EDITIONS DE L'UNIVERSITE DE BRUXELLES

The gays' and lesbians' rights in an enlarged European Union

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IEE INSTITUT D'ETUDES EUROPEENNES

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ISBN 978-2-8004-1367-9
© 2006 by Editions de l'Université de Bruxelles
Avenue Paul Héger 26-
1000 Bruxelles (Belgique)
EDITIONS@.ulb.be
http://www.editions-ulb.be

Imprimé en Belgique

Acknowledgements

This collective book is the result of a conference held in Brussels in December 2003 under the title: "Les droits des gays et des lesbiennes dans une Union européenne élargie /Gays' and Lesbians' Rights in an Enlarged European Union". Organized by the Legal Department of the European Studies Institute and the GASPPECO (Groupe d'Analyse Socio-Politique des Pays d'Europe Centrale et Orientale) research group of the Université Libre de Bruxelles, this seminar brought together researchers from all over Europe. All of the articles in this collection were submitted for publication prior to May 2005.

Several contributions, not only financial, but also collaborative, made the conference and this book possible.

We would like to mention here the financial support received from the ULB education authorities, from the *Communauté française*, from the National Fund for Scientific Research (FNRS), from the *Cabinet du Secrétaire d'Etat aux Affaires européennes*, and from the *Programme Pôles d'attraction interuniversitaire P4/04-Etat belge, Service du Premier ministre – Services fédéraux des affaires scientifiques, techniques et culturelles, du ministère de l'Education, de la Recherche et de la Formation de la Communauté française de Belgique*.

The editors' special thanks go to Mr Jean Michel De Waele, Director of the GASPPECO, for without his enthusiasm, his passion for research, his open-mindedness and his *savoir-faire* this project would not have come to fruition. He strongly believed in our collaborative project and always found good solutions to any problems we encountered.

Grateful thanks are also due to Mr Eddy Caekelberghs for the support he offered in organizing the seminar in December, for his *élan* and his trust.

Introduction

Anne WEYEMBERGH & Sînziana CÂRSTOCEA

A great number of important legal developments in the protection against discrimination based on sexual orientation have recently become apparent at the European Union level. Essential social and legal changes concerning gays and lesbians have also been observed at the national level within Europe. In this regard, the recognition of same-sex partnership in several Member States is quite eloquent. The progress achieved in this field shows the importance taken by the "homosexuality issue" both at the EU level and at the national level of the Member States.

This collective book aims at offering a scientific analysis of this impressive evolution. Its purpose is to focus on less known and less studied aspects of the process. Among the principal questions analysed, it is worth mentioning the interactions between the decisions adopted within the EU framework and the changes introduced at the national level. A number of European measures must be implemented in the national legislation of the Member States and of those acceding to Member status. This is especially true for European anti-discriminatory regulations, which have had a harmonizing effect on the States' national laws. Non-binding texts, such as recommendations, have also had an approximating impact on the Member States' legislation. However, as most of the contributions show, resistance to the implementation of European guidelines in the area remains quite strong. Another significant issue tackled by the authors is the relationship between the written norms on the one hand and their being put into practice on the other. This is particularly important because a discrepancy between both could question the role of legislation as well as the legislation's or, more generally, the law's interaction with society. Most of the contributions in this volume approach these substantive issues through the study of specific cases. These cases are usually related to one field in particular – as, for example, non-discrimination on the basis of sexual orientation or same-sex

partnership – and/or to the specific situation in a given Member State or candidate country.

The book is characterized by its international and multidisciplinary nature. The authors, who come from various countries, are lawyers, sociologists, political scientists or journalists. This explains not only the broad spectrum of issues covered but also the various points of view or methods in analysing the cases dealt with.

This volume has a three part structure, as follows.

The first part brings together contributions related to gays' and lesbians' situations in the fifteen Member States of the European Union. A first group of four contributions aim at analysing the legal situation and the improvements accomplished in order to outlaw discriminations on the basis of sexual orientation within the European Union.

Kees Waaldijk, senior lecturer at the E. M. Meijers Institute of Legal Studies of the Universiteit Leiden, gives an accurate inventory of the existing legislation against sexual orientation discrimination in employment in the fifteen Member States of the European Union. The author concentrates on the implementation of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which was supposed to be enforced at national level before 2 December 2003. The article offers a detailed overview of the amendments and new legal provisions introduced in the fifteen countries.

Three case studies follow regarding France, Sweden and Greece.

Daniel Borrillo, senior lecturer at the University of Paris X-Nanterre and associate researcher at CNRS (*Centre National de la Recherche Scientifique*), makes a survey of the legal situation of gays and lesbians in France. The French situation, as summarized by the author, could read "the individual gets everything, the couple gets only a little and the family gets nothing". Daniel Borrillo examines legal, historical and sociological aspects of the situation of gay and lesbian people: first the homosexual individual, then the same-sex couple and finally the homo-parental family.

Hans Ytterberg, associate judge of appeal and Sweden's Ombudsman against Discrimination on grounds of Sexual Orientation, presents the development of Swedish law with respect to non-discrimination and sexual orientation. Arguing that the impact of accomplishments at European level on this particular Member State's legislation has been weaker and more indirect than in several other Member States, the author first gives a general outline of the historical evolution in Sweden. In a second part of his paper, he focuses on a more specific topic, namely the setting up of the Ombudsman Office against Discrimination on grounds of Sexual Orientation, discussing the status both in concept and in practice.

The first group of articles closes with the contribution of Matthaios A. Peponas, a lawyer from Athens who offers a short but comprehensive historical overview of the legal evolution in Greece, pointing out the most significant stages of legal development concerning same-sex relationships and anti-discrimination on grounds of sexual orientation. Essential elements are emphasized, as, for instance, the influence of religion on the acceptance of homosexuality or the discrepancy between societal norms and law when alternative sexual lifestyles are concerned.

The first part of the book then contains a second group of articles, which take a closer look at an issue that has been widely discussed over the last years in Member

States of the European Union: the homosexual couple. Firstly, Frédéric Jörgens, PhD candidate at the European University Institute of Florence, focuses on the tension between law and social norms. He explores the question of the same-sex partnership taking into account the connections between legal recognition, social acceptance and representation of homosexuality. Basing his analysis on interviews made in four main cities of Europe (Paris, London, Berlin and Rome), the author examines the confrontation of the real-life experiences of gays and lesbians with legal options, from a sociological point of view. Moreover, he considers an auxiliary question referring to the possible consequences of the social environment for the construction of individual identities.

Secondly, David Paternotte, PhD candidate of the Université Libre de Bruxelles, deals with the process of legal recognition of same-sex couples in Belgium. The main focus here is so-called "inclusion models", namely the different ways of materializing specific definitions of equality in order to include more fully marginalized social groups into the polity. Adopting a theoretical and abstract approach based on discourse analysis, the author investigates whether the opening-up of civil marriage to same-sex couples constitutes an answer to a claim for equality and/or corresponds to the affirmation of a specific identity.

The second part of the volume addresses a less considered problem, namely the situation of sexual minorities in the new Member States. Is there a better place for gays and lesbians? Three different testimonies, realized with different instruments, attempt to provide an answer to this question.

In a complex sociological approach to the Slovenian situation, Roman Kuhar, researcher at the Ljubljana Peace Institute, turns his attention to the current legal and political condition of gays and lesbians in this country, with regard to the influence of the European Union's resolutions and recommendations on the dynamics of change. He considers intimate/sexual citizenship as a basis for arguing that, in spite of civil and legal equality, social equality for homosexuals is still a point at issue, and that the limits of tolerance are still narrow. Despite the fact that their rights are legally protected, gays and lesbians in Slovenia cannot actively participate in public and private life as *homosexual* citizens.

Developments in Polish law concerning discrimination based on sexual orientation are the main object of Patricja Pogodzinska's contribution. The author analyses the implementation of the Council Directive 78/2000/CE in the Polish Labour Code and gives a critical view of the effectiveness of Polish anti-discrimination clauses. She also discusses more recent legal proposals regarding same-sex partnerships and problems encountered by this project, as well as politicians' reactions, public opinion response and activist mobilization.

To complete this second part of the volume, Judit Takács, sociologist at the Hungarian Academy of Sciences, gives a historical account of the Hungarian legislation concerning anti-discrimination on the basis of sexual orientation. She emphasizes the role of the accomplishments of the European Institutions in the changes in Hungary, without neglecting national or international actors, mainly NGOs, which have taken part in the process. Furthermore, this paper presents some

representative samples of the application of equal treatment legislation in order to evaluate the outcome of such measures.

The third and last part of the book moves to cases which have usually been "neglected", for the most part, although much more problematic than the previous ones, e.g. the situation of gays and lesbians in the candidate countries. While in most of the new Member States, scholars have begun to deal with homosexuality as a subject for research, in countries such as Romania or Bulgaria, such a topic might still be considered shocking. Two innovative examinations of the internal implementation of European standards in South-Eastern Europe are the constituent elements of this last part.

In the first one, Sînziana Cârstocea, researcher at the Université Libre de Bruxelles, refers to a specific case: the legislative reform concerning sexual minorities in Romania. This paper explores the decriminalization of homosexuality as a condition for the accession to the European Union. The author also analyses the role and influence of the main social actors involved in the process of change, for instance that of the Orthodox Church and of the Romanian NGO "Accept". Considering the double role of domestic mediating factors, as facilitators on the one hand, and as resistance on the other, she argues that decriminalizing homosexuality has been more a question of awareness of European conditionality and less a matter of promotion of human rights.

A more general overview of the Balkan societies closes this part and concludes the volume. Jean Arnault Derens, journalist and editor of the *Courrier des Balkans*, gives a short, but comprehensive outline of the most important problems affecting gays and lesbians or "the absent figures of the democracies in the Balkans". Among them, he points out the difficult and chaotic economic, social and political transition, the impact of nationalism, of patriarchal values, and most of all the concept of war: gays and lesbians claiming their rights and social visibility become the image of the enemy.

Through the great diversity of studies it includes, this collective book deals with several questions which have so far been relatively little investigated. Of course some aspects, such as the negotiation between different social actors concerned with the "homosexual issue", need further inquiry and interrogation. This volume only attempts to reinforce interest in the study of gays' and lesbians' rights, a domain which is still in its infancy, and to take part in a still unfolding field of scientific research. May it contribute to the development of a fruitful scientific dialogue in the field.

PART I

The gays' and lesbians' situation in the fifteen Member States of the European Union

Legislative framework in the Europe of 15

Legislation in fifteen EU Member States against sexual orientation discrimination in employment: the implementation of Directive 2000/78/EC [1]

Kees Waaldijk

1. Introduction

The Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereinafter: the Directive) requires explicit and specific legislation to outlaw sexual orientation discrimination. It does not demand a full harmonisation of national anti-discrimination law. However, the adoption of the Directive meant that all Member States either had to amend existing laws

[1] This paper is based on the report of the European Group of Experts on Combating Sexual Orientation Discrimination (www.emmeijers.nl/experts), and especially on two of its Chapters, written by the author: Chapters 19 ("Comparative analysis") and 20 ("Conclusions"), which in turn were based on the fifteen national Chapters written by the members of the group, and on Chapter 2, on European law, written by Matteo Bonini-Baraldi, the group's assistant-coordinator. To him, to the group's researcher Alan Littler, and to the members of the group I want to express my gratitude for their valuable contributions to this big project. I am equally grateful to Riekje Boumlak and Wout Morra who assisted in coordinating the project. The Group of Experts was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 (http://europa.eu.int/comm/employment_social/fundamental_rights/policy/prog_en.htm). The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted to the European Commission in November 2004, aimed to represent the law as it was at the end of April 2004, although some later developments in 2004 were taken into account. The full text of the report (including English versions of all twenty Chapters and French versions of most Chapters, plus summaries in English and French of all Chapters) can be found via www.emmeijers.nl/experts.

and/or to introduce new ones. To assess whether the Member States are honouring their duties under the Directive, the European Commission in 2002 has set up a group of independent legal experts. In November 2004 this group presented its report *Combating sexual orientation discrimination in employment* [2]. This paper summarises the findings of that report.

Before the Directive was adopted in 2000, eight of the then fifteen Member States did already have some legislation against sexual orientation discrimination in employment, but AUS, BEL [3], DEU [4], GRC, ITA, PRT and the UK did not.

The then fifteen Member States had until 2 December 2003 to implement the Directive (either by pre-existing legislation or by new legislation) [5]. Only in BEL, FRA, ITA, PRT, SWE, and the UK the legislation to implement the Directive had been more or less completed before that date. In DNK, FIN, NLD and ESP implementation measures came into force early in 2004, and in AUS and IRL during the Summer of 2004 (as did supplementary legislation in PRT). By August 2004 a proposal to implement the Directive was waiting to be debated in the Parliament of LUX. In DEU and GRC final Government proposals to implement the Directive still had to be published.

This contribution gives an overview of the implementation situation with respect to the requirements of the Directive in the fifteen old Member States [6]. The main basis for this comparative overview is the national legislation that has been enacted or

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[2] K. Waaldijk & M. Bonini-Baraldi (ed.), *Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States,* Report of the European Group of Experts on Combating Sexual Orientation Discrimination, about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Leiden, Universiteit Leiden 2004; published on the website of the Commission of the European Communities, see www.emmeijers.nl/experts. The Chapters of that report referred to here, are the following (with the abbreviations used for the names of the Member States): 2: European law, by M. Bonini-Baraldi; 3: Austria – AUS, by H. Graupner; 4: Belgium – BEL, by O. De Schutter; 5: Denmark – DNK by S. Baatrup; 6: Finland – FIN by R. Hiltunen; 7: France – FRA by D. Borrillo; 8: Germany – DEU by S. Baer; 9: Greece – GRC by M. Peponas; 10: Ireland – IRL by M. Bell; 11: Italy – ITA by St. Fabeni; 12: Luxembourg – LUX by A. Weyembergh; 13: Netherlands – NLD by K. Waaldijk; 14: Portugal – PRT by M. Freitas; 15 Spain – ESP by R. Rubio-Marin; 16: Sweden – SWE by H. Ytterberg; 17: United Kingdom – UK by R. Wintemute; 18: Comparative overview by M. Bonini-Baraldi; 19: Comparative analysis by K. Waaldijk; 20: Conclusions by K. Waaldijk. The report also contains an appendix with a thematic study by Alan Littler: "Discriminatory partner benefits".

[3] Except for a Collective Agreement of 1999 made binding by Royal Decree; see O. De Schutter, "Belgium", Chapter 4 in the report mentioned in note 2, para. 4.1.5.

[4] Except for regional legislation in some German Länder; see S. Baer, "Germany", Chapter 8 in the report mentioned in note 2, para. 8.1.5.

[5] The ten countries that joined the European Union on 1 May 2004, had to implement the Directive before that day. This Chapter does not discuss the implementation in these ten new Member States.

