1. Marriage in a European perspective

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1. INTRODUCTION	3	2.3.2 Legal recognition of same-sex relationships	23
2. COMMON EUROPEAN DEVELOPMENTS: THREE THEMES RELATING TO MARRIAGE	5	3. MARRIAGE AND THE ECHR – INTERPRETATIONS BY THE STRASBOURG COURT	27
2.1 Theme 1: Equality – legal parity between husband and wife	5	3.1 Background	27
2.1.1 The Swedish Marriage Code of 1920 as an early example	5	3.2 Article 8: The right to protection of one's private life and family life	29
2.1.2 Comparative observations: Germany, Spain, The Netherlands and France	8	3.2.1 General remarks	29
2.2 Theme 2: Privacy – reducing the official participation in matters relating to marriage	12	3.2.2 Two levels of protection within the 'privacy sphere'	30
2.2.1 The Swedish Enactments of the 1970s and the Marriage Code of 1987	12	3.3 Article 12: The right to marry and found a family	32
2.2.2 The Swedish Neutrality Policy	14	3.3.1 General remarks	32
2.2.3 Comparative observations	16	3.3.2 Transsexual and transgender persons and the right to marry	34
2.3 Theme 3: Pluralism – regulating and recognising new cohabitation models	21	3.3.3 The legal status of same-sex couples: toward a European consensus?	35
2.3.1 The Swedish Acts on Cohabitation without Marriage: 1973, 1987 and 2003	21	4. CONCLUDING REMARKS	38
		RECOMMENDATIONS FOR FURTHER READING	40

1. INTRODUCTION

Is there a European 'concept' of marriage? In this chapter common developments relating to marriage in Europe are identified. More precisely, certain common interests or core values, which have been found worth protecting through legislation based on marriage over time and in

different European countries, are identified and analysed.¹ Sweden, which is internationally known for its 'progressive' laws relating to marriage and cohabitation models,² is used as an example and a platform for international comparisons with France, Spain, Germany and The Netherlands. The idea is not to map different regulations based on marriage in Europe and compare them in detail. This has already been done by other legal scholars.³ Instead an ideological line of development will be illustrated, which became visible in Sweden in the 1920s and gradually in many other European countries since then.

The European perspective on marriage also includes an analysis of relevant jurisprudence by the European Court of Human Rights (the Strasbourg Court), based on the European Convention of Human Rights (the ECHR) and dealing with civil status issues. The Strasbourg Court is a significant actor in the human rights arena in Europe with considerable impact on legal development in a wide range of European jurisdictions.

The Strasbourg Court is not the only body dealing with human rights in Europe. Another actor which has become increasingly preoccupied with such issues is the European Union (EU). There is a link between the free movement of persons within the EU and the principle of equality, in the sense that a person's civil status needs to be portable across EU borders in order to safeguard that the principle of free movement of persons works efficiently.⁴ Protecting human rights has also become an *independent* goal of the EU, disconnected from the principle of free movement. The EU has adopted a human rights catalogue of its own – the EU Charter⁵ – and acceded to the ECHR, which further underlines the weight placed on human rights issues at EU level. However, for

¹ Documents issued before 1 February 2013 have been taken into account. Documents issued thereafter have only been considered selectively.

² A Agell, *The Swedish Legislation on Marriage and Cohabitation, A Journey without A Destination*, (Scandinavian Studies in Law 1980) 12. See also D Bradley, *Family Law and Political Culture, Modern Legal Studies, Scandinavian Laws in Comparative Perspective* (Sweet & Maxwell 1996) 9.

³ Comparative research has been carried out by the Commission on European Family Law (CEFL). The CEFL was founded 1 September 2001 and its main objective is providing theoretical and practical research in relation to the harmonisation of family law in Europe, *inter alia* by formulating sets of 'Principles of European Family Law'. See <http://www.ceflonline.net/> (accessed 8 July 2015) and the contribution by Boele-Woelki, chapter 6 of Vol I of this book set.

⁴ K Boele-Woelki, 'The Legal Recognition of Same-Sex Relationships within the European Union' (2007–2008) 82 *Tulane Law Review* 1978.

⁵ Charter of Fundamental Rights of the European Union (2000/C364/01).

matters of delimitation the EU perspective will not be further dealt with in this chapter.⁶ Another issue which will not be dealt with is whether harmonisation and unification of laws in Europe is a desirable goal.⁷

2. COMMON EUROPEAN DEVELOPMENTS: THREE THEMES RELATING TO MARRIAGE

2.1 Theme 1: Equality – Legal Parity between Husband and Wife

2.1.1 The Swedish Marriage Code of 1920 as an early example

Creating equality between men and women is a high priority in most European countries in the 21st century. In Sweden, this development started particularly early. A historical landmark was reached in 1920 through the adoption of the new Marriage Code.⁸ Through the Marriage Code of 1920 the hierarchy of marriage formally ended, in the sense that married women were emancipated from their husbands' legal guardianship. Equality was a key concept, expressed in the preparatory work to the 1920 Code: 'The spouses shall, as far as possible, be placed side by side, as equally free and independent persons, without any legally established right for one to decide over the other or alone in joint family matters.'⁹

In line with this ideology husband and wife were treated as two equals in all respects under the law. This meant that married women became

⁶ See for instance C Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (Intersentia 2012) 275–93.

⁷ See for instance M Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective, A Tale of Two Millennia* (Intersentia 2006); M Jänterä-Jareborg, 'En harmoniserad familjerätt för Europa? Internationellt privaträttsliga och rättsjämförande perspektiv', (2009) 122(3) *Tidsskrift for Rettsvitenskap* 323–53; K Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003); K Boele-Woelki and T Sverdrup (eds), *European Challenges in Contemporary Family Law* (Intersentia 2003); E Örüci, 'The Principles of European Family Law put to the Test: Diversity in Harmony or Harmony in Diversity?', in E Örüci and J Mair (eds), *Juxtaposing Legal Systems and the Principles of European Family Law on Divorce and Maintenance* (Intersentia 2007) 233–54.

⁸ The 1920 Code replaced its predecessor the 1734 Code. The Marriage Codes of 1734 and 1920 have been analysed in detail by C Sörgjerd in *Reconstructing Marriage – the Legal Status of Relationships in a Changing Society* (n 6) 23–90.

⁹ NJA II 1921, p 6. Author's translation.

entitled to administer their property and to act as legal guardians of their children. A new marital property regime was introduced – the deferred community of property regime.¹⁰ The regime gave each spouse a latent claim for half of the total net value of the marital property, but the claim could only be realised upon dissolution of the marriage. The deferred community of property regime, which still applies in Sweden, is wide in scope and encompasses property owned prior to the marriage as well as property acquired during the marriage. It ensures the financially weaker party an equal share of the financially stronger party's wealth, if the marriage ends. In the 1920s and 1930s, when women were still mainly housewives without an income of their own, one could say that the regime improved their position in the rare case of divorce. During marriage, spouses are entitled to the same standard of living.

A new outlook on divorce was expressed in the Marriage Code of 1920.¹¹ The general idea was that it was no longer found desirable to deter couples from divorcing through upholding strict rules on divorce and compulsory church mediation. In other words, divorce changed from being looked upon as a sanction or a punishment for failing with the marriage to a remedy when the marriage had irretrievably broken down.¹² When the spouses were in agreement, divorce was made available after a one year period of legal separation, on the ground of long and constant discord. The word of the spouses was sufficient as evidence that the discord still remained after the legal separation.¹³

In respect of unilateral divorce applications, a so-called divorce catalogue was introduced in the Marriage Code of 1920, providing seven alternative grounds for divorce. Thus divorce was available if a spouse:

¹⁰ On matrimonial property see Scherpe, chapter 5 in this volume.

¹¹ In fact, the new rules on divorce had already been introduced in 1915, through a separate enactment which was then transferred into the 1920 Code. See The Law Commission Report of 1913, Lagberedningens förslag till revision av giftermålsbalken och vissa delar av ärvdabalken I. Förslag till lag om äktenskaps ingående och upplösning m.m. 1913 and NJA II 1921, no 1, Den nya giftermålsbalken I.

¹² M Antokolskaia, 'The Search for a Common Core of Divorce Law: State Intervention v. Spouses' Autonomy', in M Martin-Casals and J Ribot (eds), *The Role of Self-determination in the Modernisation of Family Law in Europe*, (Girona: Documenta Universitaria 2006) 34.

¹³ Sörgjerd, *Reconstructing Marriage – the Legal Status of Relationships in a Changing Society*, (n 6) 80.

- (1) had remarried in breach of the law (bigamy);
- (2) had sexual intercourse or fornication with somebody other than the spouse;
- (3) had infected the other spouse with a venereal disease;
- (4) had attempted to take the other spouse's life, or had committed aggravated assault on the other spouse or the children;
- (5) had been convicted for certain felonies;
- (6) abused alcohol; or
- (7) was mentally ill.

The new outlook on divorce and the extensive 'divorce catalogue' might give the impression that divorce was common in Sweden in the 1920s. However, this was not the case. Divorce remained rare in the 1920s and 1930s, although a slight increase can be noted. In 1925, 1,748 divorce decrees were issued and in 1935 the figure amounted to 2,718 divorces. During this time period the number of marriages concluded increased from 37,419 in 1925 to 51,306 in 1935. Moreover, the Swedish population increased slightly.¹⁴ It follows that most marriages in the 1920s and 1930s were still in practice concluded for life.

How then was the Marriage Code with its new outlook on divorce received in society? In fact, the Marriage Code of 1920, the emancipation of women and the emphasis on equality did not have any immediate impact on the everyday lives of the Swedish people in general. Only 4 per cent of all married women carried out paid work in Sweden in the 1920s.¹⁵ In the 1920s and 1930s, the 'traditional' division of duties between husband and wife continued to apply in most families. This meant that wives in general remained in charge of the home and the children, whereas husbands worked outside the home and were responsible for earning the family living. In other words, equality was primarily a theoretical issue in Sweden at this time. The intention behind the 1920 Marriage Code was not to challenge gender-roles within the family. In fact, a traditional division of duties, according to which the woman cared for the home and the children and the husband was the breadwinner, was thought to best serve the family's interests.¹⁶ In the rare case of divorce, spousal maintenance was normally awarded. This was important since it

¹⁴ In 1925 the Swedish population amounted to 6,053,562 persons and in 1935 the figure was 6,250,506. Committee Report, (SOU 2007:17) p 203, with reference to the National Central Bureau of Statistics.

