## Symposium

### Domestic Partnerships

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**REVUE CANADIENNE DE DROIT FAMILIAL**
CIVIL DEVELOPMENTS: PATTERNS OF REFORM IN THE LEGAL POSITION OF SAME-SEX PARTNERS IN EUROPE

Kees Waaldijk

This article sketches the main legislative developments around homosexuality in the last three centuries in Europe. Drawing on enactments from all major European countries it presents as a standard sequence that of decriminalisation, followed by anti-discrimination provisions, and then again by partnership legislation. It suggests that countries that so far have not completed decriminalisation of homosexual acts, or that have not gone beyond decriminalisation, will come round to prohibiting discriminations based on sexual orientation, and will eventually provide legislative recognition of same-sex couples. In the end that recognition might well take the form of opening up civil marriage.

I. THE IMPERIAL HISTORY OF LAW & HOMOSEXUALITY

Great empires have shaped the legal history of homosexuality. An alliance of the Roman Empire and the equally imperial (i.e. supranational) Church of Rome established the two rules on homosexuality that have marginalised same-sex love for many centuries now. Since sometime in the Middle Ages it has been the law that both for sexual activity, and for a legal marriage, you need to be of opposite sexes.

Both this criminal rule and this marriage rule have been in force throughout Europe. It took another empire, Napoleon's France, and its 'civil' codifications to abolish the criminal rule on homosexuality in great parts of Europe. Elsewhere, however, other empires (notably the British, the German, the Austrian and the Russian/Soviet Empire) seriously reinforced the rules. The emergence in the 20th century of a transnational culture of democracy and civil rights led to the complete or partial repeal of the ban on homosexual activity in a larger group of European countries. That democratic 'empire' of civil rights also made it possible to protect individuals from anti-homosexual discrimination, and from some of the exclusionary effects of the medieval marriage rule. Both processes have been sped up in the last two decades by what could properly be called the “empire” of international human rights. The rule of law characteristic for the most recent empire has ensured that the medieval criminal rule on homosexuality has now largely disappeared from Europe. Most jurisdictions have gradually recognised the simple fact of life that a number people do have sex with same-sex partners.

For the full disappearance of the marriage rule on homosexuality, however, more will be needed. The ever growing empire of the European common market might even play its part, too; but in the end it will be a question of mere civilisation: When and how to recognise, in law, the simple fact of life that same-sex partners are marrying each other?


2. Details will be given below, in paragraph 2.
Yes, indeed, same-sex partners have been marrying each other for many centuries. According to an interesting, but hardly verifiable or falsifiable hypothesis, homosexual identities and sub-cultures (and possibly even preferences) may be social constructions dating back only a century (or two). However, anthropological, legal, literary and other historical evidence suggests that not only sexual activities between two men or two women, but also same-sex relationships have been around since history began to be written. Such same-sex unions have often been indistinguishable from marriages. Quoting Homer and the Bible, Plato and Aristotle, and numerous documents from the first sixteen centuries of the Christian churches, John Boswell lists numerous examples of couples, ceremonies, and the various words (including 'marriage') used for such unions.¹

A curious historian or journalist, a doctor or psychologist might well ask; "But did these 'married women' or 'brothers of choice' have sex?" For lawyers and politicians, however, that is not a permissible question. In law, a non-sexual marriage is perfectly valid (at least in modern European legal systems). For the state to look into the sexual or non-sexual character of its citizens would be unlawful and highly uncivilised.

Furthermore, the very idea of marriage (in civil law, but also in the official teachings of the Roman Catholic church) is that people marry each other. Priests, registrars, etc., are only witnesses; at most they register something that the parties have done. Witnesses and/or registration may be relevant for the legal validity of a marriage, but the word 'marriage', in its social sense, can be used for any couple 'marrying' each other, i.e. forming a lasting, sharing bond. In fact, it is quite common among gay male couples, for example, to refer to each other, non-ironically, with the words 'my husband' or 'my man'. Similarly, words like 'wedding', 'spouse', 'marital problems' and even 'divorce' are regularly used by and for women in lesbian relationships and by men in gay relationships.