[6] For an analysis of the Directive's requirements see M. Bell, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002; M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2; and K. Waaldijk, "Comparative analysis", Chapter 19 in the same report.

proposed in most of these Member States, and that has been described and analysed in much more detail in the chapters of the report *Combating sexual orientation discrimination in employment*.

First the general situation in which this implementation is or has been taking place is sketched.

2. Social and legal background

The European Community's requirement, contained in the Directive, to prohibit sexual orientation discrimination in employment, did not arrive in a vacuum. In each of the then fifteen Member States there were already all kinds of laws – and social attitudes – about sexual orientation, about discrimination, and about employment. With respect to all three topics the Member States have many things in common, while simultaneously showing a great diversity.

A. Public opinion surveys

As regards sexual orientation, considerable changes have taken place over the last decades in all Member States. Nevertheless, both socially and legally there are still great differences between them. The *European Values Study* gives us some idea of how the populations of the different EU countries think about homosexuality.

Table 1. Data from the 1999/2000 European Values Study Survey [7]

The countries are listed here in the same order as in Table 2 (see below).

	Percentage of the sample that answered that they would not *like to have* homosexuals *as neighbours* [8]	*Mean answer to question whether* homosexuality *can always be justified, never, or something in between (10 = always, 0 = never)* [9]
SWE	6	7.7
DNK	8	6.6
ESP	16	5.5
NLD	6	7.8
LUX	19	5.9
UK (Great Britain)	24	4.9
UK (Northern Ireland)	35	4.0
FRA	16	5.3
ITA	29	4.8
BEL	18	5.2
IRL	27	4.4
PRT	25	3.2
FIN	21	4.9
AUS	25	5.4
GRC	42	3.4
DEU	13	5.7

[7] L. Halman, *The European Values Study: A Third Wave. Source book of the1999/2000 European Values Study Surveys*, Tilburg, WORC, Tilburg University, 2001, full text available at www.europeanvalues.nl. This study is based on surveys carried out in 1999 and 2000 among the population of thirty-two European countries. Per question there were some 900 to 2,000 valid answers.

[8] *Ibid*., p. 42.

[9] *Ibid*., p. 223.

These figures suggest a great variation in the degree of social acceptance of homosexual orientation. However, it should be remembered that over the last decades almost all European countries have seen a considerable increase in the level of tolerance and social acceptance of homosexual preference, homosexual conduct, and homosexual relationships. It seems reasonable to expect that this trend will continue, also in those countries where the values of a large part of the population are not yet very positive towards lesbian, gay and bisexual persons. Seen from that perspective, the social developments around homosexuality are fairly similar in the fifteen Member States. This is further evident from the fact that in each of these countries a socially and politically active lesbian & gay movement has been establishing itself. Organisations from these movements have often been quite influential in accelerating social – and legal – change. Simultaneously, the numbers of women and men deciding to come out as lesbian, gay or bisexual (to their family, friends, colleagues, employer, etc.) have also been rising noticeably throughout the European Union, although in many places it still is a difficult and sometimes risky step for the individual. Also the availability of information about homosexuality, in books, films, television, internet, etc. has been growing considerably.

These and various related social developments have led many citizens (of any sexual orientation, and obviously including politicians, judges, etc.) to conclude that discrimination because of sexual orientation should be combated just as much as discrimination on other grounds (see Table 2 below). And that again has contributed to series of political decisions *to abolish* forms of sexual orientation discrimination that could be found *in legislation* (mainly in criminal law and in family law) [10], and *to combat* sexual orientation discrimination in employment and other areas of society, often *through legislation* (see below). It seems probable that both this decrease in legal discrimination and this increase in legal protection against social discrimination, in turn are reinforcing the social developments just mentioned. One could specifically expect a further rise in the number of women and men who feel free to come out as lesbian, gay or bisexual.

Data from the *57th Eurobarometer*, carried out in Spring 2002, give some indication of attitudes of European citizens about discrimination on several grounds [11].

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[10] Section 1.H. below contains a table showing the years when the fifteen Member States have taken major legislative steps to decriminalise homosexual sexual acts, and to recognise same-sex partners.

[11] See A. Marsh & M. Sahin-Dikmen, *Discrimination in Europe (Report A & Report B)*, Policy Studies Institute, London, 2002. (*Report B* is available at http://europa.eu.int/comm/employment_social/fundamental_rights/publi/pubs_en.htm; the results per country given in the tables in this chapter are part of annexes to *Report A)*.

Table 2. Data on attitudes towards discrimination from the 2002 Eurobarometer [12]

The countries are listed here according to the results of the first question. For the first two columns a score of 100 means that all persons in the sample think that discrimination on the particular ground(s) is "wrong" in all circumstances. For the last two columns a score of 100 means that all persons in the sample think that "in general people consider it wrong" to discriminate on the particular ground(s). The scores are the combined results of questions relating to four domains of discrimination: seeking work or training, promotion at work, seeking accommodation or housing, and public services such as restaurants, banks and so on [13].

	Opposition to discrimination on grounds of sexual orientation [14]	*Opposition to discrimination on all grounds* [15]	*Perceived opposition of others to discrimination on grounds of sexual orientation* [16]	*Perceived opposition of others to discrimination on all grounds* [17]
SWE	92	86	75	73
DNK	91	87	75	72
ESP	90	89	72	72
NLD	90	84	77	72
LUX	89	88	75	75
UK	88	87	76	76
FRA	87	85	73	72
ITA	86	85	65	67
BEL	85	81	74	70
IRL	84	82	76	75
PRT	83	85	72	75
FIN	82	83	68	70
AUS	78	78	64	65
GRC	77	82	64	69
DEU (east)	71	71	65	65
DEU (west)	69	68	60	61

Data of the same Eurobarometer also indicate that actual sexual orientation discrimination is indeed taking place in all Member States (see Table 3 below).

[12] *Ibid.*.

[13] *Ibid.*, Report B, p. 27.

[14] *Ibid.*, Chart 78 of Report A.

[15] *Ibid.*, Chart 79 of Report A. "All grounds" includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

[16] *Ibid.*, Chart 78 of Report A.

[17] *Ibid.*, Chart 79 of Report A. "All grounds" includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

Table 3. Data on extent of perceived sexual orientation discrimination from the 2002 Eurobarometer [18]

The countries are listed here in the same order as in Table 2 above. The scores in the first two columns are the combined results of questions relating to seven domains of discrimination: at work, while looking for a job, in primary school, in secondary school, at university, in obtaining housing, and in accessing public and commercial services [19].

	Percentage of respondents that reported having experienced *discrimination or harassment on grounds of sexual orientation* [20]	*Percentage of respondents that reported having* witnessed *discrimination or harassment on grounds of sexual orientation* [21]	*Percentage of respondents that answered that they think "a homosexual (a gay or lesbian person)" with the same skills or qualification would have* less chance *than anyone else of getting a job, training or promotion* [22]
SWE	< 0.5	10	43
DNK	< 0.5	4	26
ESP	< 0.5	3	45
NLD	> 1.0 and < 1.5	11	24
LUX	> 0.5 and < 1.0	8	37
UK	> 0.5 and < 1.0	6	28
FRA	> 0.5 and < 1.0	6	33
ITA	< 0.5	3	39
BEL	> 0.5 and < 1.0	5	26
IRL	< 0.5	2	22
PRT	< 0.5	3	44
FIN	< 0.5	9	56
AUS	< 0.5	5	34
GRC	> 0.5 and < 1.0	4	54
DEU (east)	> 0.5 and < 1.0	5	32
DEU (west)	> 0.5 and < 1.0	6	39

[18] See note 11.

[19] *Ibid*., Report B, p. 10 and 17.

[20] *Ibid*., Chart 7 of Report A. In Report B (p. 14) A. MARSH & M. SAHIN-DIKMEN write: "In all countries except Netherlands, less than 1 per cent of respondents reported discrimination on grounds of sexual orientation. The differences between countries are too small to allow a meaningful comparison, but it is interesting to note that Netherlands (…) has the highest number of respondents who reported discrimination because of sexual orientation. It is possible that this higher rate of discrimination is more of a reflection of a cultural openness about the issue than it is an indication of comparatively higher actual incidence rates". One might add to that, that the higher rate of coming out among gay men and lesbian women in the Netherlands than in several other countries, may also make them more likely to be confronted with discrimination because of their orientation.

[21] *Ibid*., Chart 39 of Report A. See also Report B, p. 17-21.

[22] *Ibid*., Chart 71 of Report A. See also Report B, p. 25.

The fact that on average less than 1% of the respondents in all countries experienced sexual orientation discrimination (i.e. 81 persons among a total of around 16,000 respondents) [23], should be read in combination with the assumption that only around 5% of adults identify as gay or lesbian, and that a lesser percentage come out as such. It is noteworthy that the percentage of respondents reporting having experienced discrimination on grounds of race or ethnicity (3%), religion or beliefs (2%), physical disability (2%), learning difficulties or mental illness (2%), or age (5%) are only a little higher [24]. It should also be noted that these figures do not necessarily give an accurate picture of the full extent of actual discrimination taking place.

The mutually reinforcing social and legal developments indicated above are not only occurring in the Member States, but also at the European level. The inclusion of sexual orientation in Article 13 of the EC Treaty in 1999 and in the Directive in 2000 can be seen as a product of this. For eight of the then fifteen Member States this Directive has meant that additions had to be made to already existing legislation prohibiting sexual orientation discrimination in employment (DNK, ESP, FIN, FRA, IRL, LUX, NLD, SWE), for the then seven other Member States the Directive has meant that for the first time sexual orientation discrimination in employment needed to be made the object of national legislation (BEL, AUS, DEU, GRC, ITA, PRT, UK).

Given these rather different social and legal starting points with respect to sexual orientation, it will come as no surprise that existing and proposed laws in the Member States also vary considerably. In part, that variation can also be attributed to the differences in traditions and structures that characterise the existing laws of the Member States on employment in general and on anti-discrimination with respect to other grounds than sexual orientation. For example, in employment and/or anti-discrimination law the legal relevance of constitutions, collective labour agreements, or judicial law-making varies from country to country.

B. Constitutional protection against discrimination

In theory, all citizens of the European Union enjoy some constitutional protection against sexual orientation discrimination in employment, at least in *public* employment. However, this is only spelled out in one national constitution, that of Portugal. In the other Member States constitutional protection can either be derived from more general words in the national constitution, or from the European Convention on Human Rights.

The law of the European Union, so far, does not provide any real constitutional protection in this matter: Article 13 of the EC Treaty lacks direct effect, and it remains to be seen what the legal status of the non-discrimination provision of Article 21(1) of the EU Charter of fundamental rights will be. Nevertheless, the explicit inclusion of sexual orientation in both Article 13 of the EC Treaty and Article 21 of the EU

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[23] *Ibid.*, Report B, p. 13.

[24] *Ibid.*, Chart 1 of Report A.

Charter, helps to strengthen the idea that sexual orientation discrimination should be considered as unconstitutional. This has been made even more evident by the inclusion of these two provisions into the agreed text for the European Constitution [25], and by the insertion in that text of a new article, on the aim of combating discrimination in EU policies [26].

In Portugal a constitutional amendment adding "sexual orientation" to the prohibition of discrimination in Article 13 of the Portuguese Constitution came into force on 31 July 2004 [27].

As far as the other national constitutions are concerned [28], the words "sexual orientation" so far can only be found in one of the constitutional instruments of Sweden. However, (together with DNK, LUX and the UK) Sweden is one of the few countries without a general constitutional prohibition of discrimination. The Swedish provision (which is not legally binding) merely obliges Parliament, Government and other public bodies to take action against discrimination on several grounds, including sexual orientation [29]. An instruction to combat discrimination in general, can also be found in some other constitutions (ITA, PRT, ESP) [30].

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[25] See M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.1. In the Treaty establishing a Constitution for Europe of 29 October 2004 (www.europa.eu.int/constitution/constitution_en.htm) the provisions are numbered and phrased as follows:

Article II-81(1) (former II-21, based on Article 21 EU Charter) "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

Article III-124 (former III-8, based on Article 13 EC) "(1) Without prejudice to the other provisions of the Constitution and within the limits of the powers assigned by it to the Union, a European law or framework law of the Council may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council shall act unanimously after obtaining the consent of the European Parliament. (2) By way of derogation from paragraph 1, European laws or framework laws may establish basic principles for Union incentive measures and define such measures, to support action taken by Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, excluding any harmonisation of their laws and regulations".

[26] Article III-118 (former III-3) "In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[27] Constitutional Law 1/2004. On Madeira and the Azores this amendment came into force on 10 August 2004. See M. Freitas, "Portugal", Chapter 14 in the report mentioned in note 2, para. 14.1.

[28] Sexual orientation is mentioned explicitly in anti-discrimination provisions in the regional constitutions of a few Länder in DEU.

[29] H. Ytterberg, "Sweden", Chapter 16 in the report mentioned in note 2, para. 16.1.1.

[30] See the first paragraphs of the relevant national chapters in the report mentioned in note 2.

In the eleven Member States that do have a constitutional prohibition of discrimination on many grounds (AUS, BEL, FIN, FRA, DEU, GRC, IRL, ITA, NLD, PRT, ESP), that prohibition is (most probably) at least binding on the legislature [31], and on public employers. In some countries it is not yet clear whether it is covered (DEU, FRA, GRC and IRL). But in six countries there is enough authority (in case law, in the doctrine, or in the *travaux préparatoires*) to consider sexual orientation implicitly covered as a prohibited ground for discrimination (AUS, BEL, FIN, ITA, NLD, ESP) [32].

Especially for the nine countries where national constitutional protection against sexual orientation discrimination is unclear or absent, it is relevant to see if this is made good by any direct applicability of the European Convention on Human Rights. By the end of 2003, the Convention had indeed become directly applicable in all of the then fifteen Member States of the EU [33]. Although in the courts of some of them the Convention does not take precedence over parliamentary legislation (DEU, IRL, UK and possibly ITA) [34].

The European Convention on Human Rights binds its State Parties, and therefore all legislatures, and all public employers. This has been recognised in the case law of the European Court of Human Rights, most clearly in the cases where it ruled that the ban of the United Kingdom on gays and lesbians in the armed forces violated Article 8 of the Convention (respect for private life) [35]. Article 14 of the Convention prohibits discrimination on many grounds with respect to the enjoyment of the other rights and freedoms it guarantees. Sexual orientation discrimination in employment will almost always fall within the ambit of one of these other rights, especially the right to respect for private life. This is so because the European Court of Human Rights considers at least three of the main aspects of sexual orientation as (very intimate) aspects of private life: sexual conduct [36], sexual preference [37], and relationships [38]. Whether the

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[31] In NLD with the restriction that parliamentary acts cannot be declared unconstitutional by the Dutch courts (K. Waaldijk, "Netherlands", Chapter 13 in the report mentioned in note 2, para. 13.1.1).

