Taking same-sex partnerships seriously:
European experiences as British perspectives?

Fifth Stonewall Lecture

by Kees Waaldijk

---

1 London, 6 March 2002, organised by the Bar Lesbian and Gay Group, the Lesbian and Gay Lawyers Association, and the Stonewall Group. The text of this lecture aims to represent the legal situation as it was on 6 March 2002. In some footnotes some later developments (up to early 2003) have been included.

2 Senior Lecturer, E.M. Meijers Institute of Legal Studies, Universiteit Leiden, The Netherlands, <c.waaldijk@law.leidenuniv.nl>.

This is the full text of this lecture, that can be found at the author's website (together with an occasionally updated version of the Chronological overview), <www.emmeijers.nl/waaldijk>. A shortened version of this lecture, including the Chronological overview, was published in the journal: International Family Law 2003 (June), p. 84-95, <www.familylaw.co.uk>, and is available at <https://openaccess.leidenuniv.nl/dspace/handle/1887/5229>. The heading of the article in International Family Law failed to mention that it originated as the Fifth Stonewall Lecture, but referred to the Four Jurisdictions Conference in Liverpool, 7-9 February 2003, where the author presented a paper based on this lecture.
CONTENTS
1 Back to 1969
2 Key problems in legislating on same-sex partnerships
   2.1 Opposition
      2.1.1 Three religious objections
      2.1.2 Two radicalist objections
      2.1.3 Three roundabout objections
      2.1.4 How to deal with all these objections?
   2.2 Different types of consideration
      2.2.1 Considerations of law
      2.2.2 Considerations of justice
      2.2.3 Considerations of psychology
      2.2.4 Considerations of legal clarity
      2.2.5 Considerations of strategy
      2.2.6 No considerations of sex
   2.3 Selecting legal consequences
   2.4 Choosing formats
3 Recommending six pieces of legislation
   3.1 Including same-sex cohabitants in existing rules on cohabitation
   3.2 Introducing registered partnership for same-sex couples
   3.3 Prohibiting discrimination on the basis of civil status
   3.4 Allowing transsexuals to change their legal gender
   3.5 Increasing the scope and number of cohabitation rights
   3.6 Making both marriage and registered partnership gender-neutral
4 Conclusion

Annex: Chronological overview of the main legislative steps in the process of legal recognition of homosexuality in European countries
1. Back to 1969

It may be fitting on this occasion to recall the very first time that I did it. It was in June 1969. And I liked it – a lot.

Little did I know, then, how that very month the lesbian, gay and transgender crowd at the Stonewall Inn in New York had the angry courage to stand up against the anti-homosexual oppression by the law and its officers. Little did I know that this act of courageous anger would come to be seen as a turning point in history, as an inspiring symbol for a movement, for many a march, for many an organisation, and even for a series of lectures for serious lawyers, lobbyists and legislators.

Little did I know that sexual acts between men were being decriminalised in West-Germany that year, close on the heels of similar decriminalisations in England and Bulgaria, soon to be followed by Austria, Norway and Croatia. Thus bridging a divide between European countries that had existed since France, Belgium, the Netherlands and Spain had removed homosexual lovemaking from their criminal laws a century and a half earlier. Nor had I any idea that the Dutch government was getting a bill through parliament to lower the age of consent for lesbian and gay sexual acts, down to that applicable to sex between a man and a woman. Nor any idea that in the context of that debate the notion of opening up the institution of marriage to same-sex couples would be raised in the Dutch parliament, for the very first time on 12 February 1970. And that simultaneously, American lawyers were challenging this heterosexual exclusivity of marriage in the courts.

Little did I know that I was gay. I was only ten years old, and had yet to realise how beautiful and charming a man can be.

What did I do for the first time in 1969? I set foot in Britain. And I liked it – a lot. I've been back, many times.

It was in fact on the boat back to 'the continent', July 1969, a few days after the first man on the moon, that I first noticed a man's charm and beauty. It was the waiter serving us in the elegant restaurant on board, where my parents treated me and my brothers and sisters to a nice end-of-holiday meal. I can still remember how he served me smilingly, how he respectfully treated me like a grown up man choosing his dinner, and how I enjoyed being taken seriously. His image was helpful, a few years later, when I realised that gay is the word for me.

Why am I telling you this? I think because that innocent encounter on the boat was typical for a series of events in which things British, helped me to take my own homosexuality, and then homosexuality in general, seriously. So serious, that I nowadays find myself invited as if I were an expert on things homosexual, who could speak in the footsteps of such eminent lawyers as gave the previous Stonewall lectures: Martin Bowley QC, the great example of how to succeed in law - and in changing law - without hiding yourself, and to whom I am deeply grateful for the invitation to speak here tonight, the late Peter Duffy QC, who by taking British injustices to the European courts has helped to improve the situation in more European countries than any lawyer would dream of; Professor Rebecca Bailey-Harris who

---

3 See the appendix: ‘Chronological overview of the main legislative steps in the process of legal recognition of homosexuality in European countries’.

4 Idem.

5 Kamerstukken II (Parliamentary Debates of the Second Chamber) 1969/70, 10347, nr. 5, p. 2.


has forcefully shown that the anti-homosexual aspects of family law are not an exception, but
typical of the current ideological approach in that neglected branch of law; and last but not
least Dr. Robert Wintemute who has written some of the very best comparative legal studies
on homosexual rights, and still finds the time and energy to also get his findings and insights
before the courts and the policymakers that matter, and on the moments that matter. It was
the knowledge that his book on the Legal Recognition of Same-Sex Partnerships would be
published well before tonight, that made me confident enough to accept Martin Bowley's
invitation. Many of tonight's silent references are to that book.

But back to the British elements in the story of my coming out as a gay rights lawyer and
academic. They provide some evidence for my thesis that the jurisdictions of the United
Kingdom now could and should take same-sex love seriously, again.

In fact, taking same-sex love seriously (but then in a negative way) is a peculiarly British
tradition (exported to all former colonies, and only partly matched by the German, Austrian
and Russian empires). There is probably no country in the world, which has had so many
specific anti-homosexual laws and bye-laws as Britain. In some respects this has been
beneficial. It seems that the massive legal – and social – suppression of homosexuality in
Britain has generated more interesting artistic expressions – and political organising – than in
most other countries. Sure, gay novels and gay plays are from time to time written and
produced even in gay-friendly countries like the Netherlands or France. But in Europe there is
probably no literature or theatre with such a general acceptance of the importance of being
serious about homosexuality (if not always being earnest and open about it). I know no
equivalent to a theatre group like the Gay Sweat Shop. When I was 16, I had the good fortune
to see them performing on tour in the Netherlands. The play was called Mister X, a coming
out story in its basic essentials, and I still remember the casual tenderness between two of the
actors (during a discussion in the lobby after the show). The first time I saw two men holding
hands. Naturally, when working in a summer camp in Edinburgh a few years later, I went to
see their play As time goes by, which got me interested in gay history and writing, from
Edward Carpenter, via E.M. Forester's hidden novel Maurice, and via the equally hidden life
stories of Vita Sackville-West and Harold Nicolson, right up to Patrick Gale's wonderful
series of novels that seem to cover almost the complete gay rights agenda (the age of consent
in the Aerodynamics of Porc, parenting in Little bits of baby, queer-bashing in the The Facts
of Life). It may well have induced me further towards becoming one of the students following
the very first course in Lesbian and Gay Studies at the University of Amsterdam. It will be no
surprise that the set text for that course was Jeffrey Weeks's Coming Out, with its emphasis
on the legal oppression of homosexuality in Britain as a motor behind the development of a
homosexual identity and a homosexual movement. And for news, there was Gay News.