¹⁵ Committee Report (SOU 1964:35) p 17. In 1940, this figure was 9% and in 1960 it was 23%.

¹⁶ NJA II 1921, 8 and 23.

was regarded as degrading for a divorced woman to be forced to work outside the home.¹⁷

Nevertheless, the ideological significance of the Marriage Code of 1920 should not be underestimated. Through the Marriage Code of 1920 women obtained majority and legal capacity and it was emphasised in the law that different contributions during marriage – household work and gainful employment – were regarded as *equally* valuable. The 1920 Marriage Code can be seen as having laid the legal and ideological foundation for the legal development to come in the late 1960s and 1970s, when the principle of equality gained ground in society and influenced people's behaviour in the family.

2.1.2 Comparative observations: Germany, Spain, The Netherlands and France

The Swedish Marriage Code of 1920, together with the equivalent acts in Norway and Denmark, was generally regarded as progressive and pioneering in the field of equality between men and women.¹⁸ How does the Swedish legal development relating to marriage compare to the legal developments in four other 'progressive' European jurisdictions, namely The Netherlands, Germany, France and Spain?¹⁹ When did these countries implement the idea of equality between husband and wife into their domestic regulations governing marriage?²⁰

Germany was the first out of these four countries to adopt durable rules which granted married women full legal capacity and administration

¹⁷ The Swedish Law Commission Report of 1913, 448.

¹⁸ The Swedish Marriage Code of 1920 was the result of a Nordic (Danish, Swedish and Norwegian) legal cooperation. This cooperation is described by Sörgerd, in *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 57–61. See also Bradley, *Family Law and Political Culture* (n 2) and Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective, A Tale of Two Millennia* (n 7).

¹⁹ In all these countries, rules recognising the legal status of same-sex couples have been introduced. In this respect, the countries can be regarded as 'progressive' and suitable for comparison. The Netherlands, Spain and France have adopted gender-neutral marriage acts. In Germany, same-sex couples have access to a form of registered partnership 'life partnership'. This development, however, has mostly taken place during the 21st century. Spain, for instance, has been said to have obstructed 'modernisation' of for instance divorce laws during the 20th century, see Antokolskaia, Chapter 2 in this volume.

²⁰ A more detailed analysis is presented in Sörgerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 84–90, based on the reports drafted by the Commission on European Family Law.

rights in respect of their property. This was achieved through an enactment in 1953.²¹ In 1958, a new marital property regime entered into force in Germany, that is, the community of accrued gains, introduced through the German Equality Law of 1957 and replacing the previous regime based on the principle of separation of property. One cannot generally say that one matrimonial property regime favours equality more than another, but unlike its predecessor, the new regime contained a provision which stated that the wife's household work was equally valuable as the husband's gainful employment, more precisely it was established that household work was also a means of contribution.²² Moreover, the new regime created more equality between husband and wife by making property accrued during marriage subject to equal division upon dissolution. This signals that both types of contributions to the family's well-being count: work in the home *and* gainful employment. From this point of view it appears fair that the homemaker receives compensation for her (or his) contribution to the marriage upon dissolution.

As mentioned above the Swedish Marriage Code of 1920 contained a similar provision which underlined the equal value of household work and gainful employment. It can be noted, however, that according to the wording of the German Civil Code, household work was exclusively assigned to the wife until 1976.²³ According to the Swedish Marriage Code of 1920, it was not explicitly stated that household work was assigned to the wife; it was just emphasised that it was equally important as gainful employment.²⁴ In practice, however, as pointed out above, a traditional division of duties applied in Sweden as well so at that time the difference was purely linguistic and symbolic.

Similarly, in The Netherlands the incapacity of married women was abolished in the 1950s, more precisely in 1957. Through this law reform women became authorised to administer their property as well as the spouses' 'community property'. Nevertheless, a provision stating that the

²¹ The German Constitution of 1949, article 117.

²² This provision was kept until 1976. K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action, Volume IV: Property Relations between Spouses* (Intersentia 2009) 62, question 2. German Report written by D Martiny and N Dethloff, available 8 July 2015 at <http://www.ceflonline.net/>.

²³ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume IV: Property Relations between Spouses*, (n 22) 62, question 2. German Report written by Martiny and Dethloff.

²⁴ The Marriage Code of 1920, chapter 5, s 2.

husband was the head of the marriage was kept in the Dutch Civil Code until 1970.²⁵ The community of property regime which is still the default regime in The Netherlands, in principle comprises all assets, whether acquired before or during the marriage, as a gift or through inheritance.²⁶

In Spain, women did not obtain full legal capacity until 1981. It took time to create legal parity between husband and wife in Spain due to the period of the Dictatorship of General Franco, which lasted between 1939 and 1975. During the Franco regime, traditional gender roles were promoted through the law, in a strictly Catholic religious climate. The emancipation of women was considered contrary to the political goals and values of the regime.²⁷ The 1981 reform aimed at creating equality between husband and wife. The previous system according to which the husband alone administrated the spouses' property was substituted by joint administration by the spouses. Moreover household work was explicitly mentioned in the law as a form of contribution to household expenses. The community of acquisitions was the default system but the couple could opt for another system through a contract before or during marriage. The community of acquisitions (also community of acquests), which still applies as the default system in the federal law of Spain today,

²⁵ *European Family Law in Action, Volume IV: Property Relations between Spouses* (n 22) 67, question 2. Dutch Report written by K Boele-Woelki, F Schonewille and W Schrama, available 8 July 2015 at <http://www.ceflonline.net/>.

²⁶ *European Family Law in Action, Volume IV: Property Relations between Spouses* (n 22) 312, question 20. Dutch Report written by Boele-Woelki, Schonewille and Schrama. Spouses or spouses-to-be can opt for another regime through an agreement, prior to or during marriage; on this see K Boele-Woelki, and B Braat, 'Marital Agreements and Private Autonomy in the Netherlands', in J Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing 2012) 229–55. A spouse can also claim compensation in certain situations. New, more extensive rules on compensation entered into force 1 January 2012. See also European Commission and European Notarial Network: <http://www.coupleseurope.eu/en/netherlands/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide>, accessed 8 July 2015.

²⁷ For a short time prior to this regime, namely during the Second Spanish Republic (1931–1939) the principle of equality between husband and wife was expressed in the Constitution: 'marriage is based upon equality of rights for both sexes ...'. See K Boele-Woelki, B Braat and I Curry-Sumner (eds) *European Family Law in Action, Volume I: Grounds for Divorce* (Intersentia 2003) 51, question 2. Spanish Report written by M Martín-Casals, J Ribot and J Solé, 5, and available 8 July 2015 at <http://www.ceflonline.net/>. The Constitution was formally effective until 1939 but after the outbreak of the Civil War in 1936 it did not apply in practice.

means that property obtained by each of the spouses while the system is in effect is common and to be divided equally upon dissolution.²⁸

In France, husband and wife were granted full equal rights of participation in matters concerning their joint property through the Reform Act of 1985.²⁹ Prior to this, in 1965, a comprehensive reform concerning the spouses' property relations had been carried out in France, introducing the participation in acquisitions regime. This reform, however, did not aim primarily at creating equality between spouses and the husband remained the 'head of the community' with sole authority to administer the marital property. Through the reform Act of 1985, however, the husband's superior position was abolished and husband and wife were placed on par in the law, as equally entitled to dispose of their personal property and their common assets.³⁰

The overall impression is that creating equality between husband and wife has been (and remains) a central political goal in many European countries during the 20th and 21st centuries. In Sweden, as well as in Denmark and Norway, enactments on this theme were implemented into the domestic laws governing marriage at an early point in time.³¹ The early Swedish focus in the law on achieving equality between husband and wife and making divorce more accessible can explain why Sweden was ready to launch new 'progressive' enactments relating to marriage already in the 1970s. At this point in time most other European countries were still preoccupied with achieving full equality between husband and wife, or had recently introduced such rules. As will be further developed

²⁸ European Commission and European Notarial Network: <http://www.coupleurope.eu/en/spain/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide>, accessed 8 July 2015.

²⁹ Boele-Woelki, Braat and Curry-Sumner (eds) *European Family Law in Action, Volume IV: Property Relations between Spouses* (n 22) 60, question 2. French Report written by F Ferrand and B Braat. Important steps toward this goal were taken during the first half of the 20th century. In 1907 the married woman was granted the right to administrate earnings gained through a profession of her own and in 1938 and 1942 she officially obtained legal capacity to conclude agreements without her husband's consent.

³⁰ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume IV: Property Relations between Spouses* (n 22) 60, question 2. French Report written by Ferrand and Braat. Some dispositions of for instance the joint home require both spouses' participation. Available 8 July 2015 at <http://www.coupleurope.eu/en/france/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide>.

³¹ Sörgerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 57–61.

below the Swedish enactments of the 1970s enhanced the private dimension of marriage, by increasing the autonomy of individuals and reducing the level of participation of the public and the authorities in their 'private sphere'.

2.2 Theme 2: Privacy – Reducing the Official Participation in Matters Relating to Marriage

2.2.1 The Swedish Enactments of the 1970s and the Marriage Code of 1987

The Swedish Marriage Code of 1920 remained in force for more than 60 years, until it was replaced by the Marriage Code of 1987. However, significant enactments were adopted in the 1970s, dealing with conclusion and dissolution of marriage as well as spousal maintenance claims after divorce. The enactments of the 1970s, which were transferred into the 1987 Code, marked a new approach to marriage and divorce.

These enactments were facilitated by changes that had taken place in the Swedish society. By 1970, the Swedish welfare state had been established, providing services such as health care, child care and old-age care, as well as a basic social security system. These changes enabled women to work outside the home and helped to do away with the opposition to women's gainful employment.³² In fact, women were now expressly encouraged to work outside the home and it had become common and socially accepted for men to take part in household work.³³ Through an enactment in 1978 it was explicitly stated in the Marriage Code that domestic work and taking care of children were duties for both spouses.³⁴ In other words equal participation of both spouses in matters concerning their family was being 'marketed' by politicians as a desirable goal.