[32] See the first paragraphs of the relevant chapters in the report mentioned in note 2.

[33] The last of the fifteen old Member States to make the Convention directly applicable, was IRL (in 2003); see M. Bell, "Ireland", Chapter 10 in the report mentioned in note 2, para. 10.1.1.

[34] See the first paragraphs of the relevant chapters in the report mentioned in note 2.

[35] ECHR, 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96; *Smith and Grady v. UK*, appl. 32377/96; 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535-48537/99.

[36] ECHR, 22 October 1981, *Dudgeon v. UK*, appl. 7525/76; 26 October 1988, *Norris v. Ireland,* appl. 10581/83; 22 April 1993, *Modinos v. Cyprus,* appl. 15070/89; 31 July 2000, *A.D.T. v. UK*, appl. 35765/97; 9 January 2003, *S.L.. v. Austria*, appl. 45330/99; *L. & V. v. Austria*, appl. 39392/98 and 39829/98; 10 February 2004, *B.B. v. UK*, appl. 53760/00.

[37] ECHR, 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96; *Smith and Grady v. UK*, appl. 32377/96; 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96; 26 February 2002, appl. 36515/97, *Fretté v. France*; 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535-48537/99.

[38] ECHR, 24 July 2003, *Karner v. Austria*, appl. 40016/98.

Court will also consider *coming out* as an aspect of private life, remains to be seen, but this could also be considered as falling in the ambit of the freedom of expression (Article 10) [39]. Some cases of discrimination will fall within the ambit of the right to property (Article 1 of the First Protocol to the Convention). So far the European Court of Human Rights has five times found unlawful sexual orientation discrimination [40]. In the only cases of alleged employment discrimination on that ground, the Court has chosen to reach its conclusion directly on the basis of Article 8 [41].

Whether there also exists some constitutional protection against sexual orientation discrimination in private employment, is less certain in most countries. The European Convention on Human Rights here only plays a role with respect to court decisions and legislation on private employment: these decisions and that legislation need to be non-discriminatory.

Invoking a generally worded provision in a national constitution or in the European Convention on Human Rights is not easy, for an ordinary victim of employment discrimination (and for his ordinary lawyer). Therefore more specific legislation is necessary (see para. 3. C. below), especially in private employment where constitutional protection is very limited. But there is also another reason why whatever constitutional protection may exist, is not enough: the principles and concepts of equality used in constitutional law are often vague and capable of different applications, and allowing for rather more justifications than are acceptable under the Directive (see below).

C. General principles and concepts of equality

Long before the Directive was adopted, the existence of a general principle of non-discrimination was recognised by the Court of Justice of the EC. In the application of this principle the Court often uses a similarly situated test, but sometimes also simply investigates whether a decision depends on a certain (discriminatory) reason [42]. Both elements can be found in the Directive's definition of direct discrimination [43].

Even earlier, the European Court of Human Rights had had a chance to elaborate on the prohibition of discrimination contained in Article 14 of the European Convention on Human Rights. The Court considers a distinction to be discriminatory if it lacks an objective and reasonable justification. With respect to grounds as "suspect" as sexual orientation it has specified that such a justification requires particularly serious

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[39] See European Commission of Human Rights, 3 May 1988, *Morrissens v. Belgium*, appl. 11389/85.

[40] In the cases of *Salgueiro, S.L., L. & V., Karner*, and *B.B.* (see the previous notes).

[41] In the cases of *Lustig-Prean and Beckett*, *Smith and Grady*, and *Beck, Copp and Bazeley* (see the previous notes).

[42] See M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.2.

[43] See K. Waaldijk, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.2.3.

reasons, and that the distinction must be shown to be proportionate in relation to the legitimate aim sought, and necessary for achieving that aim [44].

Most national constitutional provisions on equality have been given more or less similar interpretations, or other interpretations consisting of tests that are only the starting point of any discussion about the question whether a particular distinction is justified. It can therefore be said that the Directive, and the implementing legislation inspired by it, also operate so as to give more legal certainty to those who would otherwise have to rely on a very generally worded constitutional, or even unwritten, principle of non-discrimination.

D. Provisions on sexual orientation discrimination in employment

Since the 1980s, gradually legislative and other steps have been taken by the Member States and the Institutions of the EC to *explicitly* combat sexual orientation discrimination *in employment*. The following listing, which is not exhaustive [45], demonstrates both the increasing speed of this process, and the accelerating role that the Institutions of the EC seem to have played in it [46]. There appears to be some correlation between the timing of the legal data in this listing and the data on values and attitudes given in Tables 1 and 2 above.

1984	European Parliament	Resolution on sexual discrimination at the workplace
1985	FRA	Penal Code (using "*mœurs*" to cover sexual orientation)
1986	FRA	Labour Code (also using the term "*mœurs*")
1987	-	-
1988	-	-
1989	-	-
1990	-	-
1991	Commission EC	Recommendation on the protection of the dignity of women and men at work, including Code of practice on measures to combat sexual harassment
1992	NLD	Penal Code
1993	IRL	Unfair Dismissals Act 1977
1994	NLD	General Equal Treatment Act
1995	ESP	Penal Code
	FIN	Penal Code
1996	DNK	Act on Discrimination
1997	LUX	Penal Code
1998	Council EC	Staff Regulations of officials of the EC (Article 1a, among others) and Conditions of Employment of other servants of the EC (Article 83, among others)

[44] ECHR, 24 July 2003, *Karner v. Austria,* appl. 40016/98 (see previous paragraph, and further M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.2).

[45] For national legislation the years of entry into force are given; full citations can be found in the paragraphs 1.5 and 2.1 of each national chapter of the report mentioned in note 2.

[46] See M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2.

	Court of Justice EC	*Grant v. South West Trains Ltd.* (considering a disadvantage based on the sex of an employee's partner to be sexual orientation discrimination, but leaving it to the Member States and the Council to legislate against it)
	IRL	Employment Equality Act 1998
1999	Member States EU	Article 13 EC (inserted into the EC Treaty on 1 May 1999 by the Treaty of Amsterdam of 2 February 1997)
	BEL	Collective agreement (made binding by Royal Decree)
	SWE	Sexual Orientation Discrimination Act
2000	Council EC	Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
2001	FIN	Employment Contracts Act
	FRA	Inclusion of the words "*orientation sexuelle*" in the provisions of Penal Code and Labour Code
	FRA	Amendment of Law 83-634 governing the rights and obligations of civil servants
	DEU	Industrial Relations Act
2002	SWE	Equal Treatment of Students at Universities Act
2003	BEL	Law of 25 February 2003 on combating discrimination
	SWE	Discrimination Prohibition Act
	SWE	Amendment of Sexual Orientation Discrimination Act
	SWE	Amendment of Equal Treatment of Students at Universities Act
	ITA	Legislative Decree implementing the Directive
	UK	Employment Equality (Sexual Orientation) Regulations 2003
	UK	Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003
	PRT	Labour Law Code
	Council EC	Implementation deadline of Directive 2000/78/EC (2 December)
2004	ESP	Act 62/2003 (also amending the Workers' Statute, and Act 45/1999 concerning the relocation of workers in the framework of a trans-national contractual work relation)
	FIN	Equality Act 26/2004 (also amending Employment Contracts Act)
	FIN	Act on Holders of Municipal Office as amended by Equality Act
	UK	Equal Opportunities Ordinance, 2004 (Gibraltar)
	NLD	Amendment of the General Equal Treatment Act
	DNK	Amendment of the Act on Discrimination
	Council EC	Staff Regulations of officials of the EC (Article 1d, among others) and the Conditions of Employment of other servants of the EC (Article 124, among others)
	AUS	Equal Treatment Act Federal Act on the Equal Treatment Commission and the Equal Treatment Agency Federal Equal Treatment Act
	PRT	Law 35/2004 containing supplementary provisions to Labour Law Code

IRL	Equality Act 2004, amending the Employment Equality Act 1998
IRL	Pensions Act 1990, as amended by Social Welfare Act 2004 (not yet in force)

The adoption of a pending legislative proposal to (further) implement the Directive is to be expected in 2005 in Luxembourg. Government proposals to implement the Directive were to be expected in Germany and Greece by late 2004 [47].

It should be noted that several Member States also prohibit employment discrimination on one or more related grounds, such as civil status (NLD, BEL, PRT), family status (IRL), family situation (FRA, LUX, PRT), family relations (FIN), and *mœurs* (FRA and LUX; the term may be translated as "morals, manners, customs, ways").

E. Case law precedents on sexual orientation discrimination in employment

Even before there was explicit legislation banning such discrimination, some national courts, and also the main European courts, have had to rule on cases of sexual orientation discrimination in employment. Sometimes they accepted the claim, sometimes they rejected it.

Among the "important case law" signalled in the national chapters of the report of the European Group of Experts on Combating Sexual Orientation Discrimination, less than ten cases can be counted in which the claimant was successful. For most Member States a complete lack of reported case law was indicated: AUS, BEL, DNK, GRC, ITA, LUX, PRT and SWE [48].

The first decision by a superior court finding that there had indeed been unlawful sexual orientation discrimination came in 1982, when in the Netherlands the highest court for public employment cases found that a man had been unlawfully dismissed from his job in the armed forces on the sole fact of his homosexual orientation [49]. More recently the European Court of Human Rights in 1999 ruled against the British ban on the employment of homosexuals in the armed forces [50]. And in 2002 the German Federal Administrative Court ruled that the military is not allowed to differentiate on the basis of sexual orientation [51].

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[47] In GRC, in May 2004, the opposition in Parliament has introduced a bill to implement the Directive. It is very unlikely that this opposition bill will become law. When the current opposition was still in government, before the elections of March 2004, the then Government had introduced an implementation bill, but that bill "died" because of the elections (see Chapter 9).

[48] K. Waaldijk, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.1.6.

[49] K. Waaldijk, "Netherlands", Chapters 13 in the report mentioned in note 2, para. 13.1.6.

[50] ECHR, 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96; *Smith and Grady v. UK*, appl. 32377/96.

[51] S. Baer, "Germany", Chapter 8 in the report mentioned in note 2, para. 8.1.6.

From the Dutch case it may be concluded that such discrimination was already unlawful (at least in the armed forces, and *a fortiori* in other sectors of public employment) in 1982, i.e. ten years before the first explicit anti-discrimination legislation. Similarly, the German case of 2002 indicates that such discrimination in public employment is also already unlawful in Germany, even before the first explicit anti-discrimination legislation that should be expected in 2005 or 2006. But the 1999 judgements of the European Court of Human Rights allow for a wider conclusion, certainly since the Court subsequently ruled that "sexual orientation" [52] and three of its main aspects (preference [53], conduct [54] and relationships [55]) are indeed covered by the prohibition of discrimination in Article 14 of the European Convention. Now it can be maintained that since 1999 sexual orientation discrimination with respect to *military and other public employment* is unlawful in all State Parties to the European Convention on Human Rights, and therefore throughout the European Union.

With respect to *private employment*, the little case law there is, seems less helpful. The European Court of Human Rights cannot pronounce on discrimination by private employers, because the European Convention only binds the State Parties. The Court of Justice of the EC so far has had only one case on sexual orientation discrimination in private employment, *Grant v. South West Trains Ltd.*, and it decided to leave it to the Member States and the Council to legislate on it [56].

The lack of case law does not mean that there are no cases. Especially in countries where anti-discrimination legislation is already in force, cases can be settled before going to court [57]. The fact that many cases do not make it to court, can also be learned from figures about the specialised bodies set up in three countries to deal with cases of sexual orientation discrimination:

– In Ireland in four years since 2000 the *Equality Tribunal* received fifteen complaints about sexual orientation discrimination in employment, and in two years since 2001 the *Equality Authority* has been working on a total of seventeen cases of such discrimination [58].
– In Sweden in five years since 1999 the *Ombudsman against Discrimination on grounds of Sexual Orientation* has had to deal with over sixty employment related complaints [59].

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[52] ECHR, 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96.

[53] *Ibid.*

[54] ECHR, 9 January 2003, *S.L.. v. Austria*, appl. 45330/99; *L. & V. v. Austria*, appl. 39392/98 and 39829/98; 10 February 2004, *B.B. v. UK*, appl. 53760/00.

[55] ECHR, 24 July 2003, *Karner v. Austria*, appl. 40016/98.

[56] ECJ, 17 February 1998, Case C-249/96, *Grant v. South West Trains*, *ECR*, p. I-621; see M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.6.

[57] K. Waaldijk, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.1.6.

[58] M. Bell, "Ireland", Chapter 10 in the report mentioned in note 2, para. 10.1.6.

[59] H. Ytterberg, "Sweden", Chapter 16 in the report mentioned in note 2, para. 16.1.6.

– And in the Netherlands in nine years since 1995 the *Equal Treatment Commission* has given twenty-nine opinions about alleged sexual orientation discrimination in employment. In addition to that, the staff of this Commission answers questions about sexual orientation discrimination by telephone: eighteen times in the year 2002 [60].

Finally, it should be pointed out that in several countries there have been many cases about the denial to gay or lesbian employees of certain spousal benefits because of their not being married to their partner. The second sexual orientation case to come to the Court of Justice of the EC, *D. and Sweden v. Council* [61], also falls in this category. The Court chose to treat the distinction between (same-sex) registered partnership and (different-sex) marriage as one involving civil status, and rejected the claim of the Swedish employee of the Council of the EU for a household allowance for his registered partner [62].

F. Provisions on discrimination in employment that do not cover sexual orientation

For several decades already, employment discrimination on grounds of race and sex has been the object of more international and European rules than discrimination on grounds of sexual orientation. Hence, it is not surprising that most Member States have older and wider national rules on employment discrimination on these other grounds. However, it should be borne in mind that (apart from specific topics such as social security, pregnancy and enforcement bodies) the actual level of protection required by the Directive with respect to sexual orientation discrimination in employment, is hardly lower than the levels of protection required by the Race Directive and the various directives on the equal treatment of men and women [63].

Also, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the matter, it is mostly undesirable to choose different contents and/or different words for rules with respect to different grounds. Whether different grounds of discrimination are to be tackled in (the same articles in) the same laws, is a matter of national judgement. But the question whether any differences between the rules on sexual orientation and rules on other grounds are unacceptable in light of the relevant directives and/or needlessly confusing for all concerned, surely is a topic of attention for the Commission of the EC. Therefore,

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[60] K. Waaldijk, "Netherlands", Chapter 13 in the report mentioned in note 2, para. 13.1.6.

[61] ECJ, 31 May 2001, *D. and Sweden v. Council*, Cases C-122/99 P and C-125/99 P, *ECR*, p. I-4319.

[62] For a discussion whether a similar case involving a private or public employer in a Member State would or could be decided differently, see K. Waaldijk, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.3.3.

[63] M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2, para. 2..1.7.

at a later stage, it would make sense to carry out detailed comparisons between the national rules on the different discrimination grounds in the field of employment.