So the social existence of same-sex marriages itself poses the question for any legal system when and how to legally recognise these relationships. That recognition can take different forms. And the form(s) chosen will have different kinds of (legal and psychological) effects on the partners, and on the wishes of others to become same-sex partners. So far, virtually all legal systems (in and outside Europe) have been reluctant to recognise same-sex unions as marriages (only the Dutch legislature is currently in the process of dropping that reluctance).² A small but growing number of jurisdictions, however, have already opted to recognise such unions as something else (e.g. as 'registered partnership' or as 'domestic partnership'), but with a very marriage-like set of formalities and consequences. More limited forms of recognition, in the 'similar-but-separate', approach can be found in a larger group of countries. Here the recognition does involve fewer formalities (or none at all, as in the case of recognition of de facto cohabitation) and/or carries fewer legal consequences.³

On 8 July 1999 the Dutch Government presented a Bill to Parliament to amend Book 1 of the Civil Code so as to open up marriage for persons of the same sex (printed in the Parliamentary Papers: Kamerstukken II 1998/99, 26672, nrs. 1-3). In their Coalition Manifesto the three parties forming the current majority Government have committed themselves to adopting this Bill, in which case it could become law in 2001. A summary-translation in English of this Bill can be found at the present author’s website.


Details will be given below, in paragraph 4.

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¹ John Boswell, supra note 1.
² Ibid, at 165 and 281.
³ Ibid, at 165 and 281.
The introduction, here and there, of any of these forms of legal recognition of same-sex unions can be seen in the general context of the development of national law on homosexuality. These developments in different European countries are strikingly similar, although taking place at very dissimilar speeds. The great divide is not between the civil law and the common law traditions, and neither between East and West, nor between a Protestant North and a Catholic South. No, the main split is between the Nordic and ‘Napoleonic’ countries on the one hand, and the territories of the (former) British, German, Austrian and Russian/Soviet empires on the other. But again: this is mainly a difference in speed, and hardly in substance. Virtually all countries in Europe seem to be following a standard sequence of steps. The three most prominent steps are: decriminalisation, anti-discrimination, partnership legislation.

II. FROM CRIMINALISATION TO DECRIMINALISATION

To set the scene for a description of those three steps, we must first return to the medieval criminal rule on homosexuality. In many countries, until the 19th century, this criminalisation of sex between people of the same-sex was never properly codified. The authorities mostly relied on a mix of documents on canonical, local and/or Roman law. However, a few countries already centuries ago took the trouble of legislating explicitly for this prohibition, at least with regard to male homosexuality (women were forgotten in all the senses of the word). This is particularly true for countries that were establishing themselves as empires at the time. The parallels in time between Germany, legislating on this point in 1507/1532 and 1871, and England (1533 and 1861/1885) are striking. Similarly, Russia legislated against homosexual acts in 1706 and in 1835/1845, and Austria in 1768 and in 1803/1852. In all four countries, and in virtually all those imperially dominated by them, the prohibition remained in force until the final decades of the 20th century. However, a temporary decriminalisation took place in Russia 1917, followed by re-criminalisation in 1934.

More research would be needed to give a similar overview of the codification of the medieval marriage rule. Suffice it to say that many jurisdictions have not explicitly excluded same-sex couples from the right to marry. In other words, the idea of a same-sex marriage has been even more unspeakable than the crimen nefandum itself. In most countries sex between women was not criminalised explicitly either. But these silences of the law did not imply that lesbian sex, or indeed lesbian (or gay) marriages, were legal.

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8 F. Leroy-Forgeot, supra note 1, at 31-36.


