Before partnership registration	At introduction of partnership registration	After introduction partnership registration (and before marriage)	At opening up of marriage	After opening up of marriage	Not yet by 2016
<i>Residence for partner of citizen</i>	14	5	1	–	–	3
<i>Tenancy continuation after death</i>	11	7	1	–	1	3
<i>Wrongful death compensation</i>	8	12	–	–	–	3
<i>Inheritance without testament</i>	–	16	1	3	–	3
<i>Inheritance tax exemption</i>	3	9	4	–	–	3
<i>Parental leave for partner</i>	6	4	2	1	1	1
<i>Joint parental authority</i>	5	4	2	1	1	1
<i>Medically assisted insemination</i>	9	1	2	1	1	9
<i>Second-parent adoption</i>	1	2	9	3	2	6
<i>Joint adoption</i>	–	2	5	4	2	10
<i>Legal parenthood presumption</i>	–	–	6	1	3	13

Source: Tables 2.7, 2.8, 2.9 and 2.10. Highlighted are the most common periods for each right

ject matter in three of the cases on same-sex partnership that were successful in the European courts.³⁰

Similarly, the right to continue to rent the home for which your deceased partner held the rental contract, is also a right mostly extended to same-sex partners *before* the introduction of a form of registered partnership. The very first successful case on same-sex partnership in the European Court of Human Rights was precisely about this issue: in 2003 this Court established the principle that rights such as this, when they have already been extended to unmarried different-sex partners, should also be extended to same-sex partners.³¹

³⁰ ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, 51362/09; ECtHR, 23 February 2016, *Pajić v. Croatia*, 68453/13; CJEU, 5 June 2018, *Coman and Others*, Case C-673/16.

³¹ ECtHR, 24 July 2003, *Karner v. Austria*, 40016/98.

The other three non-parenting rights that were highlighted in Tables 2.7 and 2.8 (wrongful death compensation, inheritance and inheritance tax) are typically made available to same-sex partners when registered partnership is introduced.

Also the parenting rights highlighted in Tables 2.9 and 2.10 are mostly extended to same-sex partners (if at all) before the opening up of marriage. And the three parenting rights that do not involve legal parental status (i.e. parental leave, parental authority and assisted insemination), are mostly among the very first parenting rights that become available to same-sex couples – even before the introduction of registered partnership. The situation in France, where same-sex marriage and same-sex adoptions are possible, but where medically assisted insemination is not yet lawful for women in a same-sex relationship (Ronzier 2017), is quite unique.

As can be seen in Tables 2.9 and 2.10, the first legal step towards parenting equality between same-sex and different-sex couples differs from country to country. In some countries (including Greece, Ireland, Netherlands and the United Kingdom) it started with not prohibiting medically assisted insemination of women in same-sex relationships. In a few other countries a first step was to allow the same-sex partner of a parent to take parental leave (as in Austria, Hungary and Norway), or to share in the parental authority over the child (as in Finland, France and Germany), or to apply for second-parent adoption (as in Italy and Slovenia). In a few countries (Portugal and Malta) a first step included both joint and second-parent adoption, while in at least one country (Portugal) almost all aspects of same-sex parenting became legal simultaneously.

In some countries, most recognition of same-sex parenting happened *before* same-sex marriages were allowed (as in Austria, Germany, Finland, Sweden, and the UK), while in other countries such recognition largely came *with* (as in France, Ireland, Malta, Netherlands, and Norway) or even *after* the opening up of marriage to same-sex couples (as in Belgium and Portugal).

2.5 Women and Children Last?

The relative slow, late and incomplete recognition of parenting rights begs questions about the gender-neutrality of the patterns in the legal recognition of same-sex partners. It seems that even in most 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 Cortina and Festy 2014 and their chapter in this book).

In the legal survey of *LawsAndFamilies* 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 (medically assisted insemination), 3.2 (IVF), and 3.4 (legal parenthood for the partner of the woman

who gives birth).³² The survey has shown that as regards same-sex couples, these three issues are very controversial: they are among the questions with the lowest *same-sex legal recognition consensus* in the countries surveyed (see Table 2.4 above). 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 a low *same-sex legal recognition consensus*.