G. Provisions on sexual orientation discrimination in other fields than employment

Most Member States have not only prohibited sexual orientation discrimination in the field of employment, but also in other fields. These fields clearly fall outside the scope of the Directive. However, for several reasons it is important to note the existence of such anti-discrimination provisions in other fields:

– Firstly, the borderline between employment and other fields is not always clear cut. This is particularly true for the areas of vocational training, vocational guidance, self-employment and benefits provided for by organisations of workers, employers, or professionals (all covered by Article 3(1) of the Directive). Each of these areas overlaps with that of goods and services. Therefore it is fortunate that the provision of goods and services is subject to a prohibition of sexual orientation discrimination in most Member States: BEL, DNK, FIN, FRA, IRL, LUX, NLD, ESP and SWE [64].
– Secondly, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the matter, it can be helpful if the anti-discrimination norm is a *general* norm, and not just one applicable in certain carefully delineated areas.
– Thirdly, the perception of what areas (employment, goods and services, partnership, incitement) are central to the problem of sexual orientation discrimination varies from country to country.

A chronological (not complete) list of measures signalled in the report *Combating sexual orientation discrimination in employment* indicates the increasing prevalence of national explicit prohibitions of sexual orientation discrimination beyond the field of employment [65]:

1985	FRA	Penal Code (provision of goods and services)
1986	NLD	Act on Benefits for Victims of Persecution 1940-1945
1987	DNK	Penal Code (incitement to hatred)
	DNK	Act on Race Discrimination (amended so as to also cover sexual orientation)
	SWE	Penal Code (provision of goods and services)
1988	NLD	Data Registration Act
	SWE	Homosexual Cohabitees Act
1989	DNK	Registered Partnership Act
1990	-	-
1991	-	-

[64] See para. 1.6 of the relevant chapters in the report mentioned in note 2.

[65] For national legislation the years of entry into force are given; full citations can be found in the paragraphs 1.8 of each national chapter of the report mentioned in note 2.

1992	NLD	Penal Code (discrimination by a business, by a professional or by a public official; incitement to hatred by anyone)
1993	AUS	Code of conduct for police officers
1994	NLD	General Equal Treatment Act (provision of goods and services)
	ESP	Law on Urban Housing
	SWE	Penal Code (sexual orientation aggravating motive for crimes)
1995	FIN	Penal Code (provision of services)
	ESP	Penal Code (provision of services; incitement to hatred)
	SWE	Registered Partnership Act
1996	-	-
1997	BEL	Immigration circular
	LUX	Penal Code (provision of goods and services; incitement to hatred)
	NLD	Royal Decree on the training of medical doctors
1998	NLD	Civil Code (registered partnership)
	UK	Northern Ireland Act 1998 (duty to promote equality)
1999	UK	Greater London Authority Act (duty to promote equality)
	FRA	Civil Code (registered partnership: *Pacs*; and recognition of same-sex *concubinage*)
2000	AUS	Data Protection Act
	BEL	Law on statutory cohabitation
	IRL	Equal Status Act 2000 (provision of goods and services)
2001	DEU	Law on Ending Discrimination Against Same-Sex Unions: Life Partnerships
	NLD	Civil Code (civil marriage)
	PRT	Law on *de facto* couples
2002	SWE	Equal Treatment of Students at Universities Act
	SWE	Penal Code (sexual orientation aggravating motive for crimes)
	FRA	Law 2002-73 (rental housing)
	ESP	Law on Political Parties
	FIN	Registered Partnership Act
2003	SWE	Instrument of Government
	SWE	Discrimination Prohibition Act (provision of goods and services)
	SWE	Penal Code (incitement to hatred)
	SWE	Cohabitation Act
	FRA	Penal Code (sexual orientation aggravating motive for crimes)
	BEL	Law of 25 February on combating discrimination (provision of goods and services)
	BEL	Civil Code (civil marriage)
2004	FRA	Penal Code (sexual orientation aggravating motive for more crimes)
	LUX	Partnership Act
	PRT	Constitution

H. Other aspects of the legal background

Although the Directive does not require any legislation outside the field of employment discrimination, it seems appropriate to include a table briefly indicating the legal situation of homosexuality in each Member State in two of the most relevant other areas of law: criminal law and family law (see Table 4 below). Developments in these areas are bound to have an impact on the adoption, interpretation and application of anti-discrimination legislation with respect to sexual orientation. Occasionally, the effects of criminal law or family law can also be felt in the field of employment.

Table 4. Decriminalisation of homosexuality and legislative recognition of same-sex partners [a]

The countries are listed here in the same order as in Table 2 (see above).

	Decriminalisation of sexual acts between adult men (and adult women)	*Equalisation of age limits in sex offences law*	*First legislative recognition of not-registered same-sex cohabitation*	*Introduction of a form of registered partnership*	*Joint or second-parent adoption by same-sex partner(s) allowed*	*Opening up of civil marriage to same-sex couples*
SWE	1944	1978	1988	1995	2003	in preparation
DNK	1930	1976	1986 [b]	1989	1999	—
ESP	1822 [c]	1822	1994 [d]	in preparation [e]	— [f]	in preparation
NLD	1811	1971	1979 [g]	1998	2001	2001
LUX	1792	1992	—	2004 [h]	—	—
UK	1967, 1980, 1982 [i]	2001	2000 [j]	2006 [k]	2005 [l]	—
FRA	1791	1982	1993	1999	—	—
ITA	1889 [m]	1889	—	—	—	—
BEL	1792	1985	1996	2000 [n]	in preparation	2003 [o]
IRL	1993	— [p]	1995 [q]	—	in preparation	—
PRT	1945	in preparation [r]	2001	—	—	—
FIN	1971	1998		2002	—	—
AUS	1971	2002	1998 [s]	—	—	—
GRC	1950	— [t]	—	—	—	—
DEU	1968, 1969 [u]	1989, 1994	2001	2001	2005	—

[a] Years given are the years in which national legislation came into force. This table is a shortened, and updated, version of an appendix to K. Waaldijk, "Taking same-sex partnerships seriously: European experiences as British perspectives", *International Family Law,* 2003, p. 84-95, full text available at www.emmeijers.nl/waaldijk. See also K. Waaldijk (ed.), *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries*, Documents de travail, no. 125, Paris, Institut National des Etudes Démographiques, 2005 (full text available at http://www-same-sex.ined.fr/intro_pub.htm).

[b] Surviving same-sex partner pays the same inheritance tax as surviving married spouse (Law of 4 June 1986, no. 339, repealed by Law on Registered Partnership of 7 June 1989, no. 372).

[c] Although the formal age limits for heterosexual and homosexual acts were equalised at the time of decriminalisation of homosexual acts in 1822, in practice homosexual acts with minors continued to be penalised until 1988 under a general provision against "serious scandal and indecency" (see H. GRAUPNER, *Sexualitaet, Jugendschutz und Menschenrechte*, Teil 2, Frankfurt, P. Lang, 1997, p. 665-666).

[d] Law on Urban Housing of 24 November 1994.

[e] Partnership legislation has so far been enacted in most autonomous regions: Catalonia (1998), Aragon (1999), Navarra (2000), Valencia (2001), Balearic Islands (2002), Asturia (2002), Madrid (2002), Andalucia (2002), Canary Islands (2003), Extremadura (2003) and the Basque Country (2003). See R. RUBIO-MARIN, "Spain", Chapter 15 in the report mentioned in note 2, para. 15.3.3. Not all of these legislative schemes involve a form of *registered* partnership: some only provide for the recognition of *de facto* cohabitation.

[f] Only in Navarra (2000), the Basque Country (2003) and Aragon (2004). The provisions on joint adoption by unmarried different-sex and same-sex couples in Navarra have been suspended pending a challenge to the constitutional power of the Navarra legislature (as opposed to the national legislature) to enact them (see N. PÉREZ CÁNOVAS, "Spain: The Heterosexual State Refuses to Disappear", in R. WINTEMUTE & M. ANDENAES (ed.), *Legal Recognition of Same-Sex Partnerships*, Oxford, Hart Publishing, 2001, p. 503).

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

[h] Law of 9 July 2004 ("relating to the legal effects of certain partnerships"), published in *Mémorial A*, no. 143, 6 August 2004, entry into force on 1 November 2004.

[i] Decriminalisation of most sexual activities between two men over 21 took place in England and Wales in 1967, in Scotland in 1980 and in Northern Ireland in 1982 (see H. GRAUPNER, *op. cit.*, p. 711, 727, 739).

[j] In 1997 the government introduced a "concession outside the Immigration Rules" allowing unmarried long-term cohabiting partners who could not marry each other (for example because they are of the same sex), to apply for leave to enter/remain in the United Kingdom; in 2000 this concession was incorporated into the Immigration Rules (para. 295A-295O). The first piece of parliamentary legislation recognising same-sex partners was enacted in 2000 by the Scottish Parliament: Adults with Incapacity (Scotland) Act 2000 (Section 87(2)). In 1999 and 2004 some older legislation has been interpreted so as to also cover same-sex cohabitants. See the judgements of the House of Lords of 28 October 1999, *Fitzpatrick v. Sterling Housing Association* [1999] 4 All ER 707, and of 21 June 2004, *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.

[k] In November 2004 the United Kingdom enacted the Civil Partnership Act, which is expected to enter into force around the beginning of the year 2006.

[l] The Adoption and Children Act 2002 will allow for joint and second-parent adoption by same-sex partners when it comes into force in September 2005 (expected date).

[m] In several parts of Italy sex between men was decriminalised (and in some parts then re-criminalised) before the general decriminalisation of 1889. See H. GRAUPNER, *op. cit.*, p. 505, and F. LEROY-FORGEOT, *Histoire juridique de l'homosexualité en Europe*, Paris, PUF, 1997, p. 66.

[n] It may be argued that the "*cohabitation légale*" introduced in 2000 by the Law on statutory cohabitation is either a form of registered partnership or a form of not-registered cohabitation.

[o] The Belgian law opening up marriage to persons of the same sex of 13 February 2003 (*Moniteur Belge*, 28 February 2003, Ed. 3, p. 9880) entered into force on 1 June 2003.

[p] The age limit for any sexual act between men is higher (seventeen) than for an oral or non-penetrative sexual act between a man and a woman, vaginal intercourse of a woman with a boy, or any sexual act between women (all: fifteen). However, the age limit for anal sex between a man and a woman, and for vaginal intercourse of a man with a girl is also set at seventeen. See H. GRAUPNER, *op. cit.*, 1997, p. 481 and 487.

[q] Domestic Violence Act, 1995, and Powers of Attorney Act, 1995 (see L. FLYNN, "From Individual Protection to Recognition of Relationships? Same-Sex Couples and the Irish Experience of Sexual Orientation Law Reform", in R. WINTEMUTE & M. ANDENAES (ed.), *op. cit.*, p. 596).

[r] Between 1945 and 1995 the age limits were equal. See H. Graupner, *op. cit.*, p. 597-598. In 2004 a bill was introduced in Parliament to equalise the ages again.

[s] Several partner-related aspects of criminal law, including the right to refuse testimony against your partner in a criminal court (see H. Graupner, "The first will be the last: Legal Recognition of Same-Sex Partnerships in Austria", in R. Wintemute & M. Andenaes (ed.), *op. cit.*, p. 557-559).

[t] In the case of "seduction", the age limit for sex between men is higher (seventeen) than for lesbian or heterosexual sex (fifteen). See H. Graupner, *op. cit.*, p. 466.

[u] In the former German Democratic Republic (East Germany), homosexual acts between men were decriminalised in 1968, and the age limits were equalised in 1989. In the Federal Republic of Germany (West Germany before the unification), the dates were 1969 and 1994. See H. Graupner, *op. cit.*, p. 407-410.

3. Legal instruments used to implement the Directive

In all Member States legislation to implement the Directive is required at national level. In the UK separate (national) implementing legislation has been adopted for Great Britain (that is Scotland, England and Wales), for Northern Ireland and for Gibraltar [66]. In some countries, implementation of the Directive can be accomplished (on the basis of delegation) by governmental decree (GRC, ITA, UK); in the other countries primary parliamentary legislation is required.

In addition to national legislation, some regional legislation is required in Austria (primarily with respect to public employees and agricultural workers), Belgium (with respect to public employment and vocational guidance and vocational training) and Germany (with respect to public employment) [67].

According to the case law of the Court of Justice of the EC, the provisions of a directive must be implemented with "the specificity, precision and clarity necessary to satisfy the requirements of legal certainty" [68]. This means that all elements of the Framework Directive must be explicitly implemented, if not already explicitly covered in existing law. The Court of Justice has also ruled that provisions in a Constitution cannot be considered as an appropriate means of implementation [69].

By August 2004 the Framework Directive of 27 November 2000 had been more or less fully implemented in twelve Member States. In the chronological order of their implementing legislation, these are: FRA, BEL, SWE, ITA, UK, PRT, ESP, FIN, NLD, DNK, AUS and IRL. In the latter six countries implementation was completed after the Directive's implementation deadline of 2 December 2003. The most important instruments used are the following:

[66] See R. Wintemute, "United Kingdom", Chapter 17 in the report mentioned in note 2, para. 17.1.3, 17.1.5 and 17.2.1.

[67] See H. Graupner, "Austria", Chapter 3 in the report mentioned in note 2, para. 3.1.3; O. De Schutter, "Belgium", Chapter 4 in the report mentioned in note 2, para. 4.1.3; and S. Baer, "Germany", Chapter 8 in the report mentioned in note 2, para. 8.1.3, respectively.

[68] See case law cited by M. Bonini-Baraldi, "European law", Chapter 2 in the report mentioned in note 2, para. 2.2.1.

[69] *Ibid*.

FRA Penal Code (Articles 225-1, 225-2 and 432-7), as amended in 1985, 2001 and 2002;
Labour Code (Articles L122-35, L122-45, L122-46, L122-47, L122-49, L122-52 and L122-54), as amended in 1986, 1992, 2001 and 2002;
Law 83-634 of 13 July 1983 governing the rights and obligations of civil servants (Article 6 and 6*quinquies*), as amended in 2001 and 2002 [70].

BEL Federal Law of 25 February 2003 on combating discrimination, in force since 27 March 2003;
Flemish Decree of 8 May 2002 on proportionate participation in the labour market, in force in the Flemish Region/Community since 29 June 2003;
Ordinance of 26 June 2003 on the mixed management of the labour market in the region of Brussels-Capital, in force since 9 August 2003;
Decree of 19 May 2004 on the implementation of the principle of equal treatment, in force in the French-speaking Community since 17 June 2004;
Decree of 27 May 2004 on equal treatment in employment and professional training, in force in the Walloon Region since 3 July 2004;
Decree of 17 May 2004 on guaranteeing equal treatment in the labour market, in force in the German-speaking Community since 13 August 2004 [71].