³² See section 2.1.1 above.

³³ The Social Democratic Party played a significant role in the process of transferring the legal concept of equality to the everyday family life of people in general. Toward the end of the 1920s, in a time of high unemployment figures and an alarmingly low birth rate, the launching of the 'folk home' as a basis for establishing a Swedish welfare state was timely by the Social Democratic Party leader Per Albin Hansson. The Social Democratic Party won the general election in 1932 and remained in power continually for the next 40 years. Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 92–97.

³⁴ Government Bill (Prop 1978/79:12) pp 215 f and 180 f. This provision was transferred into the Marriage Code of 1987, chapter 1, s 2.

Through rules adopted in 1973, it became easier to conclude as well as to dissolve a marriage. The impediments to marriage were minimised and divorce was turned into a personal right of each spouse, available more or less 'on demand'. In the Government Bill of 1973 it was stated that: '[N]ew rules on dissolution of marriage are founded on the basic idea that conclusion as well as continuation of marriage should be based on the parties' free will to live together, subject to marriage regulation. This means that a spouse's wish to dissolve the marriage should always be respected.'³⁵

Under Swedish divorce law, adopted in 1973 and still applicable today, divorce can be granted directly upon the joint application of the spouses. Ancillary effects, such as maintenance claims and property division issues, if disputed, can be dealt with in separate proceedings which do not delay the divorce decree. Fault has no relevance whatsoever for the outcome of divorce proceedings.³⁶ In respect of unilateral divorce claims, a six-month period of reconsideration is required before divorce is granted. A reconsideration-period of six months is also required if there are children in the family under the age of 16.³⁷

In 1978, new rules on spousal maintenance after divorce were adopted, which gave statutory support to principles established in case law. The basic idea behind the enactments of 1973 and 1978 was that all legal effects of marriage should end when the marriage ended. The spouses were treated as two equals under the law and they should strive at being financially independent after divorce. This restrictive view on spousal maintenance *after* divorce was thought to encourage each spouse to be self-sufficient also *during* marriage. It was possible to introduce restrictive rules on spousal maintenance after divorce in Sweden, largely because of the role of the welfare state, with special support given to single parent households, a state subsidised preschool system and various

³⁵ Government Bill (Prop 1973:32) p 74. Author's translation.

³⁶ Prior to the introduction of no-fault divorce, disloyal behaviour, adultery for instance, could have an impact on ancillary matters such as child custody disputes. Government Bill (Prop 1973:32) p 86.

³⁷ A reconsideration period also applies if both spouses request one. When six months have expired, either spouse can demand that the divorce be finalised. If no such claim has been made a year after the divorce application was filed, the case is dismissed. The Marriage Code of 1987, chapter 5. Moreover, the generous property division rules can compensate a financially weaker spouse upon dissolution of the marriage. Property owned prior to the marriage is included, as well as property acquired through inheritance or as a result of a will, unless otherwise stated by the donor.

other financial subsidies. Without this system divorced women in general would be more reliant on spousal maintenance after divorce.³⁸

The Swedish family law enactments of the 1970s were based on a new official outlook on marriage and civil status issues. Through the enactments, dealing with conclusion and dissolution of marriage as well as spousal maintenance, certain core values relating to marriage changed. In short, the private dimension of marriage was strengthened. The new idea was to trust the individual spouse's own ability to make rational decisions about the marriage and to minimise the level of official interference through legislation which expressed moral values concerning lifestyle and cohabitation choices. The spouses were to be treated as two independent individuals with autonomous rights and duties. This new outlook can be seen as somewhat of a contrast to the previous view on marriage as primarily a mutual, lifelong family project and the couple as an entity rather than two individuals. In the legal literature, this new Swedish policy has been discussed in terms of 'neutrality'.³⁹

2.2.2 The Swedish Neutrality Policy

In 1969, in the Government Guidelines to the Family Law Committee which drafted the Swedish enactments of the 1970s, the new policy in respect of family law legislation was formulated accordingly:

New legislation should ... be neutral as far as possible with regard to various forms of cohabitation and divergent moral concepts. Marriage has had and should have a central place within family law, but we ought to endeavour to ensure that family law legislation does not include any regulations, which create unnecessary difficulty or inconvenience for those who have children and establish a family without getting married.⁴⁰

The idea behind the Swedish enactments of the 1970s was that adult individuals should be trusted to make rational decisions concerning their relationship without unnecessary morally-based 'intervention' by the authorities. Consequently, married couples should not be treated more favourably in the law than unmarried couples, or vice versa, through

³⁸ Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 130–2.

³⁹ Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 97–9 and 116–19.

⁴⁰ Guidelines by the Chief of the Legal Department to the Commission on Family Law, 15 August 1969, Riksdagsberättelsen 1970, Ju 52, p 81. See Committee Report (SOU 1972:41), p 58. As translated by J Graversen, *Family Law as a Reflection of Family Ideology* (1990) 79.

tax-related or other benefits.⁴¹ The Swedish enactments of the 1970s reflect these basic values.⁴² Divorce on demand was introduced and cohabitation without marriage was regulated in a special act – The 1973 Act on the Joint Dwelling of an Unmarried Couple.⁴³ The practical impact of the neutrality policy on the Swedish legal development in the field of family law is a debated issue in the legal literature. Some find the neutrality policy to be exaggerated and tone down its impact on Swedish family law legislation, whereas others view it as the starting point for legally recognising and regulating additional cohabitation forms.⁴⁴

Neutrality in the sense described above is not just a Swedish phenomenon. Enactments which have enhanced the private features of marriage, by increasing the spouses' individual and joint autonomy, have been adopted in many other European countries as well and cohabitation forms other than marriage have been subject to legislative measures.⁴⁵ In my opinion, what makes Sweden different in this respect is that the ambition labelled 'neutrality' was explicitly mentioned in the Government Guidelines in 1969, as an underlying goal behind the enactments of the 1970s. This indicates a sincere political interest in strengthening the private features of the marriage regulation, which was expressed at a comparatively early point in time. One could say that the 'value-neutral' approach in the 1970s to different cohabitation forms and lifestyles paved the way

⁴¹ At this time, changes were made in the taxation law so that spouses were treated as two separate individuals with their own taxable incomes. According to the old taxation rules, spouses' taxable incomes had been treated as one entity, which could disfavour spouses with a high income and even compel them to divorce and then live together outside of marriage for tax related reasons. Government Bill (Prop 1973:32) pp 83 f. See also J Sundberg, 'Marriage or No Marriage in Swedish Law' (1971) 20 *International and Comparative Law Quarterly* 230 f.

⁴² See section 2.2.1 above.

⁴³ Lag om ogifta samboendes gemensamma bostad, which entered into force 1 January, 1974. The 1970s were innovative and radical times in Sweden. In 1972, the idea of abolishing all ceremonial features of marriage and replacing it with a registration procedure was discussed in a Committee Report. All that would be required for the marriage to be legally valid would be notification of a public official with legal capacity to administer and register such agreements. Committee Report (SOU 1972:41). However, this idea was dismissed already in the committee report.

⁴⁴ This debate is accounted for by Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 116–19.

⁴⁵ This development has been described by Antokolskaia, 'The Search for a Common Core of Divorce Law: State Intervention v. Spouses' Autonomy' (n 12) 33–58.

for adopting more detailed rules on cohabitation without marriage in the 1980s and for the legal recognition of same-sex couples in the 1990s and early 2000s.⁴⁶ In other words in Sweden the policy to remain neutral to cohabitation models functioned as a bridge between two political interests, namely ‘privacy’ and ‘pluralism’, and linked these two themes together.

2.2.3 Comparative observations

In many European jurisdictions, new family law enactments have been introduced, which have reduced the level of official participation in the couple’s private sphere. This development is particularly noticeable in the field of divorce law. One could say that there is a common ‘trend’ toward making divorce more accessible to the individual.

The Swedish rules governing divorce, adopted in the 1970s, still stand out as ‘progressive’ in a contemporary European context. But others are following suit. In 2005, Spain also adopted liberal (in the sense of divorce friendly) rules which resemble the Swedish divorce legislation.⁴⁷ The Spanish divorce rules do not require that spouses live apart prior to the divorce application and no grounds for divorce are stipulated. As under the Swedish divorce law, the petition for divorce as such, by one or both spouses, is sufficient for obtaining a court decision granting the divorce. A difference compared to the Swedish rules is that no period of (re)consideration is required under Spanish law. On the other hand, Spanish law requires that all ancillary matters are resolved before the

⁴⁶ Although same-sex couples were not subject to legislative measures in the 1970s, it was stated in a Law Commission Report that ‘... cohabitation between two persons of the same sex is a perfectly acceptable form of family life from society’s point of view’. Swedish Law Commission Report (LU 1973:20) p 116. Author’s translation.

⁴⁷ European Judicial Network: http://ec.europa.eu/civiljustice/divorce/divorce_spa_en.htm, accessed 8 July 2015. Prior to 2005, according to rules enacted in 1981, legal separation for one or three years was obligatory prior to divorce under Spanish divorce law. Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 11, p 185. Spanish Report written by M Martín-Casals, available 8 July 2015 at <http://www.ceflonline.net/>. The only exception to this rule was if one spouse had tried to kill the other spouse or his or her children. Divorce upon the request of one of the spouses was possible on certain grounds and legal separation was an alternative way out of a marriage, according to the 1932 Constitution. Spanish report, question 2, pp 50 f.

divorce decree can be issued and this can be time-consuming.⁴⁸ Swedish law prescribes a period of reconsideration in certain situations, but if the spouses are in agreement to divorce and do not have young children, divorce can be issued immediately, even if ancillary matters are disputed.

