

Why Registered Partnership is not Enough – Sweden’s Way to Same-Sex Marriage
Presentation by Mr. Hans Ytterberg, Sweden’s Ombudsman against Discrimination on grounds of Sexual Orientation, Federal Parliament of Austria, Vienna, 2 October 2006

Ladies and gentlemen, friends and colleagues,

Historic development is a continuous process. It is therefore often difficult to identify a single event, which radically changes the course of history. From this rule there are, of course, exceptions. This is the case also when we look at the development of legal recognition for same-sex relationships. For Sweden’s part such a turning point, law reform wise, came in 1973, when the Government presented Parliament with a bill¹ containing proposals for a major reform of the Swedish marriage legislation in which e.g. the rules on annulment of marriage and legal separation were done away with. Some of the older obstacles to marriage were also repealed and a new very liberal divorce legislation was introduced. In that context, little did the Standing Committee on Civil Law Legislation of the Swedish Parliament² realise the far-reaching effects one and half lines included in its legislative report on this bill would have on the future developments.

In connection with this Government bill, some Members of Parliament tabled a motion³ dealing with the legal situation also of the ‘sexually deviant’, which in those days was a common way of describing gay and lesbian couples. More specifically they submitted among other things that there was a need for a legal framework also for the cohabitation of two persons of the same sex. Although the Committee turned down the initiative, it felt at the same time the need to express sympathy for what was perceived as the particular problems of

¹ Government Bill (prop.) 1973:3

² Riksdagens lagutskott

³ Motion (mot.) 1973:1793

this minority in society. In concluding, it therefore stated that ⁴ ‘[t]here are good reasons for taking into account the problems of homosexuals. It is evident that in a lot of ways these people are in a disadvantageous situation compared to cohabitants of different sexes.’ While nevertheless declaring itself incapable of solving the problems of this group within the context of the Government bill before it, the Committee pronounced that it wanted to ‘underline that, from society’s point of view, cohabitation between two persons of the same sex is a perfectly acceptable form of family life.’⁵

This statement from the Committee, in a report which was subsequently approved by Parliament, constituted the first formal recognition in Sweden of same-sex families. Same-sex relations had been legal in Sweden since 1944. Now, if such relations were not only legal but from now on also perfectly acceptable, the next natural step in the development was of course to target any discriminating piece of legislation whether in family law or in other legal areas. Two major reforms came quickly. In 1978 the ages of consent for same-sex and heterosexual relations were set at an equal level.⁶ A year later the medical classification of homosexuality as a mental disorder⁷ was officially repealed. In 1988 the first piece of legislation giving legal recognition, albeit limited recognition, to cohabiting couples of the same sex entered into force. And, inspired by Danish and Norwegian legal reforms, the Swedish Registered Partnership Act became a reality on 1 January 1995, giving same-sex couples to a large extent the same rights and obligations as married spouses. The Registered Partnership Act has since then been amended several times leading up to virtually legal equality between registered partners and married spouses, including such things as access to adoption, both nationally and internationally, assisted procreation and joint legal parenthood over children.

⁴ Author’s own and unofficial translation

⁵ Standing Committee on Civil Law Legislation Report (bet.) 1973:LU20 p. 116

⁶ Act (SFS 1978:103) amending Chapter 6 Section 4 of the Penal Code (Brottsbalk, SFS 1962:700); Government Bill (prop.) 1977/78:69, and Standing Committee on Justice Report (JuU) 1977/78:26.

⁷ WHO Classification of Diseases 302.00

So, why then is registered partnership legislation not enough? To answer this question, we must first ask ourselves why people get married in the first place?

For many, perhaps most, this seems to follow a more or less set pattern. If you are lucky enough, you meet someone you fall in love with, someone you feel a great affinity with, someone you want to share your life with. You feel that you want this person to be your companion through life. Then, for many people, I reckon there is also the understanding that marriage offers a sort of legal package solution for a number of practical matters which experience shows can be useful, if you live with someone for a long time, perhaps even with the intention that it should be for the rest of your life. Marriage is also, or perhaps foremost, a manifestation of mutual solidarity, caring and responsibility. A manifestation towards one another that, from now on, it is just you and me.

But it is also a manifestation to the outside world. Marriage, still today, is a central and important institution in society. And quite apart from its legal implications, society around us places great importance on marriage in a range of social contexts. If, without any objective justification, you exclude collectively a whole group of the population from this important social institution, a group of people who find themselves in a perfectly comparable situation to the rest of the people, that is discrimination.