When in the late seventies both Britain and myself were not quite as out as now, I quickly
learned how to find out where to buy Gay News in any provincial city. You simply had to ask
in any middle-of-the-road newsagent, where in town Dutch newspapers might be for sale.
You would then be pointed to a off-highstreet bookshop which would sell the famous gay

8 Rebecca Bailey-Harris, ‘Lesbian and Gay Family Values and The Law’, Third Stonewall Lecture, 25
March 1999.

and the Need for an Equality Act 2002’ (Fourth Stonewall Lecture, 4 October 2000), European


11 On the clear footprints of all major European empires on the legal history of homosexuality, see
Waaldijk 2000.

12 Weeks 1977.
newspaper (but never any Dutch daily). It was primarily through odd copies of Gay News so acquired, that I became aware of the many legal aspects of same-sex love, including the challenging of anti-homosexual laws (British laws) in the European Court of Human Rights. Thus the gay angle made my chosen subject, law, far more interesting. And the legal angle made homosexuality more interesting for me, and made it look worthy of serious study. And serious politics. In the international lesbian and gay movement, I was struck by the energy and perseverance of the British members of ILGA. No doubt their emphasis on European lobbying and European litigation was also inspired by thatcherite hopelessness at the national level – but their efforts have benefited people across the continent and beyond. Let me just mention a few names of British activists who have put lesbian and gay rights on the European map: Derek Ogg, Nigel Warner, Peter Ashman, Lisa Power. Without them, lesbian and gay rights would not have become a serious concern of European law. So in a roundabout way British oppression has led to legal protection on a European scale: both in the context of the European Union (Article 13 of the EC Treaty, plus a directive based on Article 13 requiring all member states to prohibit sexual orientation discrimination)\(^\text{13}\) and in the case law of European Court of Human Rights.\(^\text{14}\)

The proud name of the Stonewall Group, the principal organiser of this lecture, sums up this strategy of turning oppression into liberation and non-discrimination. The group's name and numerous activities, also bear witness to the need for international inspiration. Improving the position of lesbian women and gay men is indeed an international task, and fortunately also an international trend, especially in Europe since the late sixties. Since then almost all European countries have improved the legal situation of gays and lesbians.\(^\text{15}\)

The tables in the attached overview also shows that Britain is not the quickest, although its legal progress in this field is very much in line with the European trend. In the words of the title of Martin Bowley's first Stonewall Lecture, \textit{the time has come} for the UK to embark on the final stages of lesbian and gay law reform. And as the standard-sequence evident in the table suggests, these final stages will be those of recognising same-sex partnerships. In fact, the UK has already started on that project. In 1997 the government introduced a ‘concession outside the Immigration Rules’ allowing unmarried long-term cohabiting partners who could not marry each other (for example because they are of the same sex), to apply for leave to enter/remain in the United Kingdom.\(^\text{16}\) The first piece of parliamentary legislation recognising same-sex partners was enacted in 2000 by the Scottish Parliament: \textit{Adults with Incapacity (Scotland) Act 2000}.\(^\text{17}\)


\(^{15}\) See the appendix: ‘Chronological overview of the main legislative steps in the process of legal recognition of homosexuality in European countries’.

\(^{16}\) In 2000 this concession (a major victory resulting from the efforts of the Stonewall Immigration Group) was incorporated into the Immigration Rules (paras 295A-295O).

\(^{17}\) See section 87(2). In 1999 and 2002 some older legislation has been interpreted so as to also cover same-sex cohabitants. See the judgement of the House of Lords in \textit{Fitzpatrick v. Sterling Housing}
2  Key-problems in legislating on same-sex partnerships

For any lawmaker contemplating to legislate on same-sex partnerships there are several key-problems. The four most important are:

- opposition (religious, radicalist and roundabout objections);
- the need to take into account different types of considerations (law, justice, psychology, legal clarity, and strategy);
- the selection of legal consequences;
- the choice of legal formats.

2.1  Opposition

It may be useful to distinguish three types of objections to full or fuller recognition of same-sex partners in law: religious, radicalist and roundabout objections.

2.1.1  Three religious objections

- 'Homosexuality is wrong.'

  The European Values Study provides some insight into the prevalence of this argument in different countries. Some results of this interesting study are brought together in Table 1, below. It shows some correlation with religious beliefs. In the table, the countries have been ranked according to the level of legal recognition of homosexuality reached in each country. This level of legal recognition is most clearly correlated with the acceptance of homosexual neighbours, and – inversely – with the level of belief in ‘sin’. And all that is somewhat correlated to the strength of the notion that ‘homosexuality’ can be ‘justified’, and to a lesser degree to the level of belief in God, and in the religious element of marriage. However, the table also shows that strong religious convictions (as in Finland and Spain, where they are stronger than in Great Britain) do not necessarily stop a country from offering quite extensive legal recognition to gays and lesbians.

  It is difficult to argue with this irrational belief. Fortunately, the number of people rejecting this argument is steadily growing within most religions.

---

The European Values Study provides some insight into the prevalence of this argument in different countries. Some results of this interesting study are brought together in Table 1, below. It shows some correlation with religious beliefs. In the table, the countries have been ranked according to the level of legal recognition of homosexuality reached in each country. This level of legal recognition is most clearly correlated with the acceptance of homosexual neighbours, and – inversely – with the level of belief in ‘sin’. And all that is somewhat correlated to the strength of the notion that ‘homosexuality’ can be ‘justified’, and to a lesser degree to the level of belief in God, and in the religious element of marriage. However, the table also shows that strong religious convictions (as in Finland and Spain, where they are stronger than in Great Britain) do not necessarily stop a country from offering quite extensive legal recognition to gays and lesbians.

It is difficult to argue with this irrational belief. Fortunately, the number of people rejecting this argument is steadily growing within most religions.
Table 1: European Values

<table>
<thead>
<tr>
<th>European Union Member States</th>
<th>Mean answer to question whether homosexuality can always be justified, never, or something in between (10=always, 0=never)</th>
<th>Percentage of population that would not like to have homosexuals as neighbours</th>
<th>Percentage of population believing in God</th>
<th>Percentage of population considering it important to hold a religious service for a marriage</th>
<th>Percentage of population believing in sin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Netherlands</td>
<td>7.8</td>
<td>6</td>
<td>61</td>
<td>46</td>
<td>40</td>
</tr>
<tr>
<td>Denmark</td>
<td>6.6</td>
<td>8</td>
<td>69</td>
<td>63</td>
<td>21</td>
</tr>
<tr>
<td>Sweden</td>
<td>7.7</td>
<td>6</td>
<td>53</td>
<td>62</td>
<td>26</td>
</tr>
<tr>
<td>Belgium</td>
<td>5.2</td>
<td>18</td>
<td>71</td>
<td>68</td>
<td>44</td>
</tr>
<tr>
<td>Finland</td>
<td>4.9</td>
<td>21</td>
<td>83</td>
<td>83</td>
<td>67</td>
</tr>
<tr>
<td>France</td>
<td>5.3</td>
<td>16</td>
<td>62</td>
<td>66</td>
<td>40</td>
</tr>
<tr>
<td>Spain</td>
<td>5.5</td>
<td>16</td>
<td>87</td>
<td>75</td>
<td>51</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>5.9</td>
<td>19</td>
<td>73</td>
<td>66</td>
<td>47</td>
</tr>
<tr>
<td>Germany</td>
<td>5.7</td>
<td>13</td>
<td>68</td>
<td>68</td>
<td>41</td>
</tr>
<tr>
<td>Ireland</td>
<td>4.4</td>
<td>27</td>
<td>96</td>
<td>92</td>
<td>86</td>
</tr>
<tr>
<td>Great Britain</td>
<td>4.9</td>
<td>24</td>
<td>72</td>
<td>69</td>
<td>67</td>
</tr>
<tr>
<td>North. Ireland</td>
<td>4.0</td>
<td>35</td>
<td>93</td>
<td>90</td>
<td>90</td>
</tr>
<tr>
<td>Austria</td>
<td>5.4</td>
<td>25</td>
<td>87</td>
<td>76</td>
<td>61</td>
</tr>
<tr>
<td>Italy</td>
<td>4.8</td>
<td>29</td>
<td>94</td>
<td>85</td>
<td>73</td>
</tr>
<tr>
<td>Portugal</td>
<td>3.2</td>
<td>25</td>
<td>96</td>
<td>89</td>
<td>71</td>
</tr>
<tr>
<td>Greece</td>
<td>3.4</td>
<td>42</td>
<td>94</td>
<td>90</td>
<td>83</td>
</tr>
</tbody>
</table>