10 H. Graupner, ibid, at 711.

11 J.S. Kon, “Russia” in D.J. West & R. Green, supra note 9, at 221-222.

12 H. Graupner, supra note 9, at 567-573; see also his chapter in D.J. West & R. Green, supra note 9, at 269-271.

13 J.S. Kon, supra note 11, at 223-224; H. Graupner, supra note 9, at 451.
In contrast to the countries that were quick to codify the criminalisation of homosexual activity, France was the first European country to decriminalise homosexuality on a permanent basis. This revolutionary decriminalisation of 1791 was then 'exported' in the imperialist manner (eventually in the form of the Napoleonic Penal Code of 1810). Thus the medieval criminal rule disappeared in Belgium and Luxembourg (1794), the Netherlands (1811) and in some parts of Italy. All these countries later adopted national Penal Codes without criminalising homosexual activity. The French influence was also effective in Spain, Switzerland and Turkey, which in 1858 decriminalised homosexual activity when adopting a Penal Code based on the French model. For some time the French influence was also effective in Portugal, and in some parts of Germany and Poland. Homosexual law reform had become a regular element in enlightened penal codification.

This was the first of four waves of decriminalisation of homosexual activity in Europe. Most of the first wave countries never re-criminalised homosexual activity as such, but did introduce specific homosexual offences, especially in the form of higher ages of consent. The Netherlands were the first to do so, in 1911, followed by France in 1942, Belgium in 1965, and finally Luxembourg in 1971. This phenomenon could be called semi-re-criminalisation. These four semi-
recriminalisations were later undone in the same order as they had been introduced: 1971, 1982, 1985 and 1992. 30

A second wave started in the 20th century, with a semi-decriminalisation in Norway in 1902 (adding a paragraph to the penal prohibition of homosexual acts, stating that prosecutions could only take place if the public interest required it) 31 and a revolutionary full decriminalisation in Russia, legalising homosexual activity in 1917. 32 However, this Russian reform was short-lived, because in all Soviet republics criminal provisions were re-introduced in 1934. 33

Without an obvious common explanation, decriminalisation in that period also took place in some other countries on the edges of Europe: Denmark (still comprising Iceland; 1930), 34 Poland (1932), 35 Sweden (1944), 36 Portugal (1945) 37 and Greece (1950). 38 Denmark, Sweden and Greece only semi-decriminalised homosexual activity: they enacted higher minimum age limits for homosexual sex than for heterosexual sex. Had homosexual law reform become a way of showing political modernity for peripheral countries?

The third wave started in the sixties, simultaneously on both sides of the Iron Curtain. One part of the former Russian

Empire (Finland) and several parts of the former British, German and Austrian empires - with their parallel histories of criminalisation - now at last brought their legislation in-line with the civilised criminal codes of the Napoleonic and Nordic circles of countries. Czechoslovakia and Hungary did so in 1961, 39 England and Wales in 1967, 40 Bulgaria and East Germany in 1968, 41 West Germany in 1969, 42 Austria and Finland in 1971, 43 Slovenia and Croatia in 1977, 44 and finally Scotland in 1980. 45 Of all these countries only Slovenia effected full decriminalisation; the other countries only managed semi-decriminalisation (by establishing different age limits for homosexual and heterosexual sex, and, in the case of Bulgaria, Britain and Austria, various other specific homosexual offences).

The success of some of the law reforms of the third wave, unlike those in the two earlier waves, can be partly credited to the activities of emerging gay and lesbian movements. Homosexual law reform had become a civil rights issue.

More was needed, however, to free some other remains of the British empire, as well as most communist countries, from the continued criminal provisions against homosexual activity. A fourth and final wave of decriminalisation was directly inspired and powered by human rights, especially by

30 H. Graupner, ibid., at 550, 558, 390 and 629.
31 H. Graupner, ibid., at 558.
32 J.S. Kon, supra note 11 at 223-224.
33 H. Graupner, supra note 9, at 451.
34 H. Graupner, ibid., at 390 and 491.
35 H. Graupner, ibid., at 590.
36 H. Graupner, ibid., at 628.
37 After the re-criminalisation of 1912 (see H. Graupner, ibid., at 597).
38 H. Graupner, ibid., at 466.
the standards set in the European Convention on Human Rights. In 1981 the European Court of Human Rights, relying inter alia on the fact that the great majority of States that were Parties to the Convention had already decriminalised,46 ruled that the total ban on homosexual activity in Northern Ireland was a violation of the right to respect for one's private life.47 The ban was lifted the following year. New judgements of the Court were needed before Ireland and Cyprus did the same with their anti-homosexual laws.48

In the meantime the Soviet Union had broken down and many of its former republics, and other ex-communist countries rushed to meet the human rights criteria that were set for membership of the Council of Europe (and eventually for membership of the European Union). Homosexual law reform had become an international human rights issue.