In Sweden, as I have pointed out, legal reform for gays and lesbians in the family law area has taken a step by step approach over quite many years. This approach proved useful in our national context, leading up to a situation where there are virtually no differences anymore when it comes to the legal consequences of a registered partnership and a civil marriage,

respectively. Looked upon from this angle, however, it also becomes obvious that when the conditions for entering into these two separate institutions, as well as the process of how to get out of them, and most of all the legal consequences of being in one or the other are the same, the only remaining function of keeping this system of ‘separate but equal’ is to maintain a hierarchy of sexualities. In excluding same-sex couples from the choice of whether to be part of the important societal institution of marriage or not – a choice which is fundamental and comes without saying for heterosexual couples – and instead referring them to the distinct category of registered partnership, same-sex couples are effectively being told that ‘you are not like us, you are not one of us, you are simply not worthy’. This serves no legitimate purpose and therefore constitutes nothing short of a violation of their human dignity.

Finally, by referring same-sex couples to the separate and distinct institution of registered partnership, the legislator increases the insecurities surrounding the lives of these couples. What legal status, if indeed any, will the entering into such an odd institution have in the eyes e.g. of authorities in other countries. If there are no guarantees that a marriage entered into in Spain, the Netherlands, Belgium, Canada or Massachusetts in the United States, between two persons of the same sex will be recognised in other jurisdictions and, indeed, such recognition would at present run contrary to the principle of public policy, or ‘ordre public’ in many countries, at least marriage as such is a universally recognised institution. The invention of registered partnership is not.

These uncertainties became a painful reality for a Swedish translator, ‘D’ as he was referred to in the legal process before the European Court of Justice in Luxemburg.⁸ He was employed

⁸ ‘D’ and Kingdom of Sweden, supported by Kingdom of Denmark and Kingdom of the Netherlands v. Council of the European Union, joined cases C-122/99 P and C-125/99 P, judgment of the Court 31 May 2001.

by the Council of the European Union and worked in Brussels. He had registered his partnership with another Swedish man, in Sweden and in accordance with the Swedish Registered Partnership Act. According to this act any and all legal provisions that apply to marriage and married spouses apply also to registered partnership and registered partners. Nevertheless the Council – his employer – when applying the Community’s Staff Regulations denied him the employment benefits that were accorded to this married colleagues. ‘D’ therefore, with the support of the Swedish Government and a few others, sued the Council before the Court of Justice. In its judgment, dismissing the complaint against the Council, the Court stated that *‘since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex [... ...] and conferring on such unions certain effects which [... ...] are the same or comparable to those of marriage. [... ...] It is clear, however, that [... ...] such arrangements for registering relationships between couples [... ...] are regarded in the Member States concerned as being distinct from marriage. In such circumstances [the Court] can not interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage.’*

Or in other words, since a registered partnership **is not** a marriage – it will not be treated as one.

I started this brief presentation by speaking of historic developments as a continuous process and would like to come back to that now in my conclusion. Out of close to 200 states represented in the General Assembly of the United Nations, only around 25 give some form of legal recognition to same-sex couples. Not very impressive, some would say. On the other hand, I would submit that it is more interesting to note that when Sweden introduced its

Registered Partnership Act in 1994, as only the third country in the world, the idea was heavily criticised with the argument that it was highly unlikely that similar legislation would become reality in any other country in the foreseeable future. Nevertheless, since then we have seen legislation and judge-made law that to a lesser or greater extent give legal recognition to same-sex couples in more countries than it is possible to remember by heart. Examples include Iceland, Finland, the Netherlands, Germany, France, Belgium, Spain, Portugal, Hungary, the United Kingdom, Luxemburg, Switzerland, Canada, New Zealand, Israel, Slovenia, Austria, Croatia, South Africa and parts of Australia and the United States of America.

This story of love and legislation will continue. The process will go on. In my own country, a report on the possible introduction of a gender neutral Marriage Code, to replace the Registered Partnership Act, is expected before the end of March next year. If votes in Parliament follow party lines, there should be a comfortable majority in favour of such a reform. And another report is expected already before the end of this year, this time on the introduction of the same rules for heterosexual and same-sex couples when it comes to an automatic legal presumption of parenthood for the partner of the birthmother in relation to children born after assisted procreation. With those two reforms, for all practical purposes, full legal equality will have been achieved between same-sex and heterosexual couples in Sweden.

When I was speaking at a conference at Kings College in London in 1999, I remember saying – with the slightly altered words of Sir Winston Churchill – that when it comes to equality in dignity and rights for gay and lesbian families at least in Sweden and in Europe, the processes that had taken place at that time were certainly not the end, not even the beginning of the end,

but they may indeed have been the end of the beginning. Today, little more than seven years down the road, for Sweden's part I would have to revise that statement. In my belief, we have indeed reached the beginning of the end, which in itself of course will prove only to be a new beginning, and not just for same-sex couples – because where there is fairness and justice for all, everyone is a winner.

Thank you very much ladies and gentlemen for your attention.