- 'Marriage is heterosexually defined.'
  This is indeed a religious, not a legal or linguistic argument: Like any law, a legal definition can always be changed by a competent legislature; and in any language a word can undergo a smaller or bigger change of meaning. It is only religious definitions that are believed to be somewhat unchangeable.

  It should be noted that the heterosexual definition of marriage is closely related to the notion that heterosexuals have an obligation to marry. And that notion is the source of most religious objections to extending some of the legal consequences of marriage to unmarried couples, that is: unmarried different-sex couples. I will come back to this point.

- 'It is in the best interest of a child to be brought up by a woman and a man.'

22 Halman 2001, p. 86.
This is a religious argument, too, not a biological argument: A child can be born to a woman who is not married to, or not living with, a male partner. And quite a number of children are in fact being brought up by one or two women or by one or two men. In theory it could also be a social scientific argument. However, so far there is not enough convincing evidence for it. And even if one day it would be established scientifically that it is more in the interest of a child to be brought up by a woman and a man, than to be brought up by two women or two men, that would not settle the relevant questions. These questions are of a more practical and concrete nature, and include the following: Is child X better off in a same-sex household or in the care of an institution? Is child Y better off as a homeless orphan or as the adoptive child of two men or two women? Is child Z better off living with one single parent, or with that parent and a same-sex partner? And what interest of child Q would be served if only one of its upbringers would be allowed to take full legal and financial responsibility for it?

2.1.2 Two radicalist objections

- 'Marriage is wrong.'

Some radicals, both lesbians and gays and heterosexuals, argue that marriage is not only a heterosexist, but also a sexist institution designed and functioning as an instrument to oppress women, and to seduce individuals to give up their independence. Of course they have a point. And a strong argument can be made in favour of reforming marriage laws so as to be more conducive to full equality of the partners and to less dependency. However, I see no reason why this would make it wrong to give lesbian and gay couples the same access to the (good and bad) legal consequences of marriage as heterosexual couples have. In fact, once exposed to the potentially oppressive aspects of marriage laws, lesbian women and gay men might well be better placed to lend power to the ongoing debate on modernising family law.25

In the background of the radicalist critique of same-sex marriage rights, there seems to be a disappointment about the increasingly conventional, conformist nature of lesbian and gay politics. Have gays and lesbians become more conservative? I don't think so. It is rather so that an ever increasing number of less radical, more conservative gays and lesbians have come out of their closets, and have started to claim their right to do traditional things: serve in the armed forces, choose husband-and-wife-style lifestyles, and take responsibility for the bringing up of children. There is also no need to share the late Peter Duffy's fear, expressed in his Second Stonewall Lecture, for too much assimilation of gays and lesbians:26 in countries where marriage or a marriage-like institution has been opened up to same-sex couples, only a minority of gays and lesbians actually go for registered partnership or marriage.27

---

25 See also Eskridge 2001.
26 Duffy 1997, p. 31.
27 So far the uptake per year (corrected for the size of the population) has been highest in the Netherlands, followed by Iceland and Denmark, and lowest in Sweden, followed by Norway (see Waaldijk 2001, p. 462-464). For France no detailed data are available, but Festy (2001, p. 4) suggests the number of same-sex couples registering a PACS in France is probably lower than that of registrations in the Netherlands. In the Netherlands in 1999 and 2000 there were two same-sex partnership registrations for every 100 different-sex marriages. And in 2002 there were two same-sex marriages and one same-sex partnership registration for every 100 different-sex marriages.
'Recognising more types of couples would make individuals not living in couples more vulnerable and more disadvantaged.'

Again, there may be some truth in the argument. However, the feared marginalising effect can only be small (because the number of same-sex marriages and/or quasi-marriages will always be very small compared to that of different-sex marriages). Rather than an argument to continue the exclusion of gays and lesbians, it should be seen as a reason to make sure that the 'non-coupled' also get a balanced set of advantages and burdens.28

2.1.3 Three roundabout objections

'Recognition of lesbian and gay couples would antagonise religious minorities.'

Without actually – or openly – supporting any of the religious objections just mentioned, many commentators have argued that to give full legal recognition to same-sex couples – notably by opening up marriage – would be repugnant to some religious minorities. It might even be so repugnant to them, that it would shock their belief in democracy and the rule of law, and possibly cause them to react irresponsibly.29 There is not much evidence of that having happened in Europe. In the Netherlands last year, it has been reported in the press that one farmer justified his refusal to carry out certain Foot & Mouth Disease requirements, by being highly indignant about the new gay marriages. Also the refusal by some individual registrars in the Netherlands to carry out their duties with respect to same-sex weddings, is an indication how strong feelings can be.30 In the Netherlands there were just a few tiny incidents. In Britain (where the road to same-sex marriage has not yet been paved by extensive legal recognition of same-sex cohabitation, nor by a decade of anti-discrimination legislation explicitly covering sexual orientation; and where religious opinions are somewhat stronger, especially the belief in the notion of 'sin' (see Table 1, above) it could conceivably be worse.

'Legal recognition of lesbian and gay couples at national level would not be recognised abroad.'

This argument, which was a dominant argument in the Dutch parliamentary debate about the opening up of marriage to same-sex couples,31 has some truth to it, but no relevance, so it can quite easily be countered: If a legally recognised same-sex couple from one country would travel to a country which would refuse to recognise that recognition, they would not be worse off than if they had not been legally recognised in their own country at all. So the non-recognition to be expected from still a large number of countries, should not be used as an argument to withhold some form of recognition at national level. It should be noted that a growing number of countries has been introducing some forms of legal recognition of same-sex couples.32 This would

28 Bailey-Harris (1999, p. 3) is not convinced by this argument either.
29 This was the main argument of the Dutch government when it was still opposing the idea of opening up civil marriage to same-sex couples.
30 The Dutch Equal Treatment Commission has ruled that a local authority should respect any religious objections of individual registrars against same-sex marriages, as long as the local authority has enough registrars available without such conscientious objections (opinions of 15 March 2002, nr. 02-25 and 02-26, <www.cgb.nl>).
31 See Waaldijk 2001.
make these countries more inclined to also recognise other forms of recognition than those adopted by themselves.

Of course, lesbian and gay couples opting for registered partnership or same-sex marriage, should be made aware that certain foreign authorities might not recognise their legal status. This will not come as a surprise to them!