SWE Penal Code (Article 9(4) of Chapter 16, on unlawful discrimination), as amended in 1987;
Sexual Orientation Discrimination Act of 1999, as amended per 1 July 2003; Discrimination Prohibition Act of 2003, in force since 1 July 2003;
Equal Treatment of Students at Universities Act of 2001, as amended per 1 July 2003 [72].

ITA Legislative Decree 216 of 9 July 2003, in force since 28 August 2003;
Workers' Statute (Article 15), as amended per 28 August 2003 by Legislative Decree of 9 July 2003;
Legislative Decree 276 of 10 September 2003 (Article 10, with respect to job agencies), in force since 24 October 2003 [73].

UK Employment Equality (Sexual Orientation) Regulations 2003, in force since 1 December 2003;
Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, in force since 2 December 2003;
Equal Opportunities Ordinance, 2004 (Gibraltar), in force since 11 March 2004 [74].

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[70] In both Codes, the Directive has been implemented first by law 2001-1066 of 16 November 2001 on combating discrimination, and then by Law 2002-73 of 17 January 2002 on moral harassment; Law 2001-1066 also introduced a prohibition of sexual orientation discrimination into Law 83-634, into which Law 2002-73 introduced a prohibition of moral harassment. See D. Borrillo, "France", Chapter 7 in the report mentioned in note 2, para. 7.1.5 and 7.2.1.

[71] See O. De Schutter, "Belgium", Chapter 4 in the report mentioned in note 2, para. 4.2.1.

[72] See H. Ytterberg, "Sweden", Chapter 16 in the report mentioned in note 2, para. 16.1.5 and 16.2.1.

[73] See S. Fabeni, "Italy", Chapter 11 in the report mentioned in note 2, para. 11.2.1.

[74] See R. Wintemute, "United Kingdom", Chapter 17 in the report mentioned in note 2, para. 17.1.5.

PRT Labour Law Code (Article 22-24), in force since 1 December 2003;
Law 35/2004 containing supplementary provisions to the Labour Law Code, in force since 29 August 2004 [75].

ESP Penal Code (Article 314), as amended in 1995;
Act 62/2003 on fiscal, administrative and social measures, in force since 1 January 2004;
Workers' Statute (Articles 4, 16 and 17), as amended per 1 January 2004 by Act 62/2003;
Act 45/1999 (Article 3) concerning the relocation of workers in the framework of a trans-national contractual work relation, as amended per 1 January 2004 by Act 62/2003 [76].

FIN Penal Code (Article 3 of Chapter 47), as amended in 1995;
Employment Contracts Act of 2001 (Article 2 of Chapter 2), as amended per 1 February 2004;
Equality Act 21/2004, in force since 1 February 2004;
Act on Holders of Municipal Office (Article 12), as amended per 1 February 2004;
Act on Civil Servants (Article 11), as amended per 1 February 2004;
Seamen's Act (Article 15), as amended per 1 February 2004 [77].

NLD Penal Code (Articles 90*quater* and 429*quater*), as amended in 1992;
General Equal Treatment Act of 1994, as amended per 1 April 2004 by the Implementation Act of 21 February 2004 [78].

DNK Act on Discrimination of 1996, as amended per 8 April 2004 by Act 253 of 7 April 2004 [79].

AUS Equal Treatment Act (covering private employment), in force since 1 July 2004;
Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (also covering private employment), in force (under this name) since 1 July 2004;
Federal Equal Treatment Act (covering public employment), proposed in November 2003, in force since 1 July 2004;
as far as the required implementation at regional level is concerned, legislation has only been adopted or proposed in five of the nine states of AUS [80].

IRL Unfair Dismissal Act 1977 (Article 6(2)(e)), as amended in 1993;
Employment Equality Act 1998, in force since 1999, as amended per 18 July 2004 by the Equality Act 2004;
Pensions Act 1990, as amended by the Social Welfare Act 2004 (not yet in force) [81].

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[75] See M. Freitas, "Portugal", Chapter 14 in the report mentioned in note 2, para. 14.2.1.

[76] See R. Rubio-Marin, "Spain", Chapter 15 in the report mentioned in note 2, para. 15.1.5 and 15.2.1.

[77] See R. Hiltunen, "Finland", Chapter 6 in the report mentioned in note 2, para. 6.1.5 and 6.2.1.

[78] See K. Waaldijk, "Netherlands", Chapter 13 in the report mentioned in note 2, para. 13.2.1.

[79] See S. Baatrup, "Denmark", Chapter 5 in the report mentioned in note 2, para. 5.2.1.

[80] Regional implementation draft bills have been adopted or proposed in four of the nine Austrian states (Vienna, Upper Austria, Lower Austria, Styria and Carinthia). See H. Graupner, "Austria", Chapter 3 in the report mentioned in note 2, para. 3.2.1 (plus his addendum before para. 3.1).

[81] See M. Bell, "Ireland", Chapter 10 in the report mentioned in note 2, para. 10.1.5 and 10.2.1.

In one country (Luxembourg) the Directive is already partly implemented by pre-existing legislation explicitly prohibiting sexual orientation discrimination in employment, while legislation to complete the implementation has been presented:

LUX Penal Code (Article 454 and following), as amended in 1997;
Bill to implement the Directive, submitted to Parliament on 10 November 2003 (which would not become law before 2005) [82].

In the two remaining countries (DEU and GRC) the Directive has not yet been implemented at all.

In Germany a government proposal to implement the Directive at national level was to be published late in 2004 [83]. At regional level there is no implementation activity yet; the Länder are waiting for the federal Government to act first [84].

In Greece first a proposal for a presidential decree to implement the Directive was presented in July 2003. This proposal was abandoned when a bill proposing to implement the Directive by Act of Parliament was published in November 2003 and presented to Parliament in January 2004. This bill did not live long, because Parliament was dissolved for the elections of March 2004. In May 2004 the opposition re-introduced the old government implementation bill, but this opposition bill has little chance of being adopted [85]. Late in 2004 the Government presented a new implementation bill.

The conclusion must be that up to August 2004 only twelve Member States had more or less fully implemented the Directive. Of these twelve, six did so after the implementation deadline of 2 December 2003 had expired (ESP, FIN, NLD, DNK, AUS and IRL). The proposal for such legislation still has to be adopted in LUX, and final proposals for implementation still have to be published in DEU and GRC.

4. The quality of the implementation of the Directive

This paragraph brings together the main conclusions about the implementation (with respect to sexual orientation) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation at national level in the then fifteen EU Member States by April 2004 (or shortly thereafter). These conclusions are based on the more detailed comparative analysis in Chapter 19 of that group's report [86], and on the fifteen national chapters written by the members of the European Group of Experts on Combating Sexual Orientation Discrimination. In

[82] See A. Weyembergh, "Luxembourg", Chapter 12 in the report mentioned in note 2, para. 12.1.5. On 4 July 2002 a Bill (no. 4979) was proposed to combat moral harassment (see A. Weyembergh, para. 12.2.5).

[83] See S. Baer, "Germany", Chapter 8 in the report mentioned in note 2, para. 8.2.1.

[84] Certain forms of sexual orientation discrimination in *public* employment had already been prohibited in four of the German Länder (Hamburg, Lower Saxony, Saarland and Saxony-Anhalt).

[85] See M. Peponas, "Greece", Chapter 9 in the report mentioned in note 2, para. 9.2.1.

[86] K. Waaldijk, "Comparative analysis", Chapter 19 in the report mentioned in note 2.

those chapters more detailed information and criticism, and more arguments, nuances and good practices can be found.

It is also important to note that these conclusions only provide a tentative analysis of the implementation of the Directive. Firstly, the Group of Experts had been asked by the Commission of the EC to cover only the fifteen "old" Member States, not the ten countries that would join the EU in May 2004. Secondly, final implementation texts are not yet available in most regional states of Austria, not on national and regional level in Germany, and not in Greece. Thirdly, in Luxembourg the proposal for implementing legislation is still being discussed and possibly amended in Parliament. Finally, the Court of Justice of the EC has not had a chance to specify the meaning of many words and phrases in the Directive, and it also remains to be seen how national courts will interpret the various implementing laws and regulations.

The following conclusions have been formulated quite strictly, because EC law demands a strict implementation wherever the Directive contains clear and specific requirements. Wherever its wording is vague or leaves scope for national variations, I have accepted more room for different interpretations of the Directive. Many of the implementation shortcomings highlighted here can, and indeed should, be solved by national courts giving an interpretation to the national legislation that is in conformity with the Directive. To remove other shortcomings, further legislation will be required, and perhaps judgements of the Court of Justice.

Because of the absence of implementing legislation, the legal situation in Germany and Greece is not covered in the remainder of this contribution, which therefore only deals with *thirteen Member States*. Regional legislation is not covered in these conclusions either (see previous paragraph).

A. Prohibition of different forms of sexual orientation discrimination in employment

Existing and proposed legislation in all thirteen Member States covers both direct and indirect sexual orientation discrimination, as required by Article 2(2) of the Directive. However, the wording of the prohibition of *direct discrimination* in the implementing legislation in PRT and ESP falls short of the minimum requirements of the Directive (because their definitions of direct discrimination does not allow for comparison with how another "would" be treated). Contrary to the Directive, a definition of *indirect discrimination* is missing in FRA; and the wording of such a definition in BEL, NLD and the UK seems a little too narrow. Contrary to Article 2(4) of the Directive, *instruction to discriminate* is not (or not always) prohibited by the legislation of FRA, PRT, SWE and the UK [87].

The words used in existing and proposed legislation to refer to "sexual orientation" always correctly cover *homosexual, heterosexual and bisexual* orientations (although in NLD only the first two are explicitly mentioned, and in FIN sexual orientation is not explicitly mentioned in two of the five implementing laws). However, the wording

[87] *Ibid*., para. 19.2.3, 19.2.4 and 19.2.6.

used in FRA (with a possessive pronoun in front of the words "sexual orientation") does not clearly extend the prohibition of sexual orientation discrimination to discrimination on grounds of a *mistaken assumption* about someone's sexual orientation, which is contrary to Articles 1 and 2 of the Directive [88].

The existing or proposed legislation of the thirteen Member States not only covers discrimination on grounds of a person's heterosexual, homosexual or bisexual *preference*, but also discrimination on grounds of a person's heterosexual, homosexual or bisexual *behaviour* or on grounds of a person's *coming out*. This helps to achieve one of the main goals of the prohibition of sexual orientation discrimination: to give lesbian women, gay men and bisexuals a chance to be as open about their sexual orientation as heterosexuals can be [89]. On the other hand, lesbian women, gay men and bisexuals should also have a right to keep their sexual orientation secret. Therefore it is a good practice in all thirteen Member States to almost always consider it irrelevant and/or discriminatory to ask a job-applicant about his or her sexual orientation. In DNK this is even explicitly prohibited in the Act on Discrimination [90].

Whether *direct discrimination between same-sex and different-sex (cohabiting) partners* in employment will be covered by the prohibition of sexual orientation discrimination is not completely certain in FRA, ITA, LUX and ESP, although the Directive clearly requires that [91]. With respect to the Directive's requirement to also prohibit *indirect discrimination against same-sex partners*, there appears to be a problem in three Member States. This concerns the most common form of indirect sexual orientation discrimination in employment: discrimination against unmarried employees and their partners. In IRL, ITA and the UK a specific exception in the implementing legislation seeks to prevent the national courts from assessing whether such indirect discrimination is indeed justified. In all thirteen Member States, however, it remains to be seen, whether such indirect discrimination would be considered objectively justified in a concrete case (for example because of the aim not to prejudice national laws on marital status, as indicated in recital 22 of the Directive) [92].

An important feature of the Directive is its requirement to prohibit *harassment* related to sexual orientation as a form of sexual orientation discrimination. A prohibition of harassment has been enacted or proposed in all thirteen Member States, but in FRA and the UK this is not done *as a form of discrimination* (although the UK legislation at least speaks of harassment "on grounds of sexual orientation"). Four Member States have adopted or proposed a definition of harassment that in

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[88] *Ibid*., para. 19.2.2 and 19.3.1.

[89] *Ibid*., para. 19.3.1 and 19.3.2.

[90] *Ibid*., para. 19.3.6.

[91] For a study of the form and extent of such direct discrimination with respect to partner benefits provided by employers, see A. Littler, "Discriminatory Partner Benefits", appendix to the report mentioned in note 2, 2004.

[92] K. Waaldijk, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.3.3.

some respects is slightly more limited than that of the Directive (AUS, FRA, SWE and UK); it remains to be seen, whether the Court of Justice of the EC would find these limitations to be acceptable under the second sentence of Article 2(3) of the Directive (which states that "the concept of harassment may be defined in accordance with national laws and practice"). For the practical relevance of the prohibition of harassment, however, much will depend on the attitude of employers, managers, co-workers, national courts, etc. towards common forms of anti-homosexual behaviour (such as verbal abuse, or revealing someone's sexual orientation against her or his will) [93].

The implementation of Article 3 of the Directive seems to be particularly problematic for Member States. Partly, this may be blamed on the less than clear formulation in Article 3 of some aspects of the material and personal scope of the Directive. The *main* shortcomings of the Member States with respect to *material scope* appear to be the following [94]:

- *Public employment* is not yet covered in the legislation proposed in LUX.
- *Vocational guidance* is not yet (fully) covered in AUS, FRA and ESP.
- *Vocational training* is not yet fully covered in AUS.
- *Employment conditions* (including pay and dismissal) are covered in all thirteen Member States, but *working conditions* (in the sense of working environment) for employees are not explicitly covered in FRA and SWE.
- With respect to the working conditions (in the sense of working environment) in *self-employment* there may be an implementation problem in AUS, FRA, ITA, PRT, ESP, SWE and the UK.
- *Access to employment* is covered in all thirteen Member States, but *access to self-employment* is not or not fully covered in PRT and the UK.
- With respect to *other forms of occupation* than employment and self-employment (such as compulsory military or alternative service), there seem to be problems in AUS, FIN and SWE.

As regards the *personal scope* of the implementing legislation, (apart from the omission of public employers in LUX) at least DNK, IRL, SWE and the UK seem to fall short of the minimum requirements of the Directive. This would be so because in their legislation co-workers – unlike employers and their representatives (such as managers, and job or training agencies) – are not subjected to the prohibition of harassment and other forms of discrimination (although the employer may be liable for their actions). This would appear to be incompatible with Article 3(1) of the Directive, which speaks of "all persons", and with Article 2(1), which does not limit the personal scope either [95].

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[93] *Ibid*., para. 19.2.5 and 19.3.8.
[94] *Ibid*., para. 19.2.7.
[95] *Ibid*., para. 19.2.8.

B. *Exceptions to the prohibition of discrimination*

The Directive *allows* for a variety of exceptions to the prohibition of sexual orientation discrimination. Not all permitted exceptions have been incorporated in all existing and proposed national legislation.