Ukraine won the race in 1991,49 followed by Latvia and Estonia in 1992,50 Russia and Lithuania in 1993,51 Belarus and Serbia in 1994,52 Moldova and Albania in 1995,53 Romania was one of the last countries to semi-decriminalise homosexual conduct (1996), copying what had happened in several other countries by preserving criminal sanctions for same-sex sexual activity:

- 'with a minor' (as in many countries),
- 'committed in public' (as in Britain) or
- 'producing public scandal' (as in Bulgaria and formerly in Spain),
- as well as for 'inciting or encouraging' such contact or 'proselytism' for it (as in Austria).54

Given the recent decriminalisation in Bosnia-Herzegovina (1998), Macedonia (1998) and Georgia (1999), there are now only four jurisdictions in Europe with a total ban on homosexual conduct: in Armenia, Azerbaijan and the Republika Srpska (in Bosnia) it only applies to sex between men, and in the Chechen Republic (in Russia) it also covers sex between women.55 The medieval criminal rule has not yet died out. It still operates in more than a third of all European countries, where various specific homosexual offences (with no heterosexual equivalents) are still on the statute books, thus allowing for the continued prosecution and marginalisation of gays and lesbians.

49 H. Graupner, supra note 9, at 451.
50 H. Graupner, ibid., at 420-421 and 518.
51 H. Graupner, ibid., at 451 and 528.
53 H. Graupner, ibid., at 363; The World Legal Survey, ibid.
55 For these latest developments see The World Legal Survey, supra note 52.
Since 1971, i.e. parallel to the third and fourth waves of decriminalisation, higher ages of consent for homosexual activity (and other 'left-overs' of semi-decriminalisation) have been abolished in many countries. The Netherlands,56 Norway, Denmark and Sweden did so in the seventies. France, Belgium and Spain (and the German Democratic Republic) followed in the eighties.57 Iceland,58 Switzerland,59 Czechoslovakia,60 (the Western part of) Germany,61 Russia, Finland and Latvia equalised their sexual age limits in the nineties. Many remain of the former Austrian, British and Soviet empires are still lagging behind.61 different age limits are still applicable in Austria, Hungary, Romania, Bulgaria, Albania, Croatia and Serbia, the United Kingdom, Ireland, Cyprus, Belarus, Estonia, Lithuania and Moldova, as well as in Greece and Portugal.62

56 M. Salden, supra note 16, at 156.
57 H. Graupner, supra note 9, at 558, 390 and 629.
58 H. Graupner, ibid., at 435-436, 374 and 665-666.
59 H. Graupner, ibid., at 492.
60 H. Graupner, ibid., at 642.
61 I. Procházk. supra note 39, at 246.
62 In the East in 1990, in the West in 1994; see R. Hoffmann, J. Hutter & R. Launmann, supra note 9, at 262.
63 The World Legal Survey, supra note 52, provides an up to date listing of all different age limits, and details about the latest changes in these.
64 In Portugal an equal age limit of 16 applied from 1945 until, in 1995, the age limit for most heterosexual acts only was lowered to 14 (see H. Graupner, supra note 9, at 597-598). In Greece only in the case of 'seduction', the age limit for sex between men is higher (17) than for lesbian or heterosexual sex (15); see H. Graupner, supra note 9, at 466.

III. ANTI-DISCRIMINATION LEGISLATION

National legislation specifically (or sometimes implicitly) outlawing anti-homosexual discrimination has been enacted in 12 European countries, so far. And once again, most of these countries are from the Nordic and Napoleonic circles.