• 'Recognition of couples of close relatives is more urgent.'

It is difficult to assess whether this is true, or to what degree this argument is only being used to side-track the debate. There certainly is not a vocal interest group representing the neglected interests of siblings living together, or of adult children living with a parent. Yet, the argument surfaces again and again in response to demands for gay and lesbian partner rights. I don't see why the unresearched situation of close relatives should be used as an argument to slow down legislation recognising same-sex partnerships. Simultaneously to any such legislation, the (financial) situation of cohabiting siblings and parent-child households could be investigated; and probably cohabiting close relatives should not be excluded from most rights given to other unmarried cohabitants.

2.1.4 How to deal with all these objections?

Religious objections per se should have no place in a secular democracy where church and state are separated. I am aware that in the United Kingdom the separation of church and state has never been quite complete. Nevertheless, I would imagine that in this country, too, religious arguments as such can never be accepted as decisive in law or in politics. But in two ways religious objections are still relevant for the debate on same-sex partnerships. Firstly, a number of individual members of parliament would explicitly or implicitly base their political opinions on their religious beliefs. Therefore, it will be politically wise to take account of religious objections when forging a majority for any piece of legislation. Secondly, there is the roundabout objection. In a pluralist (perhaps even multicultural) society it is a good thing to preserve some degree of social cohesion. Therefore it may be wise to refrain from antagonising certain religious minorities too much at once. Those minorities (and these include the more conservative sections of all major denominations in the UK) will need time to get used to the idea that they are now living in a society where Parliament is taking steps to end all forms of discrimination against the lesbian and gay minority.

For me this is the main reason why I would not advocate – in Britain during this decade – the opening up to same-sex couples of civil marriage itself. I think in this respect Britain is indeed different from countries like the Netherlands, Denmark, Sweden and Norway, where there has been a much longer tradition of equality in the criminal law, of specific legislation against sexual orientation discrimination, and of gradually recognising the rights of same-sex couples and their children. And as I have shown above, for the time being the British people are still more likely to think about their homosexual neighbours in terms of 'sin'.

At the same time, I don't think any religious objections should stand in the way of extending to same-sex partners and their children, virtually all of the legal consequences of marriage. This approach of equality of rights first, equality of status later, would give those with strong religious feelings some time to get used to the idea that the law is now taking same-sex

---

33 Wintemute 2000, p. 608.
34 See the appendix: ‘Chronological overview of the main legislative steps in the process of legal recognition of homosexuality in European countries’.
partnerships seriously. It would also give some time to lesbian, gay and heterosexual radicalists, to get used to the idea that gays and lesbians are picking up most of the legal benefits and burdens of the supposedly heterosexist institution of marriage, and to shift their energy towards the debate of reforming the substance of current family law (rather than restricting access to it).

The objections with respect to the position of single people and of close relatives living in de facto partnerships, can be more easily accommodated. For them some reform of next-of-kin rules, of inheritance tax, and of pension schemes, seems appropriate. With respect to pensions, the principle should be that any employee should be able to decide who (e.g. two sisters, or the employee herself, or a charity) should eventually profit from the premiums paid in for a potential survivor's pension. A couple of close relatives should be able to benefit from almost all rights of cohabitants. I fear that including such couples in any form of quasi-marriage, would complicate things too much, both politically and legally.

2.2 Different types of consideration

Already in my assessment of the various objections, I have tried to show that different kinds of consideration will have to be taken into account. Perhaps they could be distinguished in considerations of law, of justice, of psychology, of legal clarity, and of strategy.

2.2.1 Considerations of law

So far international human rights law does not require that the ban on same-sex marriages be lifted. Presumably, this means that also certain legal consequences of marriage can still be denied to same-sex couples. However, it would be difficult to make a list of those ‘deniable’ consequences. For example, article 14 of the European Convention on Human Rights requires that there is no unjustified discrimination with regard to the right to respect for private and family life and for the home (article 8), and with regard to the right to the enjoyment of property (article 1 of the First Protocol). Therefore almost all legal consequences of marriage could be brought under the prohibition of article 14. Surely, it will be a while before the European Court of Human Rights will have to decide all these issues, and it may well take the Court a long time to come to the conclusion that most of the legal consequences of marriages should be made available to same-sex couples, too. But it is a fact that many enlightened highest courts (including those in Canada, South Africa, the state of Vermont, Germany, and the Netherlands) have already indicated that it is or could be unlawful to continue excluding gays and lesbians from benefits that are available for married different-sex couples.

35 See for example UN Human Rights Committee, Views of 17 July 2002 (Joslin et al. v. New Zealand, CCPR/C/75/D/902/1999, www.unhchr.ch>Treaty Bodies Database>Joslin). It was held that the exclusion of same-sex couples from marriage does not violate art. 23 of the International Covenant on Civil and Political Rights, nor any other article of that Covenant.
37 Constitutional Court of South Africa 2 December 1999, NCGLE v. Minister of Home Affairs, 2000 (2) SA 1.
40 Hoge Raad der Nederlanden 19 October 1990, Nederlandse Jurisprudentie 1992, nr. 119.
It would seem a question of time, before a European, Scottish or English court will reach such a conclusion. Apart from the question whether it is lawful to exclude same-sex partners from marriage and/or from specific legal consequences of marriage, there is the question whether it is lawful (in the light of international and European law) to exclude same-sex cohabitants from specific legal consequences that are made available to different-sex cohabitants. A first case in which this question is properly presented, is currently before the European Court of Human Rights. Finally there is not much hope that the European Court of Human Rights would soon require member states to extend many of the benefits and burdens of marriage to unmarried different-sex cohabitants. The Court takes the position that this question falls within the margin of appreciation of the member states. In the absence of the possibility to marry, same-sex couples may have a better case.

2.2.2 Considerations of justice

However, a responsible legislature is not only guided by the minimalist requirements of law, but also by the wider demands of justice. In a democracy laws should be enacted on behalf of all, and for the benefit of all. In a secular state religious traditions are no justification to exclude certain citizens from the enjoyment of rights given to the majority of equally loving and committed citizens. Similarly, it is utterly unjust to deny certain citizens the possibility to carry the burdens and duties that for other citizens are linked to love and partnership.

2.2.3 Considerations of psychology

The discussion is not only about rights and duties, benefits and burdens. Those people that do marry, do not only do so to avail themselves of the legal consequences of marriage. At least as important for many couples seems to be the opportunity, provided by the law, to publicly show affection, commitment, joy and pride. Weddings (whether in church or at the registry) are not only legal events, but also public social occasions with deep psychological meaning to those involved. They can indeed be characterised as manifestations of pride! Therefore, the exclusion of same-sex couples from marriage cannot simply be remedied by making the legal consequences available to them. Just like many heterosexuals, many lesbian and gay couples will also want to publicly celebrate their affection, commitment, joy and pride. As long as the state is providing this symbolic service to heterosexuals, it should make a similar registration procedure, with a similar weight, available to homosexuals. This is also important for other gays and lesbians than the ones directly involved, especially those still finding it difficult to come out. They would greatly benefit from the clear message that the state cares as much about same-sex love as it does about heterosexual love. The importance of such a message for the young of any sexual orientation should not be underestimated.