Five countries have enacted or proposed specific exceptions that are based on Article 2(5) of the Directive (measures necessary for *public security*, for the protection of *rights of others*, etc.). These exceptions in IRL, ITA, NLD and the UK are probably not limited enough to be justified by Article 2(5), and that may also be the case for BEL [96].

All of the Member States except FRA and NLD have enacted or proposed exceptions for sexual orientation as an *occupational requirement*. Of these, the legislation in AUS, BEL, IRL, LUX and ESP (and the main piece of legislation in SWE) is in accordance with the Directive, but the implementation in DNK, FIN, ITA, PRT and the UK falls short of the objectivity and proportionality conditions set by Article 4(1) [97].

In addition, Article 4(2) of the Directive allows for specific exceptions for employers with an *ethos based on religion or belief*, but only as regards discrimination on grounds of religion of belief. Such specific exceptions for religion based employers have been enacted or proposed in AUS, DNK, IRL, ITA, LUX, NLD and the UK, most of which are not fully compatible with the requirements of Article 4(2). The main problem is that in IRL, NLD and the UK this exception also extends to discrimination on other grounds than religion or belief, including sexual orientation. Another problem may be, that in DNK, ITA and LUX it is not made explicit that the exception for the grounds of religion and belief should not be used to justify discrimination on grounds of sexual orientation [98].

A majority of the Member States have enacted or proposed exceptions for *positive action* with respect to sexual orientation (AUS, BEL, FIN, IRL, LUX, PRT, ESP and the UK), which are compatible with the wording of Article 7(1) of the Directive [99].

C. *Enforcement of the prohibition of discrimination*

In addition to the content of the prohibitions of sexual orientation discrimination, questions relating to their enforcement are of course central to the implementation of the Directive. Article 9(1) of the Directive requires the availability of judicial and/or administrative procedures, but in contrast with the Race Directive (2000/43/EC), the setting up of *specialised bodies* for the application of the principle of equal treatment is not required with respect to sexual orientation. Nevertheless, six Member States have chosen to partly entrust the enforcement of the prohibition of sexual orientation discrimination in employment to such a body. Five of these countries have established bodies covering a multitude of grounds (AUS, BEL, IRL, NLD and, only for Northern

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[96] *Ibid*., para. 19.4.2.
[97] *Ibid*., para. 19.4.4.
[98] *Ibid*., para. 19.4.5.
[99] *Ibid*., para. 19.4.6.

Ireland, the UK) and one has established an enforcement body that deals only with issues of sexual orientation discrimination (SWE). The existence of these bodies allows for specific *non-judicial procedures* for the enforcement of the prohibition of discrimination. Conciliation in discrimination cases is available in several countries. *Judicial procedures*, and in particular *civil* judicial procedures, are available in all thirteen Member States; *penal* judicial procedures are available everywhere except in AUS, DNK, PRT and the UK (and only in very specific circumstances in IRL and SWE) [100].

It appears that Article 9(2) of the Directive requires that *interest groups* can play an officially recognised role in enforcement procedures, in support or on behalf of complainants. In light of the text of Article 9(2) it would seem reasonable to let the interest groups and complainants themselves make the choice between "in support of" and "on behalf of". It remains to be seen whether the Court of Justice will opt for that interpretation. If so, the implementation in AUS, DNK, FIN and the UK (where interest groups can only act in support of complainants) and in IRL, ESP and SWE (where interest groups cannot themselves be party in an enforcement procedure for the benefit of a complainant) would probably be insufficient. The limitation to trade unions, while excluding other interest groups (as in ITA, PRT, ESP and SWE), is more certainly incompatible with the Directive, as is the limitation in AUS to one particular non-governmental organisation, that can only intervene in private employment cases [101].

The Directive's important requirement of a shift in the *burden of proof* in discrimination cases (Article 10) appears to have not been fully implemented in AUS, FRA, ITA, PRT and perhaps the UK. Furthermore, in FRA and the UK the victim of sexual orientation discrimination may sometimes have to allege (or even prove) his or her sexual orientation; this is not compatible with Article 2(2) of the Directive. Adequate protection against *victimisation*, as required by Article 11 of the Directive, is not provided in AUS, BEL, DNK and ITA [102].

Article 17 of the Directive requires that the available *sanctions* must be "effective, proportionate and dissuasive". It is doubtful whether many Member States already fulfil this important requirement:

- AUS, FIN, IRL and SWE can be criticised because of their upper limits imposed on compensatory damages, and AUS also for not providing compensatory damages in case of discriminatory termination of employment [103].
- At least DNK, FIN, ESP and the UK could be criticised for only having included employers (and their "accomplices") in the circle of persons to whom sanctions may be applied [104].

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[100] *Ibid.*, para. 19.5.2 and 19.5.3.
[101] *Ibid.*, para. 19.5.7.
[102] *Ibid.*, para. 19.5.8 to 19.5.10.
[103] *Ibid.*, para. 19.5.4.
[104] *Ibid.*, para. 19.5.5.

Without a further elaboration of sanctions, in legislation or in case law, the implementation of the Directive cannot be considered complete. Sanctions must be suited to the particular situations in which discrimination normally takes place. Therefore the availability of the following sanctions should be seen as good practices [105]:

- nullity or voidability of discriminatory dismissal (FRA, ITA, NLD and SWE);
- nullity, voidability or automatic conversion of discriminatory contracts or clauses (all thirteen Member States);
- judicial order to reinstate a discriminatorily dismissed employee (AUS, FRA, ITA, IRL, PRT and ESP);
- judicial order to start a new selection procedure or to offer the job to a discriminated job applicant (available in some countries);
- administrative fines (AUS, PRT and ESP);
- exclusion from public procurement contract(s) or public subsidies (AUS and ITA);
- binding or non-binding opinions of specialised enforcement body (AUS, IRL, NLD and SWE);
- judicial order to structurally change recruitment procedures (IRL).

5. Conclusions

The main findings of the previous paragraphs are brought together in Table 5 below. All certain or probable shortcomings (indicated with X) and all possible shortcomings (indicated with ?) are highlighted in grey, as are the columns for Germany and Greece, where the governments are not yet proposing any implementing legislation. The information in the column for Luxembourg is based on proposals for legislation that is not yet in force.

[105] *Ibid*., para. 19.5.4.

Table 5. Major aspects of implementation of the Directive at national level

Article refers to the articles of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;

X means that the existing or proposed implementation of a provision of the Directive is (certainly or probably) not completely correct;

? means that there is doubt about the correctness of the implementation of a provision of the Directive;

– means that the exception allowed by a provision of the Directive is not (yet) part of existing or proposed legislation;

✓ means that there do not seem to be major shortcomings in the implementation of a provision of the Directive.

	AUS	BEL	DNK	FIN	FRA	DEU	GRC	IRL	ITA	LUX	NLD	PRT	ESP	SWE	UK
Article 1 "sexual orientation"	✓	✓	✓	X	X			✓	✓	✓	?	✓	✓	✓	✓
Article 2(2)(a) direct discrimination	✓	✓	✓	✓	✓			✓	✓	✓	✓	X	X	✓	✓
Article 2(2)(b) indirect discrimination	✓	?	✓	✓	X			X	X	✓	?	✓	✓	✓	X
Article 2(3) harassment	?	✓	✓	✓	X			✓	✓	✓	✓	✓	✓	?	?
Article 2(4) instruction to discriminate	✓	✓	✓	✓	X			✓	✓	✓	✓	X	✓	X	X
Article 2(5) rights of others, etc.	–	?	–	–	–			X	X	–	X	–	–	–	X
Article 3(1) material scope	X	✓	✓	?	X			✓	?	X	✓	X	X	X	X
Articles 3(1) & 2(2) personal scope	✓	✓	?	✓	✓			?	✓	X	✓	✓	✓	?	?
Article 4(1) occupational requirements	✓	✓	X	X	–			✓	X	✓	–	X	✓	?	X
Article 4(2) religion based employers	✓	–	?	–	–			X	?	?	X	–	–	–	X
Article 7(1) positive action	✓	✓	–	✓	–			✓	–	✓	–	✓	✓	–	✓
Article 9(1) procedures	✓	✓	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓
Article 9(2) interest groups	X	✓	?	?	✓			?	X	✓	✓	X	X	X	?
Article 10 burden of proof	X	✓	✓	✓	X			✓	X	✓	✓	X	✓	✓	?
Article 11 victimisation	X	X	X	✓	✓			✓	X	✓	✓	✓	✓	✓	✓
Article 17 sanctions	X	✓	?	X	✓			X	✓	✓	✓	✓	?	X	?
Article 18 implementation largely completed	July 2004	Mar. 2003	April 2004	Feb. 2004	Nov. 2001			July 2004	Aug. 2003		April 2004	Dec. 2003	Jan. 2004	July 2003	Dec. 2003
	AUS	BEL	DNK	FIN	FRA	DEU	GRC	IRL	ITA	LUX	NLD	PRT	ESP	SWE	UK

In conclusion it can be said, that with respect to sexual orientation discrimination, the implementation of the Directive is more than eight months late in LUX, DEU and GRC. It is interesting to note that the two countries where public opinion is least opposed to discrimination on grounds of sexual orientation, DEU and GRC (see Table 2, above), turn out to be the last countries to start implementing the Directive.

On 20 December 2004 the European Commission has announced that it is referring Germany, Greece and Luxembourg to the Court of Justice of the European Communities, for failure to implement the Directive [106]. This does not mean that the Commission approves of the quality of implementation in the other Member States. The Commission is still examining whether the Directive has been implemented *properly* by the Member States that have so far enacted implementing legislation [107]. In doing this the Commission can use the report of the independent European Group of Experts on Combating Sexual Orientation Discrimination, on which this contribution is based. The report has shown and argued that in the twelve Member States that have largely completed the implementation, the adopted legislation does not meet all the requirements of the Directive. The countries with the most implementation shortcomings appear to be the UK, ITA, PRT, AUS and FRA. For the first four (but not for FRA) this correlates with relatively negative public opinion attitudes towards homosexuals and/or homosexuality (see Table 1, above).

With respect to the following topics the proposed or enacted implementing legislation is problematic in many (six or more) of the thirteen Member States:

- indirect discrimination;
- material scope of the prohibition of discrimination;
- occupational requirements and religion based employers;
- role of interest groups in enforcement procedures;
- sanctions.

With respect to other important aspects of the Directive the implementation seems to be problematic in a smaller number of Member States.

At the same time in several Member States various good practices were found that could serve as inspiration for further improvement of the implementation of the Directive in other Member States. This is especially true for the various specialised bodies that some Member States have set up or proposed [108], for the important role in court procedures that a few Member States have given to interest groups, and for the various specific sanctions that can help ensure that the principle of equal treatment will actually work.

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[106] Simultaneously, the Commission is also referring AUS (because of non-implementation at regional level) and FIN (because of non-implementation on the small islands of Aland) to the Court of Justice. See the press release IP/04/1512 of 20 December 2004 (http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lginfringe_en.htm).

[107] *Ibid*.

[108] Without this being required by the Directive.

Homosexual individuals, same-sex couples and homoparental families:
an analysis of French legal reality

Daniel Borrillo

The individual gets everything, the couple gets only a little and the family gets nothing: that is how one could briefly describe French legal reality in terms of rights of homosexuals. Actually, while the individual is protected by the law, same-sex couples do not benefit from the same protection level as heterosexual partners. It is in terms of family law, especially as far as filiation is concerned, that the unions between homosexuals encounter the most significant difficulties.

My article aims at analyzing these three levels of legal approach, in order to provide the reader with a survey of the situation in France within the European and international framework.

1. The homosexual individual

A. The long road towards full decriminalization of homosexuality

France was the first country in the world to decriminalize sodomy. As in all occidental countries, before the French Revolution, there were several norms severely condemning homosexuality. Inspired by the philosophy of the Enlightenment, the first revolutionary Penal Code of 1791, as well as the Napoleonic Code of 1810, ceased to criminalize "unnatural morals". Political liberalism and the secularization of the public order led the State to stop interfering in the private lives of consenting individuals who have attained their majority. Nevertheless, the highly praised French liberalism needs modulating. Actually, as Jean Danet [1] points out, the silence of the Penal Code was

[1] J. Danet, *Discours juridique et perversions sexuelles (XIXe et XXe siècles)*, Nantes, Presses Universitaires de Nantes, 1977.

accompanied throughout that period by extremely repressive jurisprudence towards homosexuals and by extremely violent medical – psychiatric treatment.

A century and a half later, on 6 August 1942, a few months after the enactment of the law on the status of Jews, France reintroduced into its Criminal Code a provision penalizing homosexuality: Marshal Philippe Pétain amended the Penal Code by introducing the crime of "indecent and unnatural acts with young persons under twenty-one and of the same sex as the perpetrator" [2], whereas for heterosexual acts, the majority was fixed at thirteen. Following the liberation in 1945, General de Gaulle maintained this criminalization by moving it to the chapter on "offences against public decency" (Article 331, para. 2 of the Penal Code). Moreover, in 1946 a provision, which would subsequently become part of the general statute of civil service, stipulated that: "No one may be appointed to a public function if he is not of good morals", thus justifying discrimination. Furthermore, an article in the Labour Code stipulated that: "The master must behave towards his apprentice with due diligence, supervise the apprentice's conduct and morals, both within and outside the house, and warn his parents (…) about any licentious tendencies he might display", thus legitimating dismissals due to bad morals. On 1 February 1949, the Prefect of the Paris Police issued the following regulation: "at all dances (…) men are forbidden to dance with each other".

Later on, as part of the fight against certain social scourges, a law of 30 June 1960 put homosexuality on the same level as procurement or alcoholism. A Decree of 25 November the same year, completed the repressive mechanism by adding indecent exposure as an aggravating circumstance to Article 331, when such an act was committed by individuals of the same sex. Furthermore, in 1968, France adopted the classification of the World Health Organization (founded in 1965) with respect to mental illnesses, which includes homosexuality alongside fetishism, exhibitionism, necrophilia…

A law of 23 December 1980, amending penal provisions concerning rape, maintains the offence based on the age difference, according to whether the intercourse takes place between persons of the same sex or between persons of the opposite sex. In its Decision 80-125 of 19 December 1980, the *Conseil constitutionnel* (or Constitutional Council) considered the law as being consistent with the Constitution [3].

Following the mobilization of the homosexual movement, the Ministry of Home Affairs on 11 June 1981 addressed a note (a *circulaire*) to the police hierarchy, prohibiting "filing of information on homosexuals, discrimination and especially anti-homosexual suspicions". The following day, the Ministry of Health ceased to include homosexuality in the list of mental illnesses as organized by the World Health

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[2] Article 334 of the former Penal Code: "Shall be punished by six months to three years imprisonment and by a fine of 2,000F to 6,000F: 1° any person who, in order to satisfy the passions of another person, habitually arouses, favours or facilitates the debauchery or corruption of young people of either sex, under the age of twenty-one, or to satisfy his own passions commits one or several indecent acts or acts against nature with a person of the same sex under the age of twenty-one" (Law 742, *Gazette officielle*, 27 August 1942, p. 2923).