Norway was the first to explicitly legislate against anti-homosexual discrimination (1981). It did so by inserting the ground of sexual orientation into existing provisions on discrimination because of race, etc. This method was later followed in Denmark (1987), Sweden (1987 and 1999), Ireland (1989 and 1993), the Netherlands (1992), Finland (1995), Slovenia (1995), Spain (1995) and Luxembourg (1997). A separate general Equal Treatment Act that came into force in the Netherlands in 1994 also explicitly mentions the ground of sexual orientation. In 1985, with the explicit purpose of covering discrimination against homosexuals, France had inserted the rather implicit term 'moeurs' (which Wintemute translates as 'morals, manners, customs, ways') into its existing anti-discrimination provisions.65

With the same purpose, the words 'or any other ground whatsoever' have been inserted into the new Constitutional anti-discrimination clause which came into force in the

A similar implicit inclusion in the Constitutional anti-discrimination clause was effected in Finland (1995) and Switzerland (1999). Explicit constitutional prohibitions of sexual orientation discrimination were only enacted at regional level (in the German Länder of Brandenburg, Thuringia and Saxony-Anhalt), and far away from Europe (South Africa, Ecuador, Fiji).

It should be noted that this wave of national laws against sexual orientation discrimination started in exactly the same year (1981) that the fourth and final wave of decriminalisation was prompted by the European Court of Human Rights. Once gay and lesbian rights had been recognised as an international human rights issue, these rights started to be spelled out explicitly in national civil rights legislation.

With the exception of Ireland, all countries that have so far enacted anti-discrimination provisions, had decriminalised homosexual activity at least nine years before (but mostly decades, if not centuries earlier). And with the exceptions of Ireland and Finland they had established equal ages of consent at least three years before. Furthermore, there are only a few countries with equal ages of consent for more than a decade, and with decriminalisation effected more than fifty years ago, that have so far not enacted anti-discrimination provisions: Belgium and Poland (where such provisions have been unsuccessfully presented to Parliament), and Italy and Turkey (coincidentally the two European countries with by far the longest uninterrupted history of full equality in criminal law with regard to homosexuality). So one might conclude that there is indeed a strong sequential link between the steps of (full) decriminalisation and of anti-discrimination.

It should be remembered that the whole idea of anti-discrimination legislation (covering first race, religion and sex) is primarily an American invention. It came about as the main strand of the USA Civil Rights Act 1964. If this was not in itself already a culturally powerful symbol to be followed in European countries, two other transnational factors further promoted the idea that discrimination of specific groups could and should be fought with legislation. The first of these is the International Convention on the Elimination of all Forms of Racial Discrimination of 1965, which requires that all States Parties shall prohibit 'racial discrimination in all its forms.' This led to anti-discrimination provisions in many penal codes as well as in various specific statutes. The second factor is of a similar nature. In giving effect to Article 119 of The Treaty Establishing the European Economic Community, the Council of the European Communities adopted Directives in 1975 and 1976 requiring the enactment of national legislation against sex discrimination in employment, which led to respective equal treatment acts for men and women in all (now 15) Member States of the EC.

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67 See The World Legal Survey, supra note 52.
68 Ibid.
69 Dudgeon v. United Kingdom, supra note 47; see paragraph 2 above.
70 Turkey and Italy lead in this way (with 142 and 111 years respectively) and are far ahead of countries like the Netherlands and Norway (with less than 30 years of full equality in criminal law).
The result of all this was, that by the beginning of the eighties, many European countries were familiar in several ways with the concept of anti-discrimination legislation. It seems that countries which had already completed their decriminalisation of homosexuality have gone on to apply the concept to anti-homosexual discrimination.

The negative exceptions of Belgium and Italy could be explained by reference to their weak and very fragmented gay and lesbian movements (as compared to those in most countries that did get anti-discrimination provisions on sexual orientation). Not being Member States of the European Communities the other two negative exceptions, Poland and Turkey, have not had a chance to get used to legislation against sex discrimination (as required by EC Directives). Anti-homosexual opinions have probably been stronger in these countries, too.