A few issues that in many countries have been historically gender-specific, including the right to use the surname of your spouse (question 1.13) and the right to acquire the citizenship of your spouse (question 4.7), are also among the questions with a low *same-sex legal recognition consensus* (see Table 2.4).

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) is one which (at least historically) has had a particularly negative impact on women (see Holtmaat 1996). However, also some key protections, that at least in traditional heterosexual relationships can be to the benefit of the female partner, are among the questions with a high *same-sex legal recognition consensus*: questions 2.7 (domestic violence protection), 6.1 (tenancy continuation), joint property (5.9 and 6.2), alimony (5.10) and 6.5 (survivor's pension). It is not clear if these (traditionally gendered) issues have the same importance in lesbian relationships as in gay relationships (but see also the other chapters in this book).

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 likely that not only lesbians and gays, but also other sexual and gender minorities can benefit from increasingly gender-neutral rules of family law. It would be good if there would be research on the impact of the growing legal recognition of same-sex relationships on people from such other minorities.

Overall, it can be said that further 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 already several indications that the pattern and impact of recognition have not been gender-neutral, especially in the field of parenting. Legal recognition of same-sex couples has advanced less – or slower – on some issues that are only or especially relevant to *lesbian* couples (questions 3.1, 3.2 and 3.4, see above).

This conclusion may be nuanced a little – but not contradicted – by pointing to the extra importance that rights to joint adoption and to surrogacy may have for gay men who wish to become parents.³³ Both rights are among the most controversial

³²The outcomes for the IVF question are very similar to those for the question on medically assisted insemination.

³³The *LawsAndFamilies Database* does include answers to a question about surrogacy (question 3.3), but this question implied so many different aspects (lawfulness of surrogacy contracts, of

issues covered in the survey, and joint adoption (question 3.10, see Table 2.4) is among the rights with the lowest *same-sex legal recognition consensus* among the countries surveyed.

Some legal protections during sickness (next of kin, leave to care for partner) and after death (tenancy continuation, survivor's pension, inheritance tax), which all have a high *same-sex legal recognition consensus* (see Tables 2.3, 2.4, 2.7 and 2.8), gained additional relevance for large numbers of gay men during the Aids crisis. The very first judgment of the European Court of Human Rights in a case about the rights of same-sex partners (*Karner v. Austria*) was of great symbolic and legal importance in this respect. In its judgment, before ruling that Austria must include same-sex partners in its tenancy continuation rules (which until then only applied to married and unmarried different-sex partners), the Court specifically pointed out that Mr. Karner (the applicant) from 1989:

lived with Mr W., with whom he had a homosexual relationship, in a flat in Vienna, which the latter had rented a year earlier. They shared the expenses on the flat. [...] In 1991 Mr W. discovered that he was infected with the Aids virus. His relationship with the applicant continued. In 1993, when Mr W. developed Aids, the applicant nursed him. In 1994 Mr W. died after designating the applicant as his heir.³⁴

Also in other ways the Aids crisis seems to have speeded up the process of legal recognition of same-sex partners. A conclusion could be (again in terms derived from classic wedding vows) that sickness rights often have been extended to same-sex partners before reproductive health rights were. This sequence may be just a manifestation of the more general sequence of “bad-times rights before good-times rights”. However, it also provides a further indication, but no conclusive evidence, that an additional pattern can be discerned in the process of legal recognition of same-sex partners in European countries: “men before women”.

A stronger typical sequence that has emerged in this and the previous sections, is that of putting “parenting rights among the last to be gained”. This may be a typical European phenomenon (Polikoff 2000). The *same-sex legal recognition consensus* among the countries surveyed is the lowest for parenting rights (Table 2.6), and recognition typically comes latest – if at all – for parenting rights that involve legal parental status: second-parent and joint adoption, and presumption of legal parenthood (Table 2.11). This can be seen as an illustration of the “rights before status” pattern, that was observed in Sect. 2.2.

In the gradual recognition of parenting rights, also some of the other typical sequences apply: The parenting rights that are about responsibilities for children that are already part of the household of same-sex partners (parental leave, parental authority, second-parent adoption) typically get recognised sooner or more often than the rights concerning “new” children (assisted insemination, joint adoption,

payments for the surrogate mother, of egg donations, etc. and of the possibility for two men to become both legal fathers of a child), that the – interesting – results do not lend themselves for inclusion in the quantitative analysis that is presented here. See Friðriksdóttir 2017 for upcoming legislation in Iceland.