Divorce upon the unilateral request of a spouse has also existed in Finland since 1987 (after a six-month period of reconsideration).⁴⁹ Denmark and Norway, however, have not (yet) followed the Swedish and Finnish examples in this respect. Instead divorce normally requires a one-year period of separation (six months in Denmark if the spouses mutually consent to the divorce).⁵⁰ In certain situations, however, divorce can be granted directly, without a period of separation.⁵¹

In France, for instance, divorce based on mutual consent was established in statutory law in 1975, as one ground for divorce among several others. A main objective of the reform was to liberalise divorce.⁵² However, there were restrictions. A basic prerequisite for obtaining divorce based on mutual consent was that the marriage had lasted at least six months prior to the application for divorce and that the spouses could present an agreement concerning all ancillary matters.⁵³ The spouses had to appear twice in front of the judge; first, in order to discuss the details of their contract concerning ancillary matters and second, to finalise it.⁵⁴

Through the French Divorce Act of 2004, which entered into force on 1 January 2005, divorce based on mutual consent was facilitated.⁵⁵ As a result, marriages of short duration can also be dissolved based on mutual

⁴⁸ European Judicial Network: http://ec.europa.eu/civiljustice/divorce/divorce_spa_en.htm, accessed 8 July 2015. See also J Ferrer Riba, 'Same-Sex Marriage, Express Divorce and Related Developments in Spanish Marriage Law', *International Survey of Family Law* (Jordan Publishing, 2006) 142.

⁴⁹ See Antokolskaia, 'The Search for a Common Core of Divorce Law: State Intervention v. Spouses' Autonomy' (n 12) 52. According to Antokolskaia, divorce based on mutual consent has also existed in Russia since 1995.

⁵⁰ The Norwegian Marriage Act, chapter 4 and the Danish Marriage Act, chapter 4.

⁵¹ For instance in respect of serious acts of violence.

⁵² C Butruille-Cardew, 'The 2004 French Divorce Law and International Prospects' [2006] *International Family Law Journal* 144.

⁵³ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 29, p 313. French Report written by Ferrand.

⁵⁴ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 29, p 313 f. French Report written by Ferrand.

⁵⁵ Law N° 2004-439, 26 May 2004.

consent and no period of separation is required.⁵⁶ Another novelty is that the spouses only have to appear once in front of the judge.⁵⁷ However, in order to obtain divorce based on mutual consent they still have to present a contract with arrangements concerning all ancillary matters.⁵⁸ Another factor which delays divorce in France is that the spouses need to be represented by a lawyer. They cannot file for divorce jointly on their own.⁵⁹

The French Divorce Act of 2004 stipulates three other grounds for divorce (beside mutual consent): (1) acceptance of the principle of marital breakdown (when the couple agrees to divorce but disagrees on ancillary issues); (2) breakdown of communal life; and (3) fault.⁶⁰ Divorce based on the breakdown of the marriage may always be granted after a two-year separation of the couple, without any further inquiries. This is a liberalisation compared to the 1975 Act, which prescribed six years of separation.⁶¹ It can be noted that the same principle applies in Sweden; if the spouses have lived apart for two years prior to the divorce application no additional reconsideration period is required.⁶² According to French law, divorce based on mutual consent is always an option and divorce proceedings initiated on a different ground can be changed subsequently by the couple to a proceeding based on their mutual consent.⁶³ This indicates that it is generally regarded as preferable if the spouses both consent to the divorce and reach agreements on ancillary matters on their own, with minimal intervention by the authorities.

⁵⁶ Butruille-Cardew, 'The 2004 French Divorce Law and International Prospects' (n 52).

⁵⁷ A possibility for the judge to make an interim order in case of domestic violence was also introduced, valid for four months.

⁵⁸ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 29, p 313. French Report written by Ferrand. The contract is presented to the Notary if the spouses have real estate. Otherwise, the spouses themselves can draw up the agreement without participation of the Notary.

⁵⁹ However, if they apply for divorce based on mutual consent, they can be represented by the same lawyer.

⁶⁰ Butruille-Cardew, 'The 2004 French Divorce Law and International Prospects' (n 52). Divorce based on acceptance of marital breakdown was first introduced in 1975.

⁶¹ Butruille-Cardew, 'The 2004 French Divorce Law and International Prospects' (n 52) 145.

⁶² The Swedish Marriage Code of 1987, chapter 5, section 4.

⁶³ This possibility was introduced in 1975 and established in article 246 of the Code Civil.

Neither Dutch nor German law recognises divorce based on mutual consent as an autonomous (direct) ground for divorce. Instead ‘irretrievable breakdown’ of the marriage is the sole ground for divorce in these two jurisdictions. In the Netherlands, divorce based on the irretrievable breakdown of the marriage was introduced as the sole ground for divorce in 1971.⁶⁴ The spouses’ word that the marriage has permanently broken down is sufficient as evidence in this respect and no further investigation is made by the judge.⁶⁵ Under German law ‘hardship clauses’ can be used to prove the breakdown of the marriage. A period of separation is required prior to the divorce, one year in respect of mutual applications for divorce and three years in respect of unilateral applications. If the spouses apply jointly for divorce, the presumption is that the marriage has broken down permanently.⁶⁶ Under German law, representation of a lawyer is compulsory and under Dutch law the application for divorce must be signed and delivered by a procurator litis. This is a difference compared to Swedish law, according to which the spouses need not consult a lawyer. In fact under Swedish law spouses are encouraged not to hire lawyers. Special forms containing the relevant questions and information are available at the websites of the district courts which one or both spouses can fill out and send in. Divorce is an administrative procedure and the spouses do not appear in front of a judge or an authority.⁶⁷

This small survey shows that there are still differences in respect of how accessible and speedy divorce is in practice. Different time periods of separation are required and few countries have gone as far as introducing divorce as a unilateral right – ‘on demand’. A common core in the legal development relating to marriage in Europe since the 1960s and 1970s is to gradually increase the autonomy of the spouses and thus in a sense *privatise* marriage, by allowing divorce based on mutual

⁶⁴ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27) questions 2 and 4, pp 44 and 89. Dutch Report written by K Boele-Woelki, O Cherednychenko and L Coenraad, and available 8 July 2015 at <http://www.ceflonline.net/>.

⁶⁵ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 4, p 89. Dutch Report written by Boele-Woelki, Cherednychenko and Coenraad.

⁶⁶ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 4, pp 80 f. German Report written by D Martiny.

⁶⁷ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 9, p 154. Swedish report written by: M Jänterä-Jareborg.

consent or based on the irretrievable breakdown of the marriage. Many national legislators have abandoned the idea of counteracting divorce through divorce regulation and emphasise the value of individual autonomy.

The general trend in Europe in the 21st century is to abolish or diminish the impact of fault in divorce proceedings.⁶⁸ In France, Germany and The Netherlands, fault can still be taken into consideration in connection with divorce, although only to a limited extent. In France, fault has been retained as a direct ground for divorce, but since the 2004 Act, the general idea in France is that financial consequences of divorce should not depend on the question of who is to blame for the breakdown of the marriage. Thus fault grounds are applied restrictively.⁶⁹ In German divorce proceedings, fault plays but a marginal role. The element of fault could, however, in exceptional cases prevent divorce from being granted at that specific time, if divorce would result in exceptional hardship for a spouse.⁷⁰ In Dutch divorce proceedings the applicant can submit evidence to the judge, by proving personal facts and circumstances which have led to the permanent deterioration of the marriage; for instance, adulterous behaviour of a spouse. Divorce can no longer be rejected because the petitioning spouse is to blame for the deterioration of the marriage, but it appears that fault can be taken into account in connection with spousal maintenance claims.⁷¹

From a Swedish perspective, which is also the generally prevailing view in many European countries, excluding fault from divorce proceedings can be seen as a means to protect the privacy and integrity of the individuals concerned. More precisely, excluding fault makes divorce more accessible, at least indirectly, in the sense that fault grounds risk deterring a 'guilty' spouse from going through with a divorce, out of fear of appearing immoral or indecent. Moreover, establishing which spouse is to blame for the breakdown of the marriage risks creating conflicts between the spouses and this can be detrimental to the well-being of their

⁶⁸ See Masha Antokolskaia, chapter 2 in this volume.

⁶⁹ Nevertheless, the judge has certain discretion in this respect. Butruille-Cardew, 'The 2004 French Divorce Law and International Prospects' (n 52).

⁷⁰ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 12, pp 188–90. German Report written by Martiny. The circumstances, however, would have to be very exceptional.

⁷¹ Boele-Woelki, Braat and Curry-Sumner (eds), *European Family Law in Action, Volume I: Grounds for Divorce* (n 27), question 11, pp 177 f and 193. Dutch Report written by Boele-Woelki, Cherednychenko and Coenraad.

children. In other words fault generally aggravates rather than solves problems, to the detriment of children.⁷² Medical and psychological research supports the view that severe conflicts between parents are more harmful to children than the parents' divorce as such.⁷³ In fact, the detrimental effects on children of conflicts between parents was a reason why France considered abolishing fault as a direct ground for divorce in connection with the 2004 reform. In the end, however, fault was retained as a ground for divorce in France but applied restrictively.⁷⁴ This can be seen as a first step toward abolishing fault all together.

2.3 Theme 3: Pluralism – Regulating and Recognising New Cohabitation Models

2.3.1 The Swedish Acts on Cohabitation without Marriage: 1973, 1987 and 2003⁷⁵

Sexual relationships outside of marriage have become socially accepted in many European countries and numerous couples have children without being married. In Sweden more than 50 percent of all children are born to unmarried mothers, most of who presumably live with the child's father.⁷⁶ A special act governs such informal cohabitee relationships – The Cohabitees Act of 2003. The act is highly relevant since a third of all

⁷² This was a widely agreed conception in Germany in the 1970s. See Antokolskaia, 'The Search for a Common Core of Divorce Law: State Intervention v. Spouses' Autonomy', (n 12) 49.

⁷³ In fact, this research shows that experiencing divorce as a child does not necessarily correlate to poor mental health as an adult. T Ängarne-Lindberg, *Grown-Up Children of Divorce – Experiences and Health*, Linköping University Medical Dissertations No 1173, 2010. See also M Gähler, 'Self-Reported Psychological Well-being among Adult Children of Divorce in Sweden', (1998) 41(3) *Acta Sociologica* 209–25. See also Antokolskaia, 'The Search for a Common Core of Divorce Law: State Intervention v. Spouses' Autonomy' (n 12), 47–52.

⁷⁴ Butruille-Cardew, 'The 2004 French Divorce Law and International Prospects' (n 52).

⁷⁵ See also E Ryrstedt, 'The Swedish Cohabitees Act', in J Scherpe and N Yassari (eds), *The Legal Status of Cohabitants* (Mohr Siebeck 2005) 415–38.