The positive exception of Ireland is only a small one. In 1989 (just after the ruling of the European Court of Human Rights condemning the total ban on sex between men) Ireland only enacted legislation against anti-homosexual incitement; dismissal on the ground of sexual orientation did not get prohibited until 1993 (the same year as decriminalisation finally took place). The exception could possibly be explained by the relative strength of their lesbian and gay movement: it was a leader of this movement who had just won the case in the European Court of Human Rights (David Norris), and one of his lawyers went on to get elected President of Ireland (Mary Robinson). In other words: things went rather fast, and not in the "normal" order that countries were following. The Irish ages of consent are still not equalised (there is higher minimum age for oral and non-penetrative gay sex than for oral and non-penetrative heterosexual or lesbian sex). The positive exception of Finland (where anti-discrimination legislation was enacted in 1995, three years before the age limits in criminal law were equalised) could also be explained by the strength of its gay and lesbian movement, and by the pressure felt from other Nordic countries which already had anti-discrimination laws. Both in Ireland and in Finland the introduction of anti-discrimination legislation was probably politically and socially far more important than the abolition of penal provisions (that were not being enforced anyhow).

IV. PARTNERSHIP LEGISLATION

Given the gradual disappearance of the medieval criminal rule, the increasing application of the non-discrimination principle to sexual orientation, and a whole range of social developments (an ever rising 'coming-out' ratio among lesbian women and gay men, a growing number of children growing up in gay and lesbian families, medical possibilities for lesbian parenthood becoming available, the confrontation of numerous gay men with the early aids-related death of a partner or friend), it was hardly surprising that, from the late 1980s, attention has focussed on the medieval marriage rule on homosexuality. In several countries, including Germany and the Netherlands, test cases were started by same-sex couples claiming the right to full civil marriage. Legally, these cases were unsuccessful. But politically, they provided a focus for sections of the gay and lesbian movements, and for media publicity. Furthermore, both the German and Dutch Supreme Courts made polite but not inconsequential references (obiter dicta) to the issue being something for the legislature.

77 H. Graupner, supra note 9, at 481-487.
76 R. Wintemute, supra note 65, at 226.
79 For a summary of the Dutch ruling of 19 October 1990, see K. Waaldijk, supra note 65, at 92. The German ruling of 1993 is
And, legislation did indeed get underway. In 1989 Denmark was the first to enact a law on registered partnership. Five other countries, so far, have followed this example of recognizing same-sex marriage by another name: Norway in 1993, Sweden in 1995, Iceland in 1996, the Netherlands in 1998 and France in 1999, whereas Belgium has enacted a far less comprehensive partnership registration law, taking effect on 1 January 2000. (Again, the Nordic and Napoleonic countries are leading the way.) In several other countries, more or less similar legislation is being prepared: Finland, Spain (where two autonomous regions already have some same-sex partnership legislation), Switzerland, Germany, Slovenia, and the Czech Republic.

All these twelve countries have already equalised their ages of consent in criminal law. Ten of them also have anti-discrimination legislation covering sexual orientation. The two exceptions are Belgium (where efforts to get an anti-discrimination law enacted failed) and Germany (where anti-discrimination laws are in force in a few of the Länder, the autonomous regions of the country). Still, it remains to be seen whether they will indeed legislate for full registered partnership, before having national legislation against anti-homosexual discrimination. The draft-proposal presented by the German Ministry of Justice in December 1999 is of a very limited nature: partnership registration would, for example, have no legal consequences in the fields of tax, social security or employment. In several other countries (Portugal, the Czech Republic, Latvia) this 'reverse' order of legislation was tried - unsuccessfully.

Furthermore, almost all countries with laws against sexual orientation discrimination, now also have partnership legislation in force or in preparation. All this suggests that the sequential link between the steps of anti-discrimination legislation and that of partnership legislation is at least as strong as that between the steps of full decriminalisation and anti-discrimination.

However, it would be wrong to present the potential for registered partnership legislation only as a function of progress on decriminalisation and anti-discrimination. Equally important seems to be the existing legal situation of de facto cohabitation.