2.2.4 Considerations of legal clarity

43 For another view, see Bailey-Harris 1999, p. 6.
When legislating on same-sex partnerships, it may be tempting to reinvent or improve the wheel. This temptation should be resisted. The problem that needs solving, has been caused by the exclusion of same-sex partners from marriage. For political reasons, and because of respect for certain religious concerns, solving the problem by simply lifting the ban, has not been possible in any European country, and will not soon be possible in Scotland, England and Wales either. Even in the Netherlands and Belgium, it proved necessary to first burden the legislative system with something else than the familiar notions of marriage or cohabitation. From a perspective of legislative clarity that is bad enough as it is. In the Scandinavian countries the lawmakers have been wise. Simple bills were drafted stating who can enter into a registered partnership, then stating that all the rules on getting into and out of a marriage apply, as well as all legal consequences of marriage, and then listing a few exceptions to that general rule.44 The Dutch lawmakers unwise have chosen to draft two bills on registered partnership: one contained the (in some respects different) way for getting into it, plus the (somewhat different) ways to get out of it, plus some of the legal consequences of registered partnership;45 and the other bill provided for most of the legal consequences by amending some 100 existing statutes (inserting the words 'or registered partner' after every mention of 'spouse' etc.).46 The idea was to amend all statutes which attached legal consequences to marriage, but, naturally, some were forgotten. Some of the mistakes and some of the smaller differences between marriage and registered partnership were later repaired by subsequent legislation. Separate statutory instruments and numerous bylaws were needed to deal with the lesser forms of written law. The French and the Germans followed the bad Dutch example (without even aiming to cover most statutory provisions relating to marriage).47 The difficulties thus created for lawyers to fully grasp the legislation, and for ordinary citizens to get satisfactory legal advice, should not be underestimated.

The lesson from this for the lawmakers in the United Kingdom should be evident. Registered partnership legislation can hardly be expected to be a jewel on the statute book, but it is better to make it like Scandinavian glass, reflecting the image of marriage, than like Dutch clay or like French or German pieces of stone. And I might add in this context that the bills introduced in Westminster by Jane Griffith MP48 and by Lord Lester49 seem to be on the stony side.

2.2.5 Considerations of strategy

In Britain, too, it will be a long, complicated and uncertain route from equality as a principle of justice to equality being fully embodied in law. Of course in each jurisdiction some new and different problems will arise, but some general lessons can be learned from other jurisdictions. European experiences so far suggest the wisdom of an incremental approach. After all, in the face of the almost universal strong opposition to homosexual law reform, some compromises will need to be made. At an earlier occasion, I have tried to formulate this as the law of small change: "Any legislative change advancing the recognition and acceptance

---

44 For Denmark see Lund-Andersen 2001 and for Sweden see Ytterberg 2001.
45 This became the Registered Partnership Act of 5 July 1997 (Staatsblad 1997, nr. 324).
46 This became the Registered Partnership Adjustment Act of 17 December 1997 (Staatsblad 1997, nr. 660).
48 Relationships (Civil Registration) Bill introduced in the House of Commons on 24 October 2001 (Bill 36).
of homosexuality will only be enacted, if that change is either perceived as small, or if that change is sufficiently reduced in impact by some accompanying legislative “small change” that reinforces the condemnation of homosexuality. This suggests that the way forward in Britain, building on progress in the fields of criminal and anti-discrimination law, will go through various stages. After the incidental recognition of cohabiting same-sex couples for certain purposes (see paragraph 1, above), the time should be right now for including same-sex couples in all legislation that gives certain rights or duties to couples cohabiting ‘as husband and wife’. That in turn would pave the way for registered partnership legislation (if politically necessary perhaps first with the exclusion of some legal consequences).

2.2.6 No considerations of sex

At the end of this list of relevant considerations I would suggest that sexuality should not be a consideration. Whether two partners actually have sex with each other should be of no legal interest at all. In fact, that is how it is with marriage and cohabitation: non-sexual partners are allowed to marry each other, or to live ‘as husband and wife’ (the latter expression does not need to be understood in a sexual sense). That should not be different for same-sex partners. Whether or not their relationship is ‘conjugal’, ‘physical’ or what other euphemism one might choose, should not be relevant for their partnership rights. For me as a foreigner it has been shocking to be reminded from time to time that sexual intercourse is still an element of English and Scottish family law. I would only hope that the practical problems of prying and the principle of privacy will be rendering it a dead letter, soon.

2.3 Selecting legal consequences

By far the most important key-decision to be taken in any project to improve the legal situation of same-sex partners, is that about legal consequences. Which of the legal consequences of marriage can and should now be made available? It is also the main point where political ideals and political reality clash, head on. In fact it is simple: the more legal consequences are involved in any piece of partnership legislation, the greater the political difficulty will be to get that legislation approved. Clearly it is the task of the advocates of equality, to push for legislation as comprehensive as would be politically possible.

In this context it is important to point out that marriage has many types of consequences, positive and negative, material and non-material, based in private law and based in public law. It is a fallacy to think that partnership rights are just a question of family law. Many other areas of public and private law also attach legal consequences to marriage and cohabitation. In the daily life of many couples the consequences outside the domain of family law (tax, social

52 In the gays-in-the-military cases the European Court of Human Rights has shown itself very critical of questioning individuals on their (non-criminal) sexual activity (Smith & Grady v. U.K. and Lustig-Prean & Beckett v. U.K., 27 September 1999).
53 In the report Cohabitation. The case for clear law. Proposals for reform, of The Law Society (July 2002) the emphasis rightly is on the legal consequences of cohabitation and registered partnership.
security, immigration) are often much more important than the classical issues of family law. In my experience many lawyers need to be reminded of this, regularly. I will come back to this below, when formulating my more precise recommendations for British law-makers.

2.4 Choosing formats

The last, and indeed the least, of the key-problems in this field is that of choosing formats for legislative recognition of same-sex partnerships. Equality of rights is far more important than equality of status.\(^{54}\) It would be very wrong to make same-sex couples wait longer for any substantive rights because first a fight about their status has to be won.

So far the law of Scotland, England and Wales provides two formats for couples: formal marriage and informal (de facto) cohabitation. In many other European countries a third format has been invented: registered partnership. In fact a whole range of subtypes of this third format has been developed in different countries. They are all based on the marriage model, i.e. a public status resulting from the public registration of the mutually agreed partnership of two persons. There are three basic types:\(^{55}\)

- quasi-marriage (with virtually the same legal consequences as in the case of marriage, e.g. in the Nordic countries, in the Netherlands, and in Nova Scotia and Quebec);
- semi-marriage (with only a limited selection of the consequences of marriage; e.g. in France and Germany, in Hawaii and California);
- pseudo-marriage (a mere registration carrying no, or hardly any, legal consequences; e.g. in various towns in the Netherlands and Germany before the national partnership legislation was enacted, in some Spanish and British cities, and in Belgium, where the national registered partnership scheme has only a few legal consequences, notably with respect to the common residence and to costs and debts incurred for the household or for the children\(^{56}\)).

As always, it would be wise to keep the law as simple as possible. It would be counterproductive to create yet another format, or to engineer a hybrid scheme which would be dependent on the couple actually living together and having formally registered their partnership.\(^{57}\)

The closer a registered partnership scheme is based on the marriage model, the better the principle of equality will be served, and the easier it will be for all concerned: for partners considering registration, for lawyers advising on it, for third parties having to deal with it, for courts having to adjudicate on it, for foreign authorities considering recognising it, and for lawmakers having to legislate on it. I would therefore suggest that the legislatures in the United Kingdom, apart from extending cohabitation rights to same-sex partners, introduce

---

\(^{54}\) Bailey-Harris 1999, p. 6.

\(^{55}\) Different classifications (of registered and non-registered partnership formats) are possible, see Forder 2000, p. 375, and Wintemute 2001, p. 763-767.