⁷⁶ The latest figures available are from 2009 and compiled by Statistics Sweden (available 8 July 2015 at http://www.scb.se/statistik/_publikationer/BE0101_2009A01_BR_08_BE0110TAB.pdf). Most likely, many of these unwed mothers are living with the child's father. No statistics are available in this respect.

couples living together in Sweden are estimated to be unmarried ‘co-habitees’, in sense of the Cohabitees Act:⁷⁷ ‘two persons living together in a relationship, on a permanent basis, sharing a household’.⁷⁸

Already in 1936, in a Swedish Committee Report, sexual relationships outside of marriage were discussed in a tolerant tone, provided that it was a question of long-term loving relationships and not casual sexual encounters.⁷⁹ This early approval of (long-term) sexual relationships outside of marriage most likely paved the way for the value-neutral approach to cohabitation forms expressed in 1969 and for adopting a special act on cohabitation without marriage in 1973.

In 1973, the Act on the Joint dwelling of an Unmarried Couple was adopted.⁸⁰ The 1973 Act was limited in scope, only providing the cohabitee with the greatest need with the possibility of taking over a tenancy contract or a condominium, against compensation. The 1973 Act applied by default, just like its successors, that is, without a special procedure establishing the consent of the couple to being subject to legal rules. The Act became applicable upon the application of either party when the relationship ended. The 1973 Act, although limited in scope, can be seen as a starting point for adopting more comprehensive rules on cohabitation without marriage in the 1980s.

The Cohabitees Joint Homes Act of 1987 widened the scope of the 1973 Act, with property division rules which were based on the property division rules applicable to spouses and laid down in the Marriage Code.⁸¹ However, the property which could be subject to division after a cohabitee relationship was much more limited in scope than upon divorce, as only the net value of the cohabiting couple’s joint home and household goods, acquired for the purpose of their joint use, could be subject to division. A corresponding ‘cohabitees act’ applicable to same-sex couples was adopted in 1987 – The Homosexual Cohabitees Act – which applied by reference to the act applicable to couples of opposite sex.⁸² In 2003 a ‘gender-neutral’ cohabitees act was adopted,

⁷⁷ Government Bill (Prop 2002/03:80) Ny sambolag, p 24. In 1985, this figure was 20%.

⁷⁸ In Swedish: ‘två personer som stadigvarande bor tillsammans i ett parförhållande och har gemensamt hushåll’ (author’s translation). The Cohabitees Act, s 1.

⁷⁹ Committee Report (SOU 1936:59) p 76.

⁸⁰ The Act on the Joint Dwelling of an Unmarried Couple (Lag om ogifta samboendes gemensamma bostad) which entered into force on 1 January 1974.

⁸¹ Lag (1987:232) om sambors gemensamma hem.

⁸² Lag (1987:813) om homosexuella sambor.

primarily for the symbolic purpose of including same-sex and different-sex cohabitants in the same enactment, but the legislator also seized the opportunity to clarify a few issues at the same time.⁸³ The scope of the 2003 Act largely remains the same as that in the 1987 Act.

Marriage is no longer the only cohabitation model available. Once marriage had been emphasised as primarily a private matter between individuals (in the 1970s), which the state or the public should refrain from intervening in, legally recognising and regulating other cohabitation models rather than marriage was close at hand.⁸⁴ First unmarried couples living together were the target of legislative measures and thereafter same-sex couples. From this point of view, the Swedish cohabitee enactments can be seen as expressions of legal pluralism.

2.3.2 Legal recognition of same-sex relationships⁸⁵

More than two-thirds of the member states of the EU have adopted or are preparing statutory registration schemes which include same-sex couples.⁸⁶ Globally, in December 2012, marriage is available to same-sex couples in 11 countries: Argentina, Belgium, Canada, Denmark, Iceland, The Netherlands, Norway, Portugal, South Africa, Spain and Sweden.⁸⁷

⁸³ Sambolag (2003:376).

⁸⁴ Then again, applying rules by default, which are based on the marriage regulation, to unmarried couples can also be seen as increasing the level of official participation in the private sphere. See Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 139–44.

⁸⁵ See also Ian Curry-Sumner, chapter 4 in this volume; K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe* (Intersentia 2012) and J Basedow et al (eds), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (Mohr Siebeck 2000).

⁸⁶ Updated information about the legal status of same-sex couples in the world can be found at: CBC News: <http://www.cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html> (accessed 8 July 2015). The figure, two-thirds, was calculated by K Boele-Woelki, in 'The Legal Recognition of Same-Sex Relationships Within the European Union' [2007–2008] *Tulane Law Review*, 1960 f. See also M Saez, 'Same sex marriage, same sex cohabitation, and same sex families around the world: Why is "same" so different?', General Report for the XVIII International Congress of the International Academy of Comparative Law, Washington, 2010 and Report by ILGA Europe, April, 2011 (available 8 July 2015 at http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/organisations/ilga_en.pdf).

⁸⁷ See map at CBC News: <http://www.cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html> (n 86). Moreover, as shown on the map, same-sex marriage is legal in certain jurisdictions, for instance in some states in the United States, in Mexico City and in the province of Alagoas in Brazil.

On 12 February 2013, a bill on same-sex marriage was approved by the French lower house of parliament. It was subsequently approved by the senate and the new law was passed. In May 2013, the first same-sex marriage took place in France.⁸⁸ A step toward legalising same-sex marriage was also taken in England and Wales in February 2013, when a bill on same-sex marriage passed the first vote in the parliament. It passed the second vote in July 2013 and the new Marriage Act was adopted. The number of countries that have introduced marriage or another formalised institution available to same-sex couples is rapidly increasing in Europe.

This development is supported by the development at EU level, where facilitating the free movement of persons, same-sex couples included, is a prioritised issue, for instance in the field of family reunification.⁸⁹ The rapid legal development in recognising the rights of same-sex couples can also be linked to the strong impact of the general human rights discourse in Europe. Laws which safeguard the rights of same-sex couples and homosexual individuals in society are often justified with reference to human rights principles such as equal treatment and non-discrimination, which it is necessary to protect in a democratic society.⁹⁰

⁸⁸ <http://www.guardian.co.uk/world/2013/feb/12/french-gay-marriage-bill> (accessed 8 July 2015). See also Ian Curry-Sumner, chapter 4 in this volume.

⁸⁹ The work of the European Union Agency for Fundamental Rights can be mentioned. It has an advisory function toward the EU institutions and the member states, performing research and providing expert advice on the topic of fundamental rights. Furthermore, The Green Paper on the right to family reunification of third-country nationals living in the European Union can be noted (Directive 2003/86/EC), Brussels, 15.11.2011 COM(2011) 735 final. The Green Paper, inter alia, aims at facilitating the free circulation of documents in the EU. The aim is to initiate a discussion among interested member states on how to facilitate recognition of documents concerning for instance EU citizens' civil status within the EU. This Green Paper might contribute to facilitating the free movement of EU citizens within the EU, but still without forcing member states to recognise a same-sex marriage or registered partnership as equal to marriage. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0735:FIN:EN:PDF>, accessed 11 October 2012. For an analysis of case law of the European Union dealing with same-sex couples, see Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 285–90. See also H Toner, *Partnership Rights, Free Movement and EU Law* (Modern Studies in European Law, Hart Publishing 2003).

⁹⁰ This is, for instance, pointed out by M Bonini-Baraldi, 'Variations on the Theme of Status, Contract and Sexuality: An Italian Perspective on the Circulation of Models', in K Boele-Woelki (ed.) *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia 2003) 321.

Same-sex couples' protection under the European Convention on Human Rights will be discussed below.⁹¹

In Sweden, a Registered Partnership Act was adopted in 1994, based on equivalent Acts adopted in Denmark in 1989 and Norway in 1993.⁹² In the Swedish preparatory work to the Registered Partnership Act, the human rights discourse was present. An ideologically coloured political rhetoric was used which strongly resembles a human rights document, with references to human equality:

Our standpoint has an ideological foundation, based as it is on human equality, both as between individuals and under the law. We acknowledge homosexual love as equal in value to heterosexual love ... We wish to accommodate the desire of homosexual couples for a valuable setting for their relations, as a way of manifesting their love.⁹³

Through the Swedish Registered Partnership Act, most legal effects of marriage were made applicable to same-sex couples. Initially, however, some legal effects of marriage were explicitly exempted from the scope of the Swedish Act. These exceptions dealt with rules on legal parenthood, gender-based provisions and international treaties. However, these differences between same-sex and different sex couples were criticised and challenged, on a political level and by spokespersons for gay rights. As a result in 2003, rules on adoption – second-parent adoption as well as adoption of children from abroad – were made applicable to same-sex couples and in 2005 lesbian couples were granted access to medically assisted procreation.⁹⁴

Also Iceland and Finland followed the Danish, Norwegian and Swedish examples, in 1996 and 2001 respectively, by adopting similar

⁹¹ See section 3.3.3 below.

⁹² Denmark: Act on Registered Partnership (No 372, 7 June 1989). The Act entered into force 1 October 1989. Norway: Act on Registered Partnership (No 40, 30 April 1993). The Act entered into force 1 August 1993. Sweden: The Registered Partnership Act (1994:1117, 23 June 1994) The Act entered into force 1 January 1995. On this see P Dopffel and J Scherpe, 'Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder', in Basedow et al (eds), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (n 85) 7–49 and I Lund-Andersen, 'The Nordic Countries: Same Direction – Different Speeds', in Boele Woelki and Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe* (n. 85) 3–17.

⁹³ Committee Report (SOU 1993:98) Part A, p 21.