This includes the situation of children outside marriage. Marriage traditionally has had some legal consequences with regard to children, but many of these consequences (including paternity, inheritance, joint parental authority) are now also applicable (or at least available by court order) to children born or living outside marriage. In at least three countries the same-sex partner of a parent can share in the authority over the child (the United Kingdom since 1989,
Iceland since 1996, and the Netherlands since 1998.\textsuperscript{85} In most countries the possibility of receiving medically assisted reproduction is not restricted to married couples, although a few countries explicitly require a different-sex relationship.\textsuperscript{86}

The main consequences still linked to marriage in certain countries are:

- presumption of paternity: the husband is deemed the legal father of the children born to his wife (so far, this presumption does not apply in the case of registered partnership of two women);\textsuperscript{87}

- automatic joint parental authority over the children of one or both spouses (only in Iceland this rule also applies in the case of registered partners; the Dutch government has announced that it will introduce a bill to make this rule applicable to children who are born after their mother entered into a registered partnership);\textsuperscript{88}

- the possibility to adopt a child of the other spouse (since 1999 registered partners in Denmark can do this; in the Netherlands also unmarried different-sex partners, whether registered or not, have this possibility, and a legislative proposal has been introduced to extend it to same-sex couples, whether married, registered, or neither);\textsuperscript{89}

- the possibility to adopt a child of other parents (in most countries only an individual, with or without a relationship to another, or a married couple have this possibility; in the Netherlands adoption by an unmarried different-sex couple is possible since 1998, and a legislative proposal has been introduced to extend it to same-sex couples, whether married, registered, or neither).\textsuperscript{90}

To make an accurate assessment of the legal situation of de facto cohabitation in all European countries is impossible, even when ignoring the situation of children. The field is constantly changing, not just by legislation, but also by administrative regulations and case law (far more so than in the fields of anti-discrimination and criminal law described above). Nevertheless, it is my impression, that with respect to the recognition of de facto cohabitation, in other fields than parenting, there are now roughly four categories of countries, depending on whether:

1. cohabitation has no legal consequences;
2. only different-sex cohabitation has some legal consequences;

\textsuperscript{85} See C. Forder, supra note 79, at 13-16 of the General part of that report.

\textsuperscript{86} This is for example true for Austria, Denmark, France and Sweden. See N.J. Beger et al. supra note 65, at 32, 39-40, 47 and 84.


\textsuperscript{88} See C. Forder, supra note 79, at 13-16 of the General part of that report.

\textsuperscript{89} On 8 July 1999 the Dutch Government presented a Bill to Parliament to amend Book 1 of the Civil Code so as to allow adoption by persons of the same sex (printed in the Parliamentary Papers: Kamerstukken II 1998/99, 26673, ms. 1-3). In their Coalition Manifesto the three parties forming the current majority Government have committed themselves to adopting this Bill, in which case it could become law in 2001. A summary-translation in English of this Bill (which is separate to the Bill to open up marriage to same-sex couples) can be found online: Universiteit Leiden, the Netherlands <http://ruljis.leidenuniv.nl/user/cwaaldij/www/> (accessed: 16 March 2000).

\textsuperscript{90} Ibid.
3. different-sex cohabitation has more legal consequences (in more fields) than same-sex cohabitation (e.g. Iceland, Finland, Belgium, France, Germany, United Kingdom);
4. all cohabitation has some legal consequences (e.g. Denmark, Norway, Sweden, the Netherlands, Hungary).

The introduction of registered partnership alongside marriage, clearly is a greater step in the first three categories of countries than in the latter. So it is not remarkable that Denmark, Norway, Sweden and the Netherlands were among the first to get registered partnership legislation. In the other three categories it will be much more complicated to get such legislation passed. In category one, first the idea that relationships outside marriage deserve some legal recognition will need to get accepted. And then, as in categories two and three, the idea that same-sex and different-sex relationships outside marriage deserve equal treatment will have to be accepted. These two basic ideological hurdles have already been taken in countries of category four. So it should not come as a great surprise that efforts to get registered partnership legislation drafted and passed in countries of category three (not to mention one or two) tend to run into great legal and political complications.

Would it not be wiser to use the experience of countries from category four? That experience suggests that before considering registered partnership legislation, the legislature (or the courts) should first take two steps:

- attach a sizeable, balanced set of legal consequences to *de facto* cohabitation;
- treat same-sex cohabitation in the same way as different-sex cohabitation.