\(^{56}\) See De Schutter & Weyembergh 2001, p. 466.

\(^{57}\) This seems to be the case in several Spanish regions; see Jaurena i Salas 2001, p. 507-508, and Pérez Cánovas 2001, p. 501-504.
some form of registered partnership that is as close to traditional marriage as is politically possible. And this should be so with respect to:

- the conditions of entry;
- the formalities of entry;
- the legal consequences;
- the ways of ending it.

3  Recommending six pieces of legislation

I respectfully submit that the way forward in Scotland, England and Wales towards full equality in the complex field of partnership law requires six pieces of legislation. I would categorise this legislative agenda under three headings: Now, Soon, Later:

**Now**
Including same-sex cohabitants in existing rules on cohabitation

**Soon**
Introducing registered partnership for same-sex couples
Prohibiting discrimination on the basis of civil status
Allowing transsexuals to change their legal gender
Increasing the scope and number of cohabitation rights

**Later**
Making both marriage and registered partnership gender-neutral

3.1  Including same-sex cohabitants in the existing rules on cohabitation

What is needed now, is legislation to include same-sex couples in all existing written rules that confer rights or duties, benefits or burdens on informally cohabiting partners. Most easily and speedily, this could be done by one omnibus bill, like what happened in Sweden,\(^{58}\) in Norway,\(^{59}\) in Hungary,\(^{60}\) in France,\(^{61}\) and at federal and provincial levels in Canada.\(^{62}\) In the Netherlands the same result was achieved by not excluding same-sex couples wherever

---

\(^{58}\) Homosexual Cohabitees Act, SFS 1987:813.
\(^{59}\) Joint Household Act of 4 July 1991, Act No. 45
\(^{60}\) Art. 685/A of the Civil Code, introduced by Act No. 42 of 1996.
\(^{61}\) The law of 15 November 1999 (no. 99-944) that introduced the Pacte Civil de Solidarité, also extended the definition of *concubinage* to cover same-sex cohabitants.
cohabitation recognition was introduced since the late 1970s. The Dutch approach is clearly too late for England, Wales and Scotland. A statute by statute approach (as now seems to be the policy in Scotland) would be unnecessarily cumbersome, and slow. The risk would then be, that before all legislation will have been properly amended, the European Court of Human Rights (or indeed a court in the UK) will have ruled that discrimination between different-sex and same-sex cohabitants is unjustifiable under article 14 of the European Convention on Human Rights (in conjunction with article 8 of the Convention – respect for home and private life – or article 1 of the First Protocol to the Convention – peaceful enjoyment of property). In light of recent judgements of the Court in Strasbourg such a ruling could be given in a pending Austrian case on the right to succession in the tenancy of one's deceased partner. The legislation could be very simple, and would easily gain cross-party support in the parliaments of the UK. There is no need to invent new constructions or criteria. All that work has been done when different-sex cohabitants got their legislative recognition. One bill (perhaps with a schedule attached) should be enough now.

For Scotland, England and Wales such omnibus legislation would have to cover mostly material consequences of cohabitation (notably in tax law, social security, and with respect to damages for wrongful death, plus the issue of inheritance-provision for family and dependants). There are also some non-material consequences that are so far only fully available to different-sex couples, and which need to be extended to same-sex couples (notably tenancy succession, next-of-kin recognition for medical purposes, and protection in relation to domestic violence).

Ideally some parenting issues should also be made fully gender-neutral in case of informal cohabitation, but that may prove rather controversial. It should not be too difficult to lift the (Scottish) ban on fostering by cohabiting same-sex couples. More problematic might be a change with respect to medically assisted insemination. Perhaps the current condition with respect to the ‘need for a father’ could be replaced by a less exclusive condition.

### 3.2 Introducing registered partnership for same-sex couples

---

63 Unregistered cohabitation (both for same-sex and different-sex couples) was first recognised in Dutch legislation in a Law of 21 June 1979 (amending art. 7A:1623h of the Civil Code, with respect to rent law), followed by a Law of 17 December 1980 on inheritance tax due by the surviving partner from a ‘joint household’. Since then many more laws have been amended so as to recognise cohabitation for a multitude of purposes, including social security, tax, citizenship, and parental authority.

64 Smith & Grady v. U.K. and Lustig-Prean & Beckett v. U.K., 27 September 1999; Salgueiro da Silva Mouta v. Portugal, 21 December 1999; and S.L. v. Austria and L. & V. v. Austria, 9 January 2003. In the case of L. & V. the Court reiterated that just ‘like differences based on sex (…), differences based on sexual orientation require particularly serious reasons by way of justification’ (par. 45). On 10 May 2001 the European Court of Human Rights declared inadmissible the case of Mata Estevez v. Spain, but this was a case where all same-sex cohabitants were treated differently from a very small group of unmarried different-sex partners, namely those who were unable to marry (again) before the divorce laws were passed in 1981.

65 Karner v. Austria (Application No. 40016/98). See Wintemute 2001, p. 727. A very similar case was recently decided by the English Court of Appeal (Mendoza v. Ghaidan [2002] EWCA Civ 1533); it was held that in light of the European Convention on Human Rights the phrase ‘living together as husband and wife’ must be interpreted as including same-sex couples.

66 Bailey-Harris 1999, p. 15.
After that first, relatively easy bit of legislation, there are four (related) pieces of legislation, that would require the attention of the British and Scottish Parliaments soon. Each piece could be enacted independently from the other three (and in theory even before the above described inclusion of same-sex partners in all rules on cohabitation). However, they would strengthen each other, so one would hope that they would all be enacted in Westminster and Hollyrood within the next three or four years. However, it is important to distinguish them clearly. Each will cause its own brand of controversy.

After the inclusion of same-sex couples in existing cohabitation legislation, there will still be a large number of major rights and duties, benefits and burdens, which in Britain are only available to different-sex partners. They can avail themselves of these things by getting married. Yet, hardly any item of this exclusively heterosexual list, has anything to do with any intrinsic difference between same-sex couples and different-sex couples (arguably, only the rules on paternity can be related to such an intrinsic difference). That insight has prompted first the Danish legislature in 1989, and then their colleagues in Norway, Sweden, Iceland, the Netherlands, Finland, the state of Vermont, the provinces of Nova Scotia and Quebec, to invent a form of quasi-marriage. In Europe these new, quasi-marital institutions of family law are mostly called 'registered partnerships'; in North America the term 'civil unions' seems to be preferred. The prime reason for introducing these new institutions was and is the desire to end the (discriminatory) exclusion of same-sex couples from many of the legal consequences of marriage.

In other countries lawmakers have chosen not for a form of quasi-marriage, but for a form of semi-marriage. This is what has happened in several Spanish regions, in France, Germany, and in Hawaii and California. A semi-marriage (like the French PACS) only entails a selection of the legal consequences of marriage. But as the Dutch saying goes, it is a better to have half an egg, than to have an empty shell. (This is not to say that the empty shells of pseudo-marriage, like the one that recently became available in London, following the example of quite of number of Dutch, German and Spanish cities, are useless. They can be useful on two symbolic levels: that of the partners involved, who appreciate the chance to show their affection, commitment, joy and pride in public, and at the wider political level as one way to pave the way for a more substantial form of partnership recognition.)