⁹⁴ A similar legal development has taken place in the other Scandinavian countries, except in Finland. Finland is the only Scandinavian country that does not allow adoption by same-sex couples and which has not introduced a

registered partnership acts and together forming what has been referred to as a ‘Scandinavian model’ of registered partnership.⁹⁵ Other ‘registration models’ exist elsewhere in Europe, such as the French ‘pacte civil de solidarité’ (PACS), which is much more limited in legal effect than the Nordic model and applicable to different-sex and same-sex couples. However, as mentioned in section 2.3.2 above, France now also allows same-sex marriages. There is also, for instance, the Dutch model of registered partnership, which has been kept after the introduction of a gender-neutral marriage concept. The Dutch registered partnership is open to same-sex and different-sex couples, and in practice functions as a ‘light version’ of marriage, which is easier to dissolve than a regular marriage.⁹⁶ In 2009 the Swedish Registered Partnership Act was replaced by a gender-neutral marriage enactment.⁹⁷ At the time of writing all Nordic countries except Finland have opened up marriage to same-sex couples.⁹⁸

However, there is no consensus in Europe – and even less so globally – that same-sex couples should be tolerated, let alone legally recognised. Homosexuality remains controversial in, for instance, Bulgaria, Estonia and Romania, where it has recently been specified in the law that

gender-neutral marriage concept. See for instance M Jänterä-Jareborg, ‘Parent-hood for Same-Sex Couples’, in *Liber Memorialis Petar Sarcevic, Universalism, Tradition and the Individual* (Sellier European Law Publishers 2006) 75–91.

⁹⁵ M Jänterä-Jareborg, ‘Registered Partnerships in Private International Law: The Scandinavian Approach’, in Boele-Woelki and Fuchs (eds) *Legal Recognition of Same-Sex Couples in Europe* (n 85) 149 and M Jänterä-Jareborg and C Sörgjerd, ‘The Experiences with Registered Partnership in Scandinavia’, *Fam-Pra.ch* 3/2004, Stämpfli Verlag AG, 577–79. The Icelandic Act on Registered Partnership (No 87, 12 June 1996) entered into force 27 June 1996 and the Finnish Act on Registered Partnerships (950/2001) entered into force 1 March 2002.

⁹⁶ For an account of different enactments for same-sex couples, see Boele-Woelki and Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe* (n 85). The Dutch institutions – registered partnership and marriage – are analysed by Sörgjerd in *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 243–48.

⁹⁷ In October 2009, the Bishops of the Church of Sweden voted in favour of officiating legally valid marriages between couples of the same sex. Thus, in Sweden, couples of the same sex, like couples of opposite sex, can choose between a legally valid civil or religious church ceremony.

⁹⁸ Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 268–74.

marriage is reserved for different-sex couples.⁹⁹ Moreover, in October 2012, the Ukraine parliament voted in favour of a proposal which will prohibit the spreading of what is referred to as 'homosexual propaganda'.¹⁰⁰ On a global level, homosexual sexual acts between consenting adults are criminalised in some 70 or 80 countries and capital punishment appears to be prescribed in seven of these countries.¹⁰¹

The overall impression is that improving the legal status of same-sex couples is a topical issue in a great number of European jurisdictions, whereas it largely remains controversial globally. The political interest in adopting special rules for same-sex couples is in line with the general idea that individuals should be free to live according to their own wishes, without official interference through legislation which is based on moral values concerning the 'right' way to live. However, as will be further illustrated below, there is still no consensus in Europe as regards the legal status of same-sex relationships.

3. MARRIAGE AND THE ECHR – INTERPRETATIONS BY THE STRASBOURG COURT

3.1 Background

Achieving equality between husband and wife and different cohabitation models in society has been and still is a driving force to legislation in many European countries during the 20th and 21st centuries. Now I will link this development to the human rights discourse in Europe, more precisely to the relevant provisions of the European Convention of Human Rights, as interpreted by the Strasbourg Court.

In the late 1940s, in the aftermath of World War II, protecting individuals' human rights vis-à-vis the state became urgent in Europe.

⁹⁹ See The European Union Agency for Fundamental Rights (FRA) (available 8 July 2015 at <http://www.fra.europa.eu/fraWebsite/attachments/FRA-LGBT-report-update2010.pdf>) 8.

¹⁰⁰ Press release by The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL) (available 8 July 2015 at <http://www.rfsl.se/?p=324&aid=12373>).

¹⁰¹ The death penalty currently appears to be prescribed for homosexual sexual acts in the following countries: Iran, Saudi Arabia, Yemen, United Arab Emirates, Mauritania, Afghanistan and Pakistan, as well as in some parts of Sudan and Nigeria. In Uganda according to the Anti-Homosexuality Act 2014 homosexual sexual acts can be punished with life imprisonment; an earlier draft had included the possibility of death penalty.

Given the horrible crimes against humanity carried out during the war, it was clear that nations could not be fully trusted to treat their citizens in accordance with basic human values.¹⁰² There was a general fear in the West over the spread of communism and it was deemed necessary to counteract the installation of a new totalitarian regime.¹⁰³ This concern resulted in the formation of different international bodies dealing with human rights issues from a public international law perspective.

In the global arena, the United Nations was founded in 1945 and its General Assembly proclaimed the United Nation's Universal Declaration of Human Rights in 1948.¹⁰⁴ At European level, the Council of Europe was founded in 1949, but the drafting of the European Convention on Human Rights had already begun 1948. The Convention was opened for signature in 1950 and the year 1952 can be regarded as the year of completion, that is, when the First Protocol to the main Convention was concluded. At the same time, the Strasbourg Court was established for the purpose of ensuring that member states complied with the articles laid down in the Convention.¹⁰⁵ Since then the ECHR has been amended by seven additional Protocols.¹⁰⁶

States that have chosen to accede to the ECHR – and to some or all of its additional Protocols – are obligated according to international law to respect the fundamental human rights of the Convention, not only in respect of the country's own citizens, but also in respect of foreign nationals abiding on its territory and belonging to its jurisdiction.¹⁰⁷ Individuals have the right to file complaints with the Strasbourg Court that a state has failed to guarantee them the enjoyment of the rights laid down in the Convention, provided that all domestic remedies have been exhausted and that formalities such as applicable time-limits have been followed.¹⁰⁸

¹⁰² I Cameron, *An Introduction to the European Convention on Human Rights* (6th edn, Iustus 2011) 25.

¹⁰³ E Bates, *The Evolution of the European Convention on Human Rights, From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 5.

¹⁰⁴ The UN will not be further analysed here.

¹⁰⁵ Bates, *The Evolution of the European Convention on Human Rights* (n 103) 23 f.

¹⁰⁶ Protocol numbers: 1, 4, 6, 7, 11, 12 and 13. Most aspects of the additional protocols have been inserted in Protocol 11. A varying number of states have chosen to accede to each additional Protocol.

¹⁰⁷ ECHR, article 1.

¹⁰⁸ Bates, *The Evolution of the European Convention on Human Rights* (n 103) 2.

When studying the legal development relating to marriage in Europe, three articles in the ECHR are of special interest: article 8 (the right to respect for one's private and family life), article 12 (the right to marry and found a family) and article 14 (the prohibition against discrimination).

3.2 Article 8: The Right to Protection of One's Private Life and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3.2.1 General remarks

The right to one's privacy has been a recurring theme in legal development in Europe since the 1960s and 1970s. In Sweden, this was expressed in terms of 'neutrality' in the late 1960s, the idea being that individuals should as far as possible be trusted to make rational decisions concerning their relationships without unnecessary morally-based 'intervention' by the authorities. Making divorce easier to obtain is in line with this policy. Also, legally recognising same-sex couples through special enactments reflects a general intention to leave lifestyle choices up to the individuals concerned. The same basic message can be found in article 8 of the ECHR – the protection of a person's privacy.

Article 8 of the ECHR covers many aspects of privacy. It protects a person's private and family life, as well as a person's home and correspondence.¹⁰⁹ In this chapter, however, only cases dealing with civil status issues will be dealt with. The idea is to investigate to what extent the line of development, which is visible at national level in Europe and accounted for above, is visible also at European level, that is, the development away from marriage as the only legally relevant cohabitation model, in favour of a more pluralistic view on who constitutes a 'family'.

¹⁰⁹ Article 8 includes issues such as personal integrity against the press and confidential data. See Cameron, *An Introduction to the European Convention on Human Rights* (n 102) 116–18.

3.2.2 Two levels of protection within the ‘privacy sphere’

Who is recognised as family and enjoys protection of their ‘family life’ under article 8? The protection of a couple’s ‘family life’ is more extensive than the protection of a couple’s ‘private life’, the former including, *inter alia*, a right for those who qualify as family under the article to live together and an obligation for the national legislator to protect the family in its domestic family law.¹¹⁰

There is no doubt that spouses of different sex are included, provided that it is not a marriage of convenience, entered into solely for immigration purposes.¹¹¹ In 1986, in the case of *Johnston and Others v Ireland*, the Strasbourg Court ruled that *unmarried* cohabiting couples also enjoy protection of their ‘family life’ under article 8. In that case, an Irish man was unable to marry the woman he had been living with for 15 years because he was already married to another woman and divorce was not permitted according to Irish law at that time. According to the Strasbourg Court, the unmarried couple constituted a family for the purposes of article 8 and was entitled to protection, notwithstanding the fact that their relationship existed outside of marriage. This meant, for instance, that they were entitled to the same social benefits as a married couple, but as specifically stated in the judgment: ‘Article 8 cannot be interpreted as imposing an obligation to establish a special regime for a particular category of unmarried couples.’¹¹² Furthermore, in the *Johnston*-case, the Strasbourg Court underlined that article 8 did not include a right to divorce.¹¹³

¹¹⁰ See *Abdulaziz v UK*, App No 921480, (ECHR, 28 May 1985). See also R Wintemute, ‘Strasbourg to the Rescue? Same-Sex Partners and Parents under the European Convention’ in R Wintemute and M Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford, Hart Publishing, 2004) 715. It can be noted that article 8 does not guarantee rights of immigration.

¹¹¹ See Toner, *Partnership Rights, Free Movement and EU Law* (n 89) 80.

¹¹² *Johnston and Others v Ireland*, App No 9697/82 (ECHR, 18 December 1986) para 68.