³⁴ ECtHR, 24 July 2003, *Karner v. Austria*, 40016/98, par. 12.

presumption of legal parenthood). This illustrates both the “responsibilities before benefits” pattern and the “individual partner rights before couple rights” pattern. Legal systems seem to be more ready to give some parenting rights to the same-sex partner of a parent, than to give parental status to a whole same-sex couple.

In Sect. 2.3, we already noticed among European countries a near-consensus that same-sex partners should at least be allowed to take *some* responsibility for each other’s children (through parental leave, or through joint parental authority, or even via second-parent adoption). In quite a few countries, same-sex couples can now take *full* responsibility for each other’s children. This started around the turn of the century, when first Denmark in 1999, and later a large minority of European countries, extended the possibility of *second-parent adoption* – so that it is now possible there to adopt the child of your same-sex partner (Nikolina 2017a; Mendos 2019, p. 297–299; and Tables 2.9 and 2.10). And such adoptions of course trigger a whole range of legal rights and responsibilities between the child and the adoptive second parent.

A slightly smaller, but also growing group of European countries (starting with the Netherlands in 2001) has gone further by also allowing *joint* adoptions by same-sex couples (Nikolina 2017a, b; Mendos 2019, p. 291–292; and Tables 2.9 and 2.10). And in a similar group of European countries it is legally possible for a woman in a same-sex relationship to become pregnant through medically assisted insemination (Tables 2.9 and 2.10). The result is that in most of these countries same-sex couples now are allowed to create a family with children, *and* to formalise their relationship to these children.

However, in many countries this formalisation of parentage can only be done through adoption, typically involving time, money, a court procedure and an examination by the child welfare authorities. This is different in different-sex families, because there the relationship between child and father (even when he is not the biological father) is mostly created simply by the legal presumption of paternity (if the couple is married) or by recognition/acknowledgment of the child by the father (Nikolina 2017a). In some countries this major difference between heterosexual and lesbian families has started to disappear. In 2003 Sweden became the first European country where, when a woman gives birth to a child, her female partner can also become a legal parent of that child from the moment of birth (without having to go through an adoption procedure) (Ytterberg 2017). Although the conditions and procedures differ somewhat from country to country, such a possibility now exists already in a sizeable minority of European countries (Nikolina 2017a, p. 103; and Tables 2.9 and 2.10).

2.6 The Social Importance of Legal Recognition

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 (2014, and their Chap. 3 in this book) indicate that each year tens of thousands of same-sex cou-

ples in European countries choose to marry or to register as partners. The initial peaks in the frequency of partnership registrations 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 (Digoix et al. 2016, p. 24; Neyer 2017, p. 21). Many of the laws that attach rights or responsibilities to different legal family formats, shape the relationships between partners, and between them and their parents, children, etc. See for example (in Tables 2.3 and 2.4) the questions from the legal survey on loss of social benefits, leave to care for partner, leave to care for parent of partner, next of kin provisions, parental authority, parental leave, alimony, inheritance and survivor's pension. A recent study showed how legislation (directly or indirectly) can mandate, block, generate or lighten intergenerational interdependence (Dykstra and Hagestad 2016, p. 57–58), “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” (idem, p. 59).

The social importance of laws for same-sex families is further evidenced in the interviews conducted in Italy, Iceland and France by other authors of this book. 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” (Digoix et al. 2017, p. 147). And these authors point out that “the existence of laws also has a favourable effect on public perceptions of homosexuals” (idem), and that “the practical consequences of laws shape everyday life” (Digoix et al. 2016, p. 24). 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” (idem, p. 26). This is similar to what Takács et al. (2016, p. 1797) find: “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.”

Digoix et al. (2016, p. 26) 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”. 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; the interviewees apparently often see legal support “as essential for *initiating* social inclusion” (idem, p. 24, emphasis added).