It goes without saying that the last point can be made much easier in countries where anti-homosexual discrimination has been outlawed already. Legislative proposals, which try to combine both points with the introduction of registered partnership, will have a very complex structure (as in the Spanish region of Catalunya where separate forms of registered partnership exist for same-sex and different-sex couples), and will suffer very confused political debates (as has been amply demonstrated in France). Iceland seems to have avoided the political confusion, but now has the legally curious situation that the social security and tax regulations applicable to marriage, also apply to *de facto* cohabiting heterosexual couples and to registered homosexual couples, but not to *de facto* cohabiting homosexual couples.

Of course, registered partnership is not the only way to put same-sex couples in a legal situation more or less equal to marriage. There are two alternatives. One is the opening up of marriage itself to same-sex couples (as the Dutch legislature is about to do). The other alternative consists of attaching to *de facto* cohabitation virtually all legal consequences of marriage (a bumpy road that no European country seems to be following). Only the first alternative would mean the end to the medieval marriage rule on homosexuality. Attaching all consequences of marriage to either registered partnership or *de facto* cohabitation would leave the marriage rule unaffected. In law, that medieval rule would then be less important, but in social reality, it would continue its function of marginalizing same-sex love and same-sex lovers.

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91 See C. Forder, *supra* note 79; *The World Legal Survey*, *supra* note 52.
92 See C. Forder, *supra* note 79, at 9-10 of the part on Spain.
93 Ibid., at 5 of the part on Iceland.
94 *Supra* note 88.
V. CONCLUSION

As I have tried to demonstrate, different European countries follow the same pattern, the same sequence of steps, in their process of legally recognising same-sex love. Each different step in that process seems to pave the way for a next step. The standard sequence of steps seems to be underpinned by an internal logic. Once people engaging in homosexual activity are no longer seen as criminals, but instead as citizens, they can hardly be denied their civil rights, including their right not to be treated differently because of their (criminaly irrelevant) sexual orientation. In this way the step of anti-discrimination not only follows, but builds on the step of decriminalisation. Similarly, the very idea of non-discrimination with regard to sexual orientation, simply demands that no one shall be disadvantaged by law because of the gender of the person he or she happens to love. In this way the links between the steps of decriminalisation, anti-discrimination, and partnership legislation are not only sequential (in the European countries that have gone that far), but also morally and politically compelling.95

In the Middle Ages, and after, same-sex marriage ceremonies, were often regarded critically, because of their suggestion of unspeakable sex.96 Thus the medieval criminal

rule on homosexuality supported the medieval marriage rule on homosexuality. Now, that the criminal rule has almost disappeared from Europe, the marriage rule stands unsupported. Not surprisingly it has been dented by the recognition of cohabitation and partnership. But will it go completely, eventually?

Yes, it will. Once virtually all legal consequences of civil marriage will have become available to same-sex partners (and their children), through registered partnership and/or through comprehensive legal recognition of de facto cohabitation, there will be no morally and politically acceptable arguments left to maintain that, in law, a same-sex partnership – a de facto marriage – cannot be called a 'marriage'. It would be small, uncivilised, and in the end a violation of human rights, to withhold the label of 'marriage' to two citizens who have chosen to marry each other. So the complete repeal of the medieval marriage rule on homosexuality, may very well be the next step to be taken by the most advanced jurisdictions in Europe.

However, the pattern so far, suggests that countries, societies, jurisdictions, states, legislatures, even courts, normally need some time to get used to the idea of taking a further step recognising homosexuality. It is difficult to overestimate the amount of getting-used-to that will be needed in many circles.97 Most progress with anti-discrimination and partnership legislation was made in countries where decriminalisation took place decades or centuries ago. Partnership legislation has so far only been enacted in countries which first had prohibited anti-homosexual discrimination. So the opening up of marriage may only be a feasible step in countries that have first completed all the other steps. After all,


96 J. Boswell, supra note 1.

discovering, understanding and applying the legacy of enlightened codification of the civil law tradition, the democratic civilisation of civil rights, and the developing requirements of the international empire of human rights, takes time.