¹¹³ *Johnston and Others v Ireland*, App No 9697/82 (ECHR, 18 December 1986) paras 52–54. Divorce is a sensitive issue in Roman Catholic influenced States like Ireland, Malta and Poland, because marriage constitutes a non-soluble sacrament according to the Catholic faith. A discord can be noted between, on the one hand, ‘progressive’ member states such as the Nordic States and the Netherlands and, on the other hand, the more ‘conservative’ member states, such as Malta, Ireland and Poland. This discord is particularly visible in respect of issues relating to divorce, sexual equality, transsexualism and homosexuality. The ‘conservative’ member states take a cautious approach in such matters, which are

When determining if a couple enjoys protection of their ‘family life’ under article 8, the Strasbourg Court has taken into account factors such as how stable the relationship is and the parties’ intention with the relationship. Relationships that have lasted for a long time are more likely to qualify as family life than short-term relationships, as are relationships where the couple has joint finances or joint children.¹¹⁴ De facto cohabitation is another important but not necessary factor when determining if a couple enjoys protection of their ‘family life’ under article 8.¹¹⁵

In 2010, in the case of *Schalk and Kopf v Austria*, the Strasbourg Court for the first time stated that same-sex couples enjoy protection of their ‘family life’ according to article 8 of the ECHR.¹¹⁶ Prior to these judgments, a same sex couple had only been granted protection of their ‘private life’ – not their ‘family life’. However, the Court established that same-sex couples do not have a right to marry. This case will be further analysed in section 3.3.3. The Strasbourg Court has improved the legal position of homosexual individuals while exercising their rights under the Convention. For instance, bans on homosexual conduct in national legislation have been found contrary to article 8 – the right to respect for one’s private life.¹¹⁷

In summary, the relationship forms qualifying as ‘family’ under article 8 have gradually been extended through a dynamic interpretation model of the Strasbourg Court. Marriage between a man and a woman is no longer the only cohabitation form protected under article 8 of the ECHR.

sensitive from the point of view of traditional (Catholic) values, whereas the most ‘progressive’ states have facilitated divorce and opened up marriage to same-sex couples. See Cameron, *An Introduction to the European Convention on Human Rights* (n 102) 115. For a thorough account for the legal development in Spain, another ‘Catholic’ region, see, Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 249–67.

¹¹⁴ Toner, *Partnership Rights, Free Movement and EU Law* (n 89) 81. See also I Curry-Sumner, *The Charter of Fundamental Rights of the European Union and Sexual Orientation*, in P Lødrup and E Modvar, *Family Life and Human Rights* (Gyldendal 2004) 876 and Wintemute, ‘Strasbourg to the Rescue? Same-Sex Partners and Parents under the European Convention’ (n 110) 721–3.

¹¹⁵ Toner, *Partnership Rights, Free Movement and EU Law* (n 89) 81, with reference to relevant case law on this topic.

¹¹⁶ *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24 June 2010).

¹¹⁷ *Dudgeon v UK* App No 7525/76 (ECHR, 22 October 1981); *Norris v Ireland* App No 10581/83 (ECHR, 26 October 1988); *Modinos v Cyprus* App No 15070/89 (ECHR, 22 April 1993) and *A.D.T. v UK* App No 35765/97 (ECHR, 31 July 2000).

Like in many European jurisdictions, unmarried couples and same-sex couples have been granted a certain level of protection of their relationships. However, as will be shown below, access to marriage under article 12 is still applied restrictively.

3.3 Article 12: The Right to Marry and Found a Family

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

3.3.1 General remarks

The right to marry and found a family in article 12 is closely connected to the right to family life in article 8. Articles 8 and 12 both protect the family as something of a corner stone in society. In short, article 8 prohibits interference with an existing relationship or family unit, whereas article 12 governs the right to form family ties through marriage.¹¹⁸ However, the right to marry according to article 12 is interpreted more narrowly than the right to one's private life and family life under article 8. A restrictive understanding of the right to marry and found a family is stipulated in the wording of article 12; the right to marry and found a family only applies 'according to the national laws governing the exercise of this right'.

What does the reference to 'national laws' mean in article 12? In the legal literature it has been pointed out that the right to marry cannot be a matter for domestic laws alone to decide; the Convention is a public international law document adopted for the purpose of providing a certain basic level of protection regardless of what domestic laws stipulate.¹¹⁹ If a member state could place whichever restrictions it pleased on this right, it would be pointless to include the right in the Convention in the first place.¹²⁰ This means that a member state may restrict the right to marry through its domestic law – the states have a margin of appreciation – but the aim with the restriction must be

¹¹⁸ R White and C Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 334.

¹¹⁹ H Danelius, *Mänskliga rättigheter i europeisk praxis* (4th Edition, Norstedts Juridik 2012) 503. White and Ovey, *The European Convention on Human Rights* (n 118) 353.

¹²⁰ Cameron, *An Introduction to the European Convention on Human Rights* (n 102) 137.

legitimate and proportionate in relation to the goal sought to achieve.¹²¹ As a result, the details in the marriage regulation vary among the member states, for instance in respect of impediments to marriage and marriageable age. An example of a legitimate and proportionate restriction is to prevent incest or polygamy.¹²²

Generally the states' margin of appreciation is wide in respect of matters relating to public morality, since there is no European consensus on what 'good' morality is.¹²³ In certain family law matters – irrespective of their sensitive character – the Strasbourg Court has gradually become more dynamic and thereby, in a sense, forced 'progressive' values on the more 'conservative' member states.¹²⁴ There is a limit to the state's margin of appreciation even in sensitive issues such as marriage and divorce; otherwise the right would mean nothing. For example in 1987, in the case of *F v Switzerland*, the Court found that banning an adulterous party from remarrying for three years, pursuant to a specific provision in the Swiss Civil Code which applied at that time, for the purpose of protecting the institution of marriage, constituted a breach of article 12.¹²⁵ The Court found that the Swiss provision undermined the very essence of the right to marry.¹²⁶

The judgment in *F v. Switzerland* is in line with the legal development in many European jurisdictions, toward reducing moral input in the marriage regulation, in order to facilitate divorce and enhance marriage as an institution based on equality and individual freedom. Punishing the

¹²¹ White and Ovey, *The European Convention on Human Rights* (n 118) 353.

¹²² Ibid. In *B and L v UK* App No 36536/02 (ECHR, 13 September 2005, noted by Scherpe [2006] *Cambridge Law Journal* 32–5) rules prohibiting marriage between a daughter-in-law and her father-in-law, were considered to be a violation of article 12. The prohibition aimed to protect the integrity of the family unit.

¹²³ Danelius, *Mänskliga rättigheter i europeisk praxis* (n 119) 52.

¹²⁴ Iain Cameron points out that the 'progressive' Northern states can be accused of going too far in this respect and thereby neglecting important traditional values in a country. Cameron, *An Introduction to the European Convention on Human Rights* (n 102) 116.

¹²⁵ European Court of Human Rights: *F v Switzerland* App No 11329/85 (ECHR, 18 December 1987). See also the case of *Airey v Ireland* App No 6289/73, (ECHR, 9 October 1979). The case concerned judicial separation.

¹²⁶ Cameron, *An Introduction to the European Convention on Human Rights* (n 102) 138. For an analysis of what the essence of marriage is, see Sörgerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6).

spouse who is 'to blame' for the breakdown of the marriage by obstructing that spouse from concluding a new marriage, was a type of moral intervention by the public into the individual's private sphere, which was not found acceptable from a human rights perspective.

3.3.2 Transsexual and transgender persons and the right to marry

When the ECHR was adopted in 1950, the right to marry only applied to couples of opposite biological sex. The Strasbourg Court cannot adopt new rights but it can interpret existing rights in a dynamic fashion which widens the meaning of the concepts.¹²⁷ Recognising a transsexual persons' right to marry someone of their opposite (assigned) sex is an example of this dynamic interpretation model.

In 2002, in the case of *Christine Goodwin v the United Kingdom*, the Strasbourg Court for the first time found that denying transsexual persons who had undergone gender-reassignment surgery the right to marry someone of the opposite sex constituted a breach of article 12 of the ECHR. In previous decisions on the same topic – *Rees* (1986), *Cossey* (1990) and *Sheffield and Horsham* (1998) – the Strasbourg Court allowed the national governments a wide margin of appreciation and no violation of the Convention was found.¹²⁸ Since the *Goodwin*-case, however, the member states' margin of appreciation is much narrower when dealing with transsexual persons' rights under the Convention. The member states are generally free to regulate the details concerning a change of legal gender without violating the Convention (article 8), but they cannot infringe transsexual persons' right to marry someone of their opposite assigned sex according to article 12.¹²⁹

In the *Goodwin* case, the Strasbourg Court stated that it 'attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.'¹³⁰

¹²⁷ Cameron, *An Introduction to the European Convention on Human Rights* (n 102) 74. Sometimes the line between widening an existing right and adopting a new one appears thin.

¹²⁸ *Rees v The United Kingdom* App No 9532/81 (ECHR, 17 October 1986); *Cossey v UK* App No 10843/84 (ECHR, 27 September 1990) and *Sheffield and Horsham v UK* App No 22885/93; 23390/94 (ECHR, 30 July 1998).

¹²⁹ Danelius, *Mänskliga rättigheter i europeisk praxis* (n 119) 502.

¹³⁰ *Christine Goodwin v UK* App No 28957/95 (ECHR, 11 July, 2002) para 85.

In other words clear and uncontested evidence of a European trend to recognise the rights of transsexual persons was not necessary for the outcome in the *Goodwin* case, which in fact contradicted the prevailing laws of most European countries. As will be discussed below, it would be possible, at least in theory, to apply the same line of argument to same-sex couples, that is, to open up marriage to same-sex couples as a result of a ‘continuing international trend’ to recognise the rights of homosexuals in society.¹³¹

3.3.3 The legal status of same-sex couples: toward a European consensus?¹³²

Given the fact that transsexual persons have been granted the right to marry pursuant to article 12, without full consensus in the member states, perhaps also same-sex marriage will be recognised in the future, through a similar dynamic interpretation method.¹³³ In the *Goodwin* case the Court stressed that the Convention is a living instrument which needs to be adjusted to present-day conditions.¹³⁴

In 2010, in the *Schalk and Kopf*-case the Strasbourg Court ruled that same-sex couples enjoy protection of their *family life* under article 8 and not just of their *private life*. In that case, two men who were living together in a stable relationship in Austria applied for permission to marry each other in Austria. Austrian law did not allow same-sex marriage and no formalised union for same-sex couples had been adopted at the time. (The Austrian Registered Partnership Act was adopted in

¹³¹ See section 3.3.3 below.