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., while 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 (Waaldijk 2014, 2018b). The latter Court has also ruled that non-marital partnerships are also covered by the right to respect for “family life”,³⁵ and that this includes same-sex partnerships.³⁶ 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.³⁷ And that such recognition would further bring “a sense of legitimacy to same-sex couples”.³⁸

In Sect. 2.3 we found some evidence for the typical sequence of “attitudes before rights”, although in some countries also the reverse sequence could be noticed. Presumably both these patterns are at play, with rights and attitudes regarding same-sex families reinforcing each other. In other words, attitudes facilitate rights, and in turn *legal recognition strengthens social legitimacy*.

2.7 Conclusion: From Core Rights to More Rights

There is a clear and rapid trend, among a large majority of the 21 countries surveyed for the *LawsAndFamilies Database*, 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 these 21 countries (and in 19 of the 47 Council of Europe countries) may well be against recent case law of the European Court of Human Rights.³⁹

And there is a clear and rapid trend among the 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, by some EU legislation, and by case law of the Court of Justice of the EU (Crisafulli 2014; Orzan 2014; Waaldijk 2014, 2018b). And it has been encouraged by the recommendations and studies of other bodies of EU and Council of Europe.⁴⁰

³⁵ ECtHR, 18 December 1986, *Johnston v Ireland*, 9697/82, par. 55–56.

³⁶ ECtHR, 24 June 2010, *Schalk & Kopf v Austria*, 30141/04, par. 94.

³⁷ ECtHR, 7 November 2013, *Vallianatos v. Greece*, 29381/09 & 32684/09, par. 81.

³⁸ ECtHR, 21 July 2015, *Oliari v. Italy*, 18766/11 & 36030/11, par. 174.

³⁹ ECtHR, 21 July 2015, *Oliari v. Italy*, 18766/11 & 36030/11.

⁴⁰ See for example the comprehensive reports by the Commissioner for Human Rights (2011) of the Council of Europe and by the EU Agency for Fundamental Rights (FRA 2015), and Resolution 2239 (2018) of the Parliamentary Assembly of the Council of Europe (PACE 2018).

Both these trends reflect the recognition – as articulated by the European Court of Human Rights – that same-sex couples are covered by the right to respect for family life.⁴¹ 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”,⁴² and “have the same needs in terms of mutual support and assistance as different-sex couples”.⁴³ Both trends 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.

This chapter set out to find more specific patterns and typical sequences within this double trend of legal recognition of same-sex partners.

In Sects. 2.2 and 2.6 this chapter has signalled various indications for an interaction between the legal and the social. Positive social attitudes towards homosexuality seem to facilitate the legal recognition of same-sex partners, and this legal recognition in turn seems to strengthen the social legitimacy of same-sex families. In short, the following two *typical sequences* seem to be reinforcing each other:

- Attitudes before rights
- Legal recognition before social legitimacy

This chapter looked at the timing of the introduction of registered partnership and/or the opening up of marriage to same-sex couples (Sect. 2.2). In a *five periods* analysis, it established whether major partnership rights were extended to same-sex couples at the time of the introduction of registered partnership, or before, or at the time of the opening up of marriage, or between those two moments, or after the opening up of marriage (Sect. 2.4). Thereby, and by calculating the *same-sex legal recognition* consensus among the 21 European countries surveyed for each of 26 selected rights and responsibilities (Sect. 2.3), another seven *typical sequences* could be noticed. These typical sequences are characteristic for the process of legal recognition of same-sex partners in these countries. The following seven were found:

- Rights before status
- Partnership before marriage
- Bad-times rights before good-times rights
- Responsibilities before benefits
- Individual partner rights before couple rights
- Immigration rights among the first to be gained
- Parenting rights among the last to be gained

These typical sequences overlap and reinforce each other. And as discussed in Sect. 2.5, some may be making the process of legal recognition somewhat slower for female partners than for male partners. As noted in the previous sections, there are

⁴¹ ECtHR, 24 June 2010, *Schalk & Kopf v. Austria*, 30141/04, par. 94.

⁴² *Idem*, par. 99; see also ECtHR, 7 November 2013, *Vallianatos v. Greece*, 29381/09 & 32684/09, par. 78.

⁴³ ECtHR, 7 November 2013, *Vallianatos v. Greece*, 29381/09 & 32684/09, par. 81.

various exceptions to these typical sequences: in specific countries specific rights or responsibilities have been gained sooner or later than the general pattern suggests.