In theory, an alternative to the route of registered partnership legislation, would be a more comprehensive recognition of informal cohabitation. In my opinion that would not be a recommendable route. Firstly, a system based on the occurrence of a fact, rather than the fulfilling of a formality, would provide considerably less legal certainty to the partners involved, and to any third parties. Secondly, that lack of legal certainty might make legislators very reluctant to attach the more far-reaching legal consequences of formal marriage to the informal fact of living together. Thirdly, the automatic recognition of informal cohabitation

67 Law on Registered Partnership of 7 June 1989, nr. 372.
68 See Wintemute 2001, p. 761 and 775-778.
70 Law no. 99-944 of 15 November 1999 introducing the Pacte Civil de Solidarité.
71 Law of 16 February 2001 (9 Bundesgesetzblatt 266) introducing Lebenspartnerschaft.
72 See Wintemute 2001, p. 779.
73 In Canada, where this route has been taken by federal and provincial parliaments, there are already problems with the constitutionality of such ascription of status and unchosen burdens (see Lahey 2001, p. 269).
would deprive the partners of their freedom of choice (unless the legislation would provide for an opt-out system). And finally, such an automatic recognition would not satisfy the evident desire among certain same-sex couples to go through a public, legal and symbolic ceremony akin to the marriage ceremony.

For all those reasons, and for the considerations of law, justice, psychology and legal clarity discussed above, I would strongly recommend that the jurisdictions of the United Kingdom model their registered partnership both on the form of marriage (i.e. same conditions, same procedures), and on the substance of marriage. That would mean that registered partnership would have all the legal consequences attached to cohabitation (see above), plus most other consequences of marriage, including the rules on:

- joint property, alimony and inheritance;
- immigration, citizenship and surname;
- tax, social security and pensions;
- fostering, adoption and parental rights and responsibilities.

And finally, I think there are seven good reasons to exclude different-sex couples from partnership registration (here again it would be much better to follow the Scandinavian same-sex-only examples than the Dutch or French example):

- If it would be proposed to also admit different-sex couples to registered partnership, there would be loud opposition from many religiously minded people and organisations, fearing that this would encourage many heterosexual couples not to get properly married. Such opposition would endanger the adoption of the registered partnership bill, and thus postpone a much needed improvement in the legal position of lesbian women and gay men. In fact in the Netherlands the Christian Democrats (the main opposition party during the last eight years) voted against the legislation on registered partnership not because they were against greater equality for same-sex couples, but because they were against providing different-sex couples with an unnecessary alternative to marriage.

- If it would be proposed to also admit different-sex couples to registered partnership, there would be a lot of pressure to make the legal consequences of registered partnership much lighter than those of marriage, so as to appeal to heterosexuals who do not want to marry. This would run counter to the justified desire of gay and lesbian couples to gain access to virtually all legal consequences of marriage, not just to a light selection of those. It seems that this mechanism has played a role in the debates leading up to the French PACS legislation, which covers different-sex couples but affect only a limited number of legal consequences.

- If registered partnership is very much like marriage, only very few heterosexuals would opt for it.74

- If it would be proposed to also admit different-sex couples to registered partnership, there might well be some pressure to distinguish between the legal consequences for same-sex

---

74 In the Netherlands, in 1998, 1999 and 2000 the number of different-sex partnership registrations was even lower than that of same-sex registrations (less than two for every 100 new different-sex marriages). From 2001 the number of same-sex partnerships went down because of the opening up of marriage. Simultaneous the number of different-sex registrations went up, but this was because an oddity in the Dutch legislation meant that married couples seeking a divorce could avoid having to go to court, by first converting their marriage into a registered partnership (which can be dissolved by mutual agreement, signed by a lawyer). For numbers see Waaldijk 2001, p. 463.
registered partners and different-sex registered partners (as has happened in the Catalonia region of Spain). This would make the law very confusing.

- If different-sex couples would be admitted to registered partnership, a separate procedure would be needed to allow such couples to convert their registered partnership into a marriage (or even vice versa).
- It is not discriminatory to exclude different-sex couples from registered partnership, as long as registered partnership is not more advantageous than marriage.
- If different-sex couples would be admitted to registered partnership, and same-sex couples not yet to marriage, the symbolic inequality between homosexuals and heterosexuals would be reinforced, rather than lessened.

All legitimate interests of different-sex couples can be met by adequate legislation on marriage and on informal cohabitation. There is no reason to include them in registered partnership legislation.

3.3 Prohibiting discrimination on the basis of civil status

It is not only legislation that attaches legal relevance to marriage or cohabitation. Many employers, pension funds, service providers, hospitals, administrative authorities, etc. also quite frequently treat people differently depending on whether someone has a partner, on what the gender of that partner is, and/or on what the legal status of the relationship is.

It is all too easy to forget this dimension of the problem. If one were to introduce registered partnership without a prohibition of civil status discrimination, many employers and service providers might continue to exclude (now registered) same-sex partners from certain spousal benefits. Probably only some civil status discrimination in the employment field would be covered by the prohibition on indirect sexual orientation discrimination (as required by the EC’s Framework Directive, which does not cover direct discrimination on the ground of civil status).

A prohibition of civil status discrimination would outlaw discrimination between married and registered partners, between married and unmarried/unregistered partners, and between registered and unregistered/unmarried (but the latter only if being registered as partner would be deemed to be a civil status, as is the case in the Netherlands, but not in France).

3.4 Allowing transsexuals to change their legal gender

---

75 Jaurena i Salas 2001.
77 Such prohibitions exist in Belgium (Loi tendant à lutter contre la discrimination, entering into force in 2003), Ireland (Employment Equality Act 1998 and Equal Status Act 2000), in the Netherlands (General Equal Treatment Act of 1994). Similarly, in Luxembourg (Penal Code) and France (Penal Code and Labour Code) discrimination on the ground of 'family situation' is prohibited, and in Finland (Penal Code and Employment Contracts Act) discrimination on the ground of 'family relations'.
78 In the Netherlands there is no legal definition of 'civil status', but during the passage of the registered partnership bill, it was stated by the government that being registered as partner is a new civil status (see Kamerstukken II (Parliamentary Papers of the Second Chamber) 1996/97, 23761, nr. 11, p. 3). For France, see Borrillo 2001, p. 475.
For many transsexuals the impossibility to change their legal gender, also severely limits their possibilities to marry. Opening up marriage to same-sex couples would of course solve this problem. However, that option seems far too futuristic for Britain at the moment. A much quicker solution to give transsexuals the full enjoyment of their right to marry, would be the one adopted in many other European countries: the possibility to change one's legal gender.\textsuperscript{79} I would suppose that such a solution would be much more welcome to most transsexuals, and also far less controversial in British politics than the opening up of marriage.

It would of course be possible that a transsexual is married already when he or she wants to have a change of legal gender. In such a situation the transsexual and his or her partner should be given the option of either dissolving the marriage, or of converting it into a registered partnership (and vice versa).

3.5 \textit{Increasing the scope and number of cohabitation rights}

There are several reasons why a number of rights and duties should not only be attached to marriage (and registered partnership) but also to informal cohabitation. Such reasons include the protection of weaker partners, the protection of children, and the wish to eliminate unjustified discrimination between married and unmarried individuals. However, for reasons of legal certainty, privacy and freedom of choice, it may be wrong to attach \textit{all} legal consequences of marriage to \textit{all} informal cohabitation. There are two solutions out of this dilemma. Either a legal system can choose to link some of the heavier legal consequences (such as comprehensive joint property, alimony-after-divorce, and intestate inheritance) exclusively to marriage and registered partnership. Or a legal system can choose to extend such legal consequences to informal cohabitants who have not opted out of them.\textsuperscript{80} Such opt-out systems are in force in some Scandinavian countries and in Canada.\textsuperscript{81} Most European jurisdictions, on the other hand, have kept a number of important rights and duties the exclusive domain of marriage (and registered partnership).