[3] 80-125, *RJC*, I-88.

Organization. On 22 June 1982 the Quilliot law (concerning housing) was passed, abolishing the obligation for homosexuals to use their apartments with due diligence. On 4 August 1982 the socialist majority at that time, together with the other left-wing parties voted Law 82-683, thus putting an end to the age difference between heterosexual (fifteen years) and homosexual (eighteen years) relations. Lastly, on 13 July 1983 a new law abrogated Article 40 of the Civil Service Code stipulating that a public servant had to be of "good morals". Since these first measures, several legal provisions have been enacted to protect gays and lesbians against discrimination, both at the civil and penal levels [4].

As a consequence, within a few years the law has gone from the sanctioning of homosexuality to the sanctioning of discriminations against homosexual individuals.

B. Criminalisation of homophobia

As for the legal mechanism related to protection against different discriminating phenomena, we ought to differentiate between material actions (job denials, dismissals, hindering economic activities…) and abusive, slanderous or inciting to discrimination discourse.

1. Material acts

In France there has been a legal mechanism to provide protection against discrimination (material act) which under the heading of the notion of "morals" has enforced protection in terms of labour law and criminal law since 1985.

Thus, the constitutional principle of equality has been supplemented by an anti-discrimination principle established in Article 225-1 of the Penal Code [5]. It should be pointed out that this general principle does not make it possible to punish all acts of discrimination, but only those listed in Article 225-2 of the said Code [6].

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[4] D. Borrillo, "Statut juridique de l'homosexualité et droits de l'homme", in *Un sujet inclassable? Approches sociologiques, littéraires et juridiques des homosexualités*, *Cahiers gai kitsch camp*, 28, February 1995, p. 99-115.

[5] Article 225-1 of the Penal Code: "Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, physical appearance, surname, state of health, handicap, genetic characteristics, morals, sexual orientation, age, political opinions, trade union activities, membership or non-membership – real or alleged – of a given ethnic group, nation, race or religion. Discrimination also comprises any distinction between legal persons by reason of the origin, sex, family situation, physical appearance, surname, state of health, handicap, genetic characteristics, morals, sexual orientation, age, political opinions, trade union activities, membership or non-membership – real or alleged – of a given ethnic group, nation, race or religion of all or of some members of these legal persons".

[6] Article 225-2 of the Penal Code: "Discrimination defined by Article 225-1 committed against a natural or legal person shall be punished by two years' imprisonment and by a fine of 30,000 euros when it consists: 1° in refusing to supply goods or services; 2° in obstructing the normal exercise of any given economic activity; 3° in refusing to hire, in sanctioning or

On a penal level, the following acts of discrimination are penalized :

– refusing to hire a person,
– sanctioning or dismissing a person,
– subjecting an offer of employment to a condition based on one of the factors listed in Article 225-1 [7].

Likewise, where the discriminating party is a public authority, the following acts of discrimination are penalized:

– refusing the benefit of a right conferred by the law and/or
– hindering the normal exercise of any economic activity [8].

Besides the penal protection provided for cases of discrimination in civil life situations (refusal to hire, refusal to rent…) and in terms of job engagements (hiring, sanctioning, dismissal and subjecting an offer), there are numerous provisions that are specific to labour law (company rules, remuneration, qualification, transfer, career planning, etc.) [9].

As far as public sector employment is concerned, the norm to be enforced is Article 6 of Law 83-634 of 13 July 1983 (amended by Law 2001-1066 from 16 November 2001 on combatting discrimination [10]). Finally, the mechanism is completed by Article 432-7 of the Penal Code [11].

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dismissing a person; 4° in subjecting the supply of goods or services to a condition based on one of the factors listed in Article 225-1; 5° in subjecting an offer of employment, an application for a traineeship or a period of in-service training to a condition based on one of the factors listed in Article 225-1; 6° in refusing to admit a person to any of the training courses referred to in Article L. 412-8, 2° of the Social Security code".

[7] Article 225-2 para. 3 and 5 of the Penal Code.

[8] Article 432-7 of the Penal Code.

[9] Article L. 122-35 of the Labour Code: "The company rules (...) shall not contain provisions that prejudice employees in their employment or occupation by reason of their sex, morals, sexual orientation (…)". Likewise, Article L. 122-45 of the Labour Code provides: "No person shall be excluded from a recruiting procedure or from access to a traineeship or to a period of in-service training, and no employee shall be sanctioned, dismissed or subjected to direct or indirect discrimination with respect to remuneration, training, placement, appointment, qualification, classification, professional advancement, transfer or contract renewal by reason of his origin, sex, morals, sexual orientation (...). No employee shall be sanctioned, dismissed or subjected to the direct or indirect discrimination acts listed within the previous paragraph in terms of the normal exercise of the right to strike. No employee shall be sanctioned, dismissed or subjected to direct or indirect discrimination acts for having given evidence of acts defined in the previous paragraphs or for having reported such acts".

[10] Article 6 of Law 83-634 of 13 July, 1983 (modified by law 2001-1066 of 16 November 2001): "No discrimination, direct or indirect, shall be made between civil servants by reason of their political, trade union, philosophical or religious views, their origin, sexual orientation, age, surname, state of health, physical appearance, handicap, or their membership or non-membership – real or alleged – of a given ethnic group or race".

[11] Article 432-7 of the Penal Code: "Discrimination defined by Article 225-1, committed against a natural or legal person, by a person holding public authority or in charge with a public

The contribution of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation has been essential for the status of homosexual employees. Prior to the adoption of this Directive and despite the protection provided by French law, only one decision had been delivered at the highest level of national jurisdiction [12]. This shows how ineffective the system was. In a ruling of 17 April 1991, *P... c. Association Fraternité Saint-Pie X*, the *Chambre sociale* of the *Cour de Cassation* decided that the dismissal of a sexton on account of his homosexuality could constitute a wrongful breach of the employment contract, and therefore an act of discrimination, if the employer fails to produce proof confirming that "bearing in mind the nature of his duties and the purpose of the company (…) the employee's conduct" causes "significant trouble" within this company. According to the *Cour de Cassation*, it was not legitimate to invoke the employee's homosexuality as being contrary to the catholic tradition (as the Court of Appeal in Paris emphasized in the quashed judgment). Nevertheless, if the "morals" of the employee caused disruption in the company, such dismissal would not be wrongful. The Court of Appeal charged with the reexamination of the judgment quashed in *cassation*, did in fact take on board the objection by deciding in the case in question that "the dismissal of this employee on the grounds of his homosexuality and the fact that he is HIV-positive ensues from a motive exclusively related to his private life and cannot constitute a real and serious reason for terminating the contract, since the employee's behaviour outside the company, which falls within the exercise of his freedoms, cannot justify a dismissal apart from the clearly specified disruption which such behaviour is liable to provoke within the collectivity it constitutes, seeing that the unreserved adherence of the employee to the catholic faith is beyond doubt" [13].

In other circumstances, the case-law did consider the dismissal of a homosexual justified. In a judgment of 28 January 1993, the Court of Appeal in Montpellier, reached such a conclusion in a case where the employer accused the employee "of having worked for a competing company and of having committed provocative indecent acts, namely homosexual acts with a handicapped person, also an employee of the company".

In other respects, most decisions of the tribunals and appeal courts refer to the professional advantages linked to the life of a couple.

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service mission, in the exercise or on the occasion of the exercise of its tasks or mission, is punished by three years' imprisonment and by a fine of 45,000 euro where it consists of
1° refusing the benefit of a right granted by the law;
2° hindering the normal exercise of any given economic activity".

[12] There are several case-law precedents related to homosexuality, but they concern rather the family (divorce for reason of misconduct, child custody, visiting arrangements, maintenance…), the respect for private life... and not employment or occupation related issues.

[13] Cour d'Appel, Paris, 4 November 1992, "Informations rapides du recueil Dalloz", *Dalloz,* p. 125.

Ever since the enforcement of the new system, the circumstances have become significantly more favourable to the homosexual employees. In a decision of 20 January 2003 the *Conseil de Prud'hommes* (the Industrial Tribunal) of Martigues ordered a company to pay 130,000 Euro, in damages for discrimination on grounds of sexual orientation and moral harassment of a homosexual employee [14].

Ultimately, Article 47 of the law of 18 March 2003 has modified the Penal Code, by stipulating that certain crimes committed by reason of the sexual orientation of the victim will be aggravated in terms of sanction [15]. Such aggravating circumstance applies especially to murder, violence, threat, sexual assault and robbery (Articles 221-4, 222-3, 222-8, 222-10, 222-12, 222-13, 222-18-1, 222-24, 222-30).

2. Insulting, defamatory speeches or discourses inciting to discrimination

For more than thirty years, the associations for the defense of the gay and lesbian rights, as well as the rights of other members of civil society (associations for the defense of human rights, feminist movements, associations combating HIV, consumer groups…) have been demanding the alignment of the legal system concerning verbal outrages against individuals because of their sex or sexual orientation with the existing systems against offences, slander and incitement to hatred towards a person or a group of persons by reason of their origin or membership in a given ethnic group or religion. Thanks to an amendment of the law of 29 July 1881 on the freedom of the press, a system combatting the discourse on racial hatred was adopted in 1972 in France. Ever since then, the system has improved and case-law has allowed a borderline to be drawn between a simple opinion on the one hand and insulting, defamatory remarks or a discourse inciting to discrimination on the other hand. It is no longer possible to say, without incurring unpleasant consequences, that "black people are inferior to white people" or that "Jews constitute a lobby that is against national interests".

Unlike the Anglo-Saxon legal system, in which freedom of expression is an absolute value, the French penal law restricts such freedom by considering that an insulting remark cannot be disseminated in the same manner as an opinion. Of course the antiracist laws did not abolish racism. However, they have allowed the introduction into the law of some values that are the very basis of our life in a society claiming to be lay and democratic. This symbolic dimension of penal law functions as an axiological parameter for such purpose. Those sanctions were not inserted in the French law as a consequence of a more or less "capricious" will of the minorities;

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[14] Conseil de Prud'Hommes de Martigues, 20 January 2003, *Philippe Boutin c. TNT Jet Sud Est*, unpublished.

[15] Article 132-77 of the Penal Code: "Under the circumstances provided for by the law, the sanctions incurred for a crime or an offence, are aggravated when the infringement was committed by reason of the sexual orientation of the victim. The aggravating circumstance defined in the first paragraph is realized when the infringement has been preceded, accompanied or followed by remarks, written documents, use of images or of objects or by any acts that have degraded the honor or consideration of the victim or of a group of persons of which the victim is a member, by reason of their real or alleged sexual orientation".

they represent a relatively efficient answer to a heavily colonial and racist past, which presented the exclusion of given categories of the population as being a normal fact and finally made the rhetoric justifying inequalities common place. Similarly, the mobilization of the associations fighting for the enlargement of the legal protection of homosexuals is clearly connected with a political and social context that – from the debate on the *Pacte civil de solidarité* (or Civil Solidarity Pact, the *Pacs*) to the marriage of Bègles [16] – is characterized by the steady increase of slanderous remarks about gays and lesbians [17].

Headline III of Law 2004-1486 of 30 December 2004 concerning the establishment of the *Haute autorité de lutte contre les discriminations et pour l'égalité* (or the supreme authority fighting against discrimination and for equality) has amended the law of 1881 on *freedom of the press*, making it possible to sanction insulting and defamatory speeches and discourses inciting to discrimination by reason of sexual orientation.

This evolution of penal law has clearly engendered a transformation of the "geography of discrimination". Actually, it has moved from the penal field (which has become the area where anti-homosexual behaviour or phrases are criminalized) to the civil area and more specifically to family law. The spectacular evolution of penal law has not been accompanied by a similar progress in terms of family law.

2. The same-sex couple

Even if the law of 15 November 1999 about the *Pacs* acknowledges the legal existence of same-sex couple (both the *de facto* union and the "*Pacsed*" couple), the equality relating to marriage is far from being guaranteed in France. Homosexual couples are inferior from a legal point of view. Unlike marriages, the *Pacs* does not grant any rights with respect to filiation. The *Pacs* does not automatically and immediately concede a residence permit to one's foreign partner. When concluded between a French person and a foreigner, it does not allow the latter to acquire the French nationality. It does not grant the right to a survivor's pension in case one of the partners dies. The *Pacs* does not give any right of succession *ab intestat*/right of intestate estate and does not allow the use of the partner's name. The partners who have signed the *Pacs* do not have the right to claim any insurance benefit in case of an industrial accident and they have no old age insurance. The *Pacs* unions are not recognized outside the French territory.

In France, the sex difference can still be considered as a *conditio sine qua non* for the access to the right of getting married. In a decision of 27 July 2004 concerning the marriage of Bègles [18] the *Tribunal de Grande Instance* in Bordeaux considered

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[16] See *infra*.

[17] See the collection of insulting letters sent to Noël Mamère and published by S. SIMON, *Homophobie en France 2004*, Latresne, Le Bord de l'eau, 2004.

[18] Based on his interpretation of the absence of a definition of family in the Civil Code, Noël Mamère, the Mayor of Bègles and municipal officer has celebrated a marriage between two men on 5 June 2004. He has been dismissed from his position for one month by the

that marriage constitutes the union between a man and a woman. Consequently, the union of two persons of the same sex was cancelled. The justification put forward by the Tribunal when denying such right to a couple consisting of two men is to be found in the "traditional function of marriage, commonly seen as being the foundation of a family". The Court of Appeal in Bordeaux confirmed that decision through a ruling of 19 April 2005.

Let us examine more closely the reasoning of the Tribunal and of the Court of Appeal of Bordeaux.

When the Tribunal stated that marriage is indissolubly connected with family life or when the Court points out that "marriage is an institution aiming at the union of two persons of different sex, allowing them to found a so called legitimate family, the sexed notion of man and wife being the reflection of the sexed notion of father and mother" – both of these statements can lead to two interpretations: either it can mean that marriage is an institution that aims at legitimating the family (which is contrary to the reform of 1972 regarding the equality of filiations and to the case-law of the ECHR, which, according to Article 8 of the European Convention on Human Rights, considers the relationship between a single person and his/her child as constitutive of a family life) or it can mean that marriage is an institution associated with the idea of procreation (but this view is contrary to the *substantive* French law).

A. The substantive French law

Procreation has never been a condition for the celebration or the validity of marriage. Marriage and filiation are dealt with separately in the Civil Code [19] : they refer to different legal systems and their realities have never been subordinated one to the other. So, from a legal point of view, procreation is neither a condition, nor a finality of marriage. Actually, sterile couples and women having reached their menopause have always had access to it. Besides, the law of 28 December 1967 decriminalizing the use of contraceptive methods confirms the fact that there is no reproduction obligation and no need to envisage a parental project to get married. Moreover, the very ancient acceptance of posthumous marriage, according to Article 171 of the Civil Code is the absolute confirmation of such dissociation.