¹³² See Ian Curry-Sumner, chapter 4 in this volume. See also J Scherpe, ‘From “Odious Crime” to Family Life – Same-sex Couples and the ECHR’, in A-L Verbeke, JM Scherpe, C Declerck, T Helms and P Senaevé (eds), *Confronting the Frontiers of Family and Succession Law – Liber amicorum Walter Pintens* (Intersentia 2012) 1225–40 and J Scherpe, ‘The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights’ (2013) 10 *Equal Rights Review* 83–96 (available in print and 8 July 2015 at http://www.equalrightstrust.org/ertdocumentbank/ERR10_sp1.pdf).

¹³³ On the other hand, the outcome of the *Goodwin* case can be interpreted as underlining the idea of marriage as a heterosexual union. See Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 299–300.

¹³⁴ *Christine Goodwin v UK* App No 28957/95 (ECHR, 11 July 2002) paras 74–75. See also for instance *EB v France* App No 43546/02 (ECHR, 22 January 2008) para 92.

2010.)¹³⁵ When the couple's request was denied by Austrian authorities, they turned to the Strasbourg Court and claimed that they had been victims of unlawful discrimination based on their sexual orientation, more precisely because they as a same-sex couple could not marry or otherwise have their relationship formally recognised by Austrian law.¹³⁶ The Strasbourg Court recognised that many member states had introduced rules providing same-sex couples with access to a formalised institution. However, the Court pointed out, the substantial rules differed considerably from one country to another in respect of legal effects.¹³⁷ Thus there was still no *consensus* in Europe on the issue of legal recognition of same-sex couples.

The merit of the *Schalk and Kopf*-case, from the perspective of same-sex couples and their spokespersons, is that same-sex couples qualify as enjoying 'family life' under article 8 and not just 'private life'. The Court underlined that the verdict does not mean that national Governments are obligated to introduce a special legal institution for same-sex couples, but they are compelled to treat unmarried same-sex and different-sex couples equally in respect of social and other benefits. This was illustrated in another case – The case of *P.B. and J.S. v Austria*, also decided in the summer of 2010.

In the *P.B. and J.S.* case, the Strasbourg Court for the first time ruled that a same-sex couple's 'family life' had in fact been violated. The case concerned a homosexual man's demands for access to his partner's sickness and accident insurance. Treating unmarried couples of the same sex differently than unmarried cohabiting couples of the opposite sex constituted a breach of article 14 in conjunction with article 8.

These two cases – *Schalk and Kopf* and *P.B. and J.S.* – can be seen as examples of the Court's dynamic interpretation method.¹³⁸ They can be interpreted as the Court taking one step toward obliging member states to introduce a formalised institution for same-sex couples, in order to

¹³⁵ The Registered Partnership Act, Federal Law Gazette (Bundesgesetzblatt) Vol I, No 135/2009. The Act entered into force 1 January 2010.

¹³⁶ *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24 June 2010) para 3.

¹³⁷ *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24 June 2010) para 31.

¹³⁸ See also *Valliantos and others v Greece* App Nos. 29381/09 and 32684/09 (ECHR, 7 November 2013), where the Court ruled that excluding same-sex couples in Greece from registering a civil union, an option available to heterosexual unmarried couples, violated rights protected by article 14 in conjunction with article 8 of the Convention.

safeguard the protection of their family life.¹³⁹ However, as it turns out, the Court is not ready to go that far, at least not yet. In 2012, in the case of *Gas and Dubois v France*, the Strasbourg Court ruled that excluding same-sex couples from access to marriage was not discriminatory; that is, article 14 in conjunction with article 8 of the ECHR had not been violated.¹⁴⁰

In the *Gas and Dubois* case, two women had entered into a 'PACS' in 2002. In the year 2000, the couple had had a child by means of assisted procreation in Belgium, using an anonymous sperm donor. They raised the child together and in 2006 the birth mother's partner applied to adopt the child (with the birth mother's consent). The French tribunals rejected the application by virtue of the French civil code, which stipulates that only spouses can achieve joint parenthood through adoption. Same-sex marriage is about to be legalised in France in 2013, most likely along with rules on adoption by same-sex couples, but at the time of the *Gas and Dubois* case same-sex couples could neither marry nor adopt under French law. The Strasbourg Court ruled that there had been no discrimination because of the couple's sexual orientation in the present case, since unmarried same-sex couples were treated equally to unmarried different-sex couples and there is no obligation to grant same-sex couples access to marriage or to a legal institution with equivalent legal effects, as established in the *Schalk and Kopf* case.

In summary, the Strasbourg Court does not appear to be on the verge of compelling member states to grant same-sex couples access to marriage. Same-sex marriage remains a sensitive issue in Europe and article 12 leaves a wide margin of appreciation to the member states. On the other hand, the legal development relating to same-sex couples has been extremely rapid in Europe during the past few decades, which speaks in favour of a rapid development and a dynamic interpretation also in the jurisprudence of the Strasbourg Court.

¹³⁹ Sörgerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6) 303–11.

¹⁴⁰ *Gas and Dubois v France* App No 25951/07, Judgment of 15 March 2012. The decision is in French but the facts of the case can be found at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?%7B%22dmdocnumber%22%3A%5B%22882709%22%5D%2C%22display%22%3A%5B0%5D%7D>. For an English summary see The Guardian, 'Can a homosexual person adopt his or her partner's child?' 2 April, 2012. <http://www.guardian.co.uk/law/2012/apr/02/can-gay-person-adopt-partners-child> (both accessed 8 July 2015).

4. CONCLUDING REMARKS

Is there a European definition or common conception of marriage? As I see it, it is not possible to find one uncontested definition of marriage, not within a country and even less so across Europe. Marriage is a complex and dynamic institution. It is not just a legal contract, concluded by two persons for the purpose of settling their financial matters; it is also a product of its historical, cultural and religious functions in society.¹⁴¹ As the Strasbourg Court has put it: ‘marriage has deep-rooted social and cultural connotations which may differ largely from one society to another’.¹⁴²

What one can do, however, in order to increase our understanding of how marriage functions in 21st century Europe, is to identify common interests or core values which have been found worth protecting through legislation over time in different European countries. When doing so, a general line of development appears. This development first focuses on achieving equality – legal parity – between men and women and then moves on to reducing the level of official participation in the couple’s private sphere, inter alia by making divorce more accessible. Adopting laws which recognise the rights of unmarried and same-sex couples, in favour of a more pluralistic outlook on civil status issues, constitutes a third ‘stage’ in this development: pluralism. The jurisprudence of the Strasbourg Court, based on the ECHR, has stimulated this development through dynamic interpretations. As a result, the member states’ margin of appreciation has gradually diminished in selected fields, whereas the Strasbourg Court has remained more cautious in other matters, which are considered to be best left to national authorities to determine.

The three themes – *equality, privacy and pluralism* – are important keys to understanding how marriage functions in Europe in the 21st century. Marriage is a legal institution based on equality between the couple. It is also based on the idea of respect for the individual’s privacy and couples are trusted to make rational decisions about their relationship without unnecessary interference by the authorities. The emphasis on party and individual autonomy has resulted in, for instance, law reforms aiming at reducing the impact of fault in divorce proceedings and the introduction of divorce based on mutual consent or even ‘on demand’.

¹⁴¹ See Sörgjerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6).

¹⁴² *Schalk and Kopf v Austria* App No 30141/04 (ECHR, 24 June 2010) para 62, with reference to a case from 2005 – *B and L v UK*, para 36. See section 3.4.2 above.

The focus on *equality* and *privacy* has helped pave the way for the third theme – *pluralism*. If everyone is truly equal under the law and if lifestyle choices belong to the individual's 'private sphere', people's differences in this respect must be accepted, respected and even, to some extent, protected through legislation. This has opened up the legal recognition of same-sex couples in the domestic laws of several European countries. Special enactments have been introduced, which vary in substance and form but share a common ambition, namely to improve the legal status of same-sex couples and counteract discrimination. The human rights discourse in Europe has fuelled this development, by emphasising equality and non-discrimination. In some countries the institutions created with same-sex couples in mind are also open to unmarried couples of the opposite sex.¹⁴³

What will happen to the institution of marriage if the development towards more privacy, autonomy and pluralism continues? Will the institution of marriage still serve a relevant purpose from a legal point of view in the future, or will marriage become superfluous and be abolished? As I see it, privacy as an isolated phenomenon, can perhaps be a 'threat' to the institution of marriage. There are ways to privately celebrate and solemnise a relationship and of honouring a couple's commitment to each other without involving the authorities through a legally binding ceremony. However, in my opinion, marriage still serves a relevant purpose and should not be abolished as a legal institution. Marriage comes with a package of legal rules, which are based on the idea of creating equality between the spouses and specially designed to recognise different kinds of contributions to the mutual 'family project' as equally valuable. Couples cannot be fully trusted to regulate their financial situation through agreements in an equal and fair manner; a certain level of official participation is needed.

Moreover, if privacy can be a threat to marriage, then pluralism can be the remedy. The experience with the Swedish gender neutral marriage reform of 2009 illustrates this. The Swedish 2009 enactment was not about same-sex couples acquiring the legal effects of marriage. The Registered Partnership Act of 1994 already provided same-sex partners with access to the same legal rules as those acquired through marriage. The Swedish reform of 2009 was about the symbolic value of calling a union 'marriage' instead of 'registered partnership'. It became clear, from a Swedish perspective, that marriage is not just a package of legal rules

¹⁴³ This is the case in respect of, for instance the French PACS and the Dutch Registered Partnership.

but also a kind of trademark, which signals durability and long-term commitment and this was attractive to same-sex couples.¹⁴⁴ Since 2009, in Sweden, marriage also signals equal treatment and non-discrimination.

Against this background one could say that if marriage was heading toward complete 'privatisation' and thereby by extension risked becoming superfluous as a legal institution, then same-sex couples recharged the symbolic value of marriage as a civil status and thereby saved it. This line of reasoning can be applied to many European jurisdictions, where same-sex couples have been legally recognised. Modernising marriage is a way to keep it á jour with contemporary values. It is likely that marriage will continue to be an important cohabitation model and civil status in Europe, as long as it does not stagnate but continues to prove flexible and adaptable to changing values in society.

RECOMMENDATIONS FOR FURTHER READING

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Publications by the Commission on European Family Law, especially European Family Law in Action, Volumes 1, 2 and 4, see <http://ceflonline.net/>.

¹⁴⁴ Sörgerd, *Reconstructing Marriage – The Legal Status of Relationships in a Changing Society* (n 6).