Whatever choice will be eventually made in any jurisdiction, at least some legal consequences of marriage should be extended to cohabitants of any gender-combination:

- The protection of children is a very good reason to extend the possibilities of fostering and adoption, and indeed of any set of parental rights and duties, to partners who are informally cohabiting. The best interest of a child, as assessed by the competent court or authority, is never depending on the mere formality of the civil status of the two adults, or on their gender(s), who are bringing the child up or who could bring it up.\textsuperscript{82}

- The protection of weaker partners is a very good reason to extend any rules on next-of-kin to include the informal cohabitant of the person concerned. The best interest of an incapacitated and/or hospitalised person can almost always be best assessed by the person he or she has been cohabiting with.

\textsuperscript{79} Now the European Court of Human Rights requires such legislation; see its judgements of 11 July 2002 in the cases of \textit{Christine Goodwin v. UK} and \textit{I. v. UK}.

\textsuperscript{80} An opt-out approach has been advocated for Britain by Rebecca Bailey-Harris in her Stonewall Lecture (1999, p. 6-19).

\textsuperscript{81} See Forder 2000 and Lahey 2001.

\textsuperscript{82} See Bailey-Harris 1999, p. 12. In 2002 the English ban on adoption by an unmarried couple (same-sex or different-sex) was lifted by the Adoption and Children Act 2002 (Chapter 38).
These and similar measures, if enacted before the introduction of some form of registered partnership, may also serve another purpose. They reduce the number of legal consequences that will need to be considered when the lawmakers finally come round to introducing registered partnership.

3.6 Making both marriage and registered partnership gender-neutral

After all that legislation, there would probably still be a demand for fuller equality, now including equality of status. And at least the considerations of justice shall require that this demand will be met by the opening up of civil marriage to same-sex couples. However, before that could successfully be considered in the UK, probably marriage law should first be made more secular, less sexual, and less gendered.

When? Difficult to predict. But it may help to realise how much has changed in public and political opinion about homosexuality since the late 1980s (introduction of Section 28),\(^{83}\) or since the late 1970s (gay sex still a criminal offence in large parts of the UK). If opinion keeps changing at a similar speed (and that can be expected, given the quite irrevocable ever increasing degree of coming out), the time for same-sex marriages in Britain could come within decades, rather than within years or within centuries. In his Stonewall Lecture Robert Wintemute has predicted this for the year 2025.\(^{84}\) That seems more or less in line with the Dutch and Belgian time scales: in the Netherlands marriage was opened up to same-sex couples 30 years after the equalisation of the ages of consent in 1971,\(^{85}\) and the Belgians seem set to do so some 18 years after they equalised their ages of consent in 1985.\(^{86}\) But why would the Brits be slower than the Belgians? Perhaps in Scotland, England and Wales the opening up of marriage could be part of the golden jubilee of the Stonewall uprising in 2019.

Only after the opening up of marriage to same-sex couples (and consequently also of registered partnership to different-sex couples) would it make sense to increase the difference in legal consequences between these two institutions. In a pluralistic society there may well be a demand for several forms of formalised relationships, available to all.

4 Conclusion

I have come to the end of my talk. I have endeavoured to encourage you to take same-sex partnerships seriously in law, and to help create useful images – in law and beyond – for the discovering eyes of the ten-year-old who needs to know that his or her feelings will be taken seriously, too. In short, this means twelve things:

- aiming for full equality;

---

83 Section 28 of the Local Government Act 1988 introduced the words ‘homosexuality as a pretended family relationship’.
84 Wintemute 2000, p. 626.
85 The Dutch law opening up marriage to persons of the same sex, of 21 December 2000 (Staatsblad 2001, nr. 9), entered into force on 1 April 2001; for an English translation and additional information, see <www.emmeijers.nl/waaldijk>.
86 The Belgian law opening up marriage to persons of the same sex, of 13 February 2003 (Moniteur Belge, 28 February 2003, Ed. 3, p. 9880), will enter into force on 1 June 2003.
realising that not just one law is needed, but a whole series of legislative measures;
• putting the legal consequences first: equality of rights is far more important than equality
  of status;
• starting with a simple bill to extend all existing cohabitation rights to same-sex
  cohabitants;
• then proposing a type of registered partnership that in all but name takes the same form
  and formalities as marriage;
• restricting access to such registered partnership to same-sex couples (as long as access to
  marriage is restricted to different-sex couples), and not needlessly burdening or obscuring
  the legislative effort by also including different-sex partners in the legislation;
• attaching to this registered partnership as many legal consequences of marriage as
  politically possible;
• not forgetting about civil status discrimination by employers and other private bodies;
• making haste with allowing transsexuals to change their legal gender;
• proposing separate legislation to improve the situation of (heterosexual and homosexual)
  cohabitants who do not want to get all the legal consequences of marriage / registered
  partnership;
• knowing that it is a controversial field in which political reality may force you to water
  down certain proposals, to change their order or to recombine different aspects;
• eventually opening up civil marriage to same-sex couples.

I come from a small country where almost all of this has been accomplished over the last 25
years. There is something about small countries. There can be a greater and easier exchange
of ideas and ideals there. In a small country, different groups, such as academics, politicians,
activists and lawyers, are more likely to meet each other and to move from one circle to the
other. A good example is Mr Job Cohen, now the Mayor of Amsterdam. You may have seen
him on television last month, when he was acting-registrar at the wedding of the Prince of
Orange and his Argentine fiancée. Before he became Mayor he was the government Minister
for Justice, who got the bills on marriage and adoption by same-sex partners through
Parliament. Before that, he was a senator and a law professor. In that latter capacity he was
my valued PhD supervisor. From close range I have seen how he gradually picked up on the
importance of fuller – and then full equality for gay and lesbian couples. A curious
coincidence made it possible for him, as the freshly appointed Mayor of Amsterdam, to act as
registrar at the first same-sex weddings of the world, last year on the first of April, at
midnight. So when ten months later he was again acting as registrar, now at the Princely
wedding, he could refer in his speech – and he did, in front of royalty and cameras – to his
short career as registrar. He commented that at his previous wedding (i.e. the first legal
lesbian and gay wedding ceremony) he had learned how much importance marrying partners
attach to that very public and very private moment. When he said that, I once again realised
how fortunate it is to live in a small country, where things and people come together.
Tonight has brought together, in this august room, people from politics, from the civil service,
from academia, from the lesbian and gay movement, and many lawyers – from the judiciary,
from the bar, from the Law Society. It is almost as if Britain is acting like a small country. Or
is it?
France, Germany and Britain have been the only countries in Europe where the equalisation
of the ages of consent could not be done in one step. In these three big countries the age
difference was first decreased a little, and then a few years later abolished. Similarly the
prohibition of sexual orientation discrimination was introduced quite hesitantly in the big three: only in some regional constitutions in Germany, only hidden in the euphemistic term ‘moeurs’ in France, and only in a few vague government policies, so far, in the United Kingdom. All this in contrast to small countries such as Iceland, Norway, Sweden, Finland, Denmark, the Netherlands and Luxembourg. This might make us pessimistic about the speed of progress of British legislation on same-sex partnership, but fortunately Britain is not quite as big as it used to be. For Scotland (and Northern Ireland?) it should come quite natural to act (and enact) like any small, prosperous, mainly protestant monarchy in the North Western part of Europe. England and Wales had better do the same, and continue its two-centuries-old legal tradition of taking same-sex love seriously.

References to literature