It is possible that the general pattern presented here, will already have some effect on countries that are only starting or considering to legally recognise same-sex couples and their children. Perhaps the typical sequences will inspire activists, lawmakers and judges in such countries – perhaps accelerating them or possibly slowing them down. At the very least the typical sequences can be read as advice on where to start (and what steps to take next) when political or legal actors in a country want to improve the legal situation of same-sex couples.

However, it seems likely that the mere example offered by the developments in 21 European countries here analysed, will not be enough to make changes happen in those countries (among and beyond this sample of 21) where legal recognition is still limited or even absent. Therefore political and judicial European institutions may have an important role to play (Waaldijk 2018a).

The European Court of Human Rights, for example, has spoken repeatedly about the “core rights relevant to a couple in a stable committed relationship”.⁴⁴ 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.⁴⁵ This so-called “consensus analysis” of the Court, potentially gives extra importance to data as in the *LawsAndFamilies Database*.

The assessment of the *same-sex legal recognition consensus* for each of the 26 selected substantive rights and responsibilities (Tables 2.3, 2.4 and 2.5) suggests a core minimum of rights and responsibilities that should at least be made available to same-sex partners (be it through informal cohabitation, through registered partnership, or through civil marriage). The assessment in Sect. 2.3 suggests that a core minimum of rights would consist *at the very least* of those rights for which the *same-sex legal recognition consensus* is relatively high:

- legal protections for times of death (such as: tenancy continuation, wrongful death compensation, inheritance, inheritance tax exemption, 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 your partner or your partner’s parent is in need of care);
- the right to be able to live in the same country (residence permit for partner); and

⁴⁴ ECtHR, 21 July 2015, *Oliari v. Italy*, 18766/11 & 36030/11, par. 174 (see also par. 172, 185). In its later judgment in the case of *Taddeucci & McCall v. Italy*, the ECtHR spoke of “certain essential rights” (30 June 2016, 51362/09, par. 83, 95).

⁴⁵ See for example ECtHR, 19 February 2013, *X and Others v. Austria*, 19010/07, par. 54; and ECtHR, 30 June 2016, *Taddeucci & McCall v. Italy*, 51362/09, par. 88, 97. In the same-sex marriage case of *Schalk & Kopf v. Austria*, the ECtHR (24 June 2010, 30141/04, par. 31-34) based its description of the “state of relevant legislation in Council of Europe member States” implicitly on content of the report *More and more together* (Waaldijk 2005) that had introduced the methods and many of the questions later used for the *LawsAndFamilies Database*.

- the right to take at least *some* responsibility for each other's children (through parental leave, parental authority, or even second parent adoption).

If the European Court of Human Rights (and other European bodies) would adopt such a definition of mandatory *core rights*, it would mean that at the beginning only *some* equality will be required from countries. Of course this will fall short of *full* equality, but this is how other countries mostly have started. A large majority of the countries surveyed, before giving same-sex couples access to registered partnership or marriage, did actually begin with giving a few rights and responsibilities to such couples. And almost all have since then moved on from *core rights* to *more rights* or even to (almost) full equality. The legal recognition of same-sex partners is almost always a process. And that process has to start somewhere.

Before and at the start of this process, countries typically are reluctant to include same-sex couples in the rights and responsibilities that come with different-sex marriage. Given this reluctance or even hostility in such countries, it makes sense for activists, lawmakers and judges to first focus on specific rights (rather than on family status), on rights for bad times (rather than on rights for good times), on partner responsibilities (rather than on partner benefits), on rights for an individual partner (rather than on rights for the couple as a unit), on immigration rights (rather than on parental status), and on partnership registration (rather than on civil marriage). For many countries this will already take a lot of legal and political struggle. However, even small legal steps towards guaranteeing some *core rights* for same-sex couples, can pave the way for more. A beginning legal recognition can already have a positive effect on social attitudes, and on the social legitimacy of same-sex families. And all this in turn can pave the way for more European countries to give *more and more equal rights* to same-sex partners. If we look at the data, this is apparently how it works.

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⁴⁶ See also below, for papers published in the LawsAndFamilies Database (Waaldijk et al. 2017).

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