Examples of adoptions by one unmarried person [20], the recognition of a child born in adultery and the legal protection assigning the status of family to a mother and her child clearly point out the dissociations existing between marriage, family and filiation. There are other proofs confirming the dissociation between marriage and filiation, such as, on the one hand, the reform of 1972, which cancels all bans based

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Minister of Home Affairs. The department of public prosecution has solicited the annulment of that marriage before the *Tribunal de Grande Instance* in Bordeaux. The cancellation enforced by the tribunal is currently under appeal at the Court of Appeal in Bordeaux.

[19] Marriage is referred to in Headline V, biological affiliation in Headline VII, while adoptive filiation is dealt with in Headline VIII of Tome I "Person related issues".

[20] Since the passing of the law from 11 July 1966 a single person (married or not married) is allowed to *plenarily* adopt a child.

on the adulterine nature of the filiation and, on the other hand, the protection of the single mother receiving the same legal treatment as a family consisting of a married couple with or without children. In France, marriage most certainly represents the most frequent family foundation, but it would be untrue and anachronistic to maintain that it remains a monopoly.

The modern notion of marriage

Marriage is an institution that socially legitimates the union of two persons, for the purpose of mutual solidarity, based on mutual affection. As Dean Carbonnier remarked, "*La famille est moins une institution qui vaudrait par elle-même qu'un instrument offert à chacun pour l'épanouissement de sa personnalité (...) c'est une forme de droit au bonheur implicitement garantie par l'Etat*" [21]. Hannah Arendt considered marriage as an essential choice and as one of the most important existing rights. In 1959, expressing her view in a debate on inter-racial marriages in the United States, Arendt declared that the right of marrying whoever we want – regardless of colour of his/her skin or race – is an elementary human right, compared to which the right to education, the right to sit anywhere we wish on a bus, the right of going to whichever hotel or entertainment place actually appear to be minor rights. According to Arendt, even the political rights, such as the right to vote and almost all the rights listed by the Constitution are secondary rights compared to the indefeasible human rights to life, to freedom and to the search for happiness, as stipulated in the Declaration of Independence. For Arendt, the right to housing and the right to get married undoubtedly belong to the rights listed in this last category [22].

In France, according to this very spirit, the Constitution of 1946, as well as the European Social Chart, stipulates that the State must guarantee the full development of individuals and of families, since such development is necessary to a real democratic life. In a decision of 13 August 1993, the *Conseil constitutionnel* points out that the freedom to get married and to have a normal family life belongs to the fundamental rights and liberties.

If most French authors and most French case-laws are against the enlargement of marriage to same-sex couples [23], this is due to arguments relying more on prejudices and fantasy, than on rational, legally grounded reasoning [24]. Thus, as far

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[21] "Family is less a valuable institution in itself, it is rather an instrument provided for each of us, enabling the development of one's personality (...) it is a form of the right to happiness, implicitly granted by the State" (J. Carbonnier, *Essais sur les lois*, Defrénois, Répertoire du notariat, 1979, p. 171).

[22] See Dissent Magazine, in *Courrier international*, 290, May 1996, p. 5.

[23] According to all the authors sexual duality is a *sine qua non* condition of marriage. The Court of Cassation has even gone further, with respect to the discrimination of the same-sex couple, since in 1989 and 1997 it twice refused to recognize the *de facto* concubinage of two persons of the same sex.

[24] D. Borrillo, "Fantasmes des juristes vs Ratio juris: la doxa des privatistes sur l'union entre personnes de même sexe", in D. Borrillo et E. Fassin (dir.), *Au-delà du Pacs. L'expertise familiale à l'épreuve de l'homosexualité*, Paris, PUF, 1999, p. 161.

as the legal recognition of the homosexual union is concerned, there seems to be a negative consensus among the experts on civil law: homosexuality is considered as a pathology [25] or a sin [26] and therefore the affection of an individual for another person of the same sex cannot find any legal recognition. "*Il y a urgence à définir le couple parce que Sodome réclame droit de cité*" – as stated in the introductory report of a paper gathering the opinions of some specialists in family law [27]. The lack of arguments is accompanied by an appeal to common sense, to biological truth or to moral order, as if such "evidences" could put an end to a discussion which has only begun and which is far from being ended, in the belief that all these instances could form, by themselves, a reason strong enough to justify the denial of a fundamental right to certain couples.

According to these views, there are several reasons against the acceptance of the same-sex couple. The procreative aim of the union systematically appears to be the main argument that prevents the homosexual couples from having access to marriage. In this context, Jean Hauser notices that: "*Le couple n'est un sujet de droit que parce qu'il répond à deux fonctions essentielles. Une première fonction politique qui en fait une petite famille au sein de la grande, une seconde fonction évidente parce que naturelle et d'ailleurs liée à la première qui est celle de la procréation*" [28]. If

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[25] "*Il ne peut donc y avoir de mariage homosexuel (...) certains pays, comme le Danemark, admettent un "mariage" entre homosexuels. C'est une institution aussi difficile à comprendre qu'à admettre socialement et moralement*" ("There can be no solemnized homosexual marriage (...) some countries, such as Denmark, accept though the "marriage" between homosexual persons. It is difficult both to understand and to socially and morally accept such an institution") (P. Malaurie, *Droit Civil – La famille*, Paris, Cujas, 1989, p. 67). "*En aucune manière le couple homosexuel ne devrait être assimilé au couple hétérosexuel (...) pas de contrat d'union civile incestueux, homosexuel, pédophile ou polygame*" ("Under no circumstances the homosexual couple should be assimilated to the heterosexual couple (...) there should be no incestuous, homosexual, pedophile, or polygamous civil union contract") (P. Malaurie, note relative à l'arrêt du Conseil d'Etat du 9 octobre 1996, *Recueil Dalloz, Jurisprudence*, 1997, p. 119).

[26] "*Nouvelle preuve que le contrat d'union civile profite surtout à ceux qui souhaitent entretenir entre eux des relations sexuelles. Surtout nouvelle borne moralisatrice qui, après avoir basé un statut civil ou social sur des actes contre nature, se refuse cependant à tout permettre. Pourquoi ceci plutôt que cela? Question de degré dans la transgression, sans doute*" ("A new proof confirming the fact that the civil union contract brings benefits mainly to those who want to get involved into sexual relationships. That is mainly a moralizing landmark which, after having grounded a social or civil status on acts against nature, does not allow everything. Why this and not that? That is no doubt a question related to the level of transgression" (A. Seriaux, "Etre ou ne pas être: les ambiguïtés juridiques de la constitution légale d'un contrat d'union civile", *Chroniques Droit de la Famille Juris-Classeur*, March 1998, p. 7).

[27] "It is urgent to define the couple, because Sodom claims its rights over the city" (in Cl. Brunetti-Pons (dir.), *La notion juridique de couple*, Paris, Economica, 1998, p. 1).

[28] "The couple is only a subject to law because it corresponds to two essential functions. The first one refers to its political role, which transforms it into a smaller family within the larger one, while the second function, being a natural one, is obvious, connected to the first and refers to procreation".

reproduction is an essential function of marriage, "*N'y a-t-il pas un abus de minorité"*, François Gaudu asks himself, because "*dans la volonté d'obtenir un statut, non pour un cadre de la reproduction mais pour un comportement sexuel, il peut sembler qu'il y a une véritable indiscrétion (...). En posant le statut du mariage le droit renvoie simplement à cette banalité que nous sommes tous nés d'un homme et d'une femme*" [29]. "*Ce n'est pas là une appréciation d'ordre moral et subjectif"*, notices Jean-Luc Aubert "*mais une constatation biologique élémentaire. Et cette évidence continue de s'imposer même si l'on tient compte des évolutions contemporaines – je ne me hasarderai pas à parler de progrès, tant la palette est contrastée – de la procréation scientifique: l'union homosexuelle n'est pas* a priori *orientée, c'est le moins qu'on puisse dire, vers la constitution d'une famille. De ce point de vue, elle n'incline pas à une reconnaissance – au sens de consécration – sociale*" [30]. If the matrimonial relationship is assessed rather in terms of procreation than in terms of intimate relationship between two individuals and if filiation plays such a central role with respect to the nature of the matrimonial act, this should also be reflected both in the theory of nullities and in divorce cases. But, as we have already pointed out, the incapacity of procreation or the lack of a parental aim does not represent an obstacle to the union, or a reason that could lead to its dissolution.

The danger incurred by the children is also invoked by certain legal experts, in order to deny homosexuals the right to get married. As far as that issue is concerned, François Gaudu admits that "*(...) le véritable enjeu, depuis le début, est de permettre aux couples homosexuels de se procurer des enfants (...) l'excès prépare le retour du bâton*" [31]. Laurent Leveneur confesses his concern when writing that: "*Sans doute les couples homosexuels auront-ils la satisfaction d'obtenir la réalisation de l'un de leurs désirs, mais à l'évidence au prix de l'intérêt de l'enfant qui doit pourtant être la considération primordiale en la matière. Puisque l'engrenage doit inéluctablement aboutir à des résultats inacceptables, c'est l'engrenage lui-même qu'il faut se garder d'enclencher*" [32].

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[29] "Is it not a minority abuse", François Gaudu asks himself, because "in the will to obtain a certain status not for reproduction, but for a sexual behavior, there seems to be some real indiscretion (...). While establishing the status of marriage, the law simply refers to this triviality according to which we have all been born of a man and a woman" (F. Gaudu, *A propos du contrat d'union civile: critique d'un profane*, Paris, Dalloz, 1988, vol. 2, p. 20).

[30] "It is not a moral and subjective statement", notices Jean-Luc Aubert, "it is an elementary biological observation and this fact keeps on imposing itself, even if we consider the contemporary evolution – I would not dare talk about progress, since the range is so wide and contrasting – of scientific procreation: the homosexual union is not oriented *a priori* – to say the least – towards the establishment of a family. From this point of view, it does not incline to a social recognition or acknowledgement" (J.-L. Aubert, commentaire de l'arrêt 1807, Ch. civ., Cour de Cassation, 17 December 1997, *Dalloz Jurisprudence*, 1998, p. 114-115).

[31] "(...) the stake, from the very beginning, is to allow the homosexual couples to get children (...) An excess calls for the return of the club".

[32] "Probably homosexual couples will have the satisfaction of seeing one of their wishes come true, but most certainly, at the cost of the child's interests, although the child should be

Irène Théry also expresses her opposition to marriage between persons of the same sex, starting from an essentialist (pre-legal) interpretation of it. Actually, as the sociologist underlines "*la raison pour laquelle le couple homosexuel n'a pas accès au mariage est que celui-ci est l'institution qui inscrit la différence des sexes dans l'ordre symbolique, en liant couple et filiation*" [33]. She concludes by saying that "*c'est donc pour préserver la culture, et non la nature, que, jusqu'à présent, tous les pays occidentaux ont refusé d'instituer une quelconque forme de filiation unisexuée*" [34]. L. Khaïat explains better the stakes of such issue by pointing out that "*le respect de l'intimité de la vie privée doit être assuré par le droit. Chacun est libre de choisir son enfant : celui qui a hérité de ses gênes, celui que porte sa compagne, celui qui a été conçu grâce aux gamètes d'un donneur fraternel ou d'une donneuse compatissante. Le droit ne saurait s'immiscer dans l'élaboration d'un lien privé entre deux personnes*" [35].

Lacking legal arguments that could justify the denial of marriage rights to homosexual couples, civil law specialists do not hesitate to resort to theological arguments. Bernard Beignier shows that: "*Le canon 1096 du Code (canonique) de 1983 le dit bien mieux que le Code civil: "(...) le mariage est une communauté permanente entre l'homme et la femme, ordonnée à la procréation des enfants par quelque coopération sexuelle. Le mariage est une communauté qui a vocation à engendrer, ce ne peut être le désir d'une union homosexuelle*" [36].

God, culture, children or biology are, in the opinion of those authors, obstacles to the recognition of gay and lesbian couples.

It is really necessary to clarify the legal boundaries of the debate relating to the right to get married. All the more since, despite the metaphysical impulses of certain law professors, marriage must be – above all – considered as a cultural phenomenon. This formal union is actually the outcome of a social construction that is regularly

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of primary concern in this issue. Since the process will unavoidably yield unacceptable results, one should refrain from engaging in it" (L. Leveneur, "Les dangers du Contrat d'Union Civile ou Sociale", *La Semaine Juridique*, 50, 1997, p. 4069).

[33] "The reason why the homosexual couple is not granted access to marriage is the fact that marriage is an institution which relies on the sex difference as a symbol, connecting the couple to filiation".

[34] "Therefore, it is in order to preserve culture and not nature that up to now all western countries have refused to legitimize any form of unisex filiation" (I. Théry, "Le CUS en question", *Notes de la Fondation Saint-Simon,* 1997, p. 26).

[35] "The respect for the intimacy of one's private life is to be granted by the law. Everybody is free to choose his child: the one who has inherited his genes, the one who is borne by his partner or the one who has been conceived thanks to the gametes of a fraternal donor or of a compassionate female donor. Law should not interfere in the creation of a private link between two persons" (L. Khaïat, *Vérité scientifique, vérité psychique et droit de la filiation,* Toulouse, Erès, 1995, p. 17).

[36] "Canon 1096 of the (Canonical) Code from 1983 puts it better than the Civil Code: "(...) marriage is a permanent community between a man and a woman, oriented towards the procreation of children, as a result of sexual cooperation. Marriage is a community whose vocation is to engender children and that cannot be the wish of a homosexual couple"

subjected to change [37]. It is this very "constructivist" perspective that will allow us to go beyond an "essentialist" [38] image of marriage.

Marriage is not based on reproduction. Though the putative fatherhood, known as *pater is est quem nuptiae demonstrant*, remains a rule of evidence, it has lost its meaning as substantive rule since the reform of 1972. Actually, such presumption would most properly function in a patriarchical and male vision, tending not necessarily to reflect the biological reality of filiation, but rather to maintain the family order and, through this, the social order. The claiming of this presumption [39] – a genuine fiction serving a conservative family policy – ultimately means restoring the preeminence of an anachronistic idea which awards marriage the monopoly of the family foundation.

Marriage does not find its legitimacy in natural law. On the contrary, every reference to Nature is unacceptable in modern law, because the latter relies on general principles which do not owe anything to natural order. Natural order are deceptive terms referring to a framework inspired by unalterable biological or anthropological elements and natural order becomes therefore a metaphysical order. Rather than reproducing nature, law has a social function and as such it organizes its system around a certain number of fictions, making a peaceful and fair settlement of human relations possible. Issues such as objective responsibility, personality of legal persons, adoptive filiation, legal theory on absence or even fideicommissary substitutions for instance have nothing of a natural essence. Law has a function [40], rather than a nature. Invoking nature when talking about traditional marriage was merely a means of subjecting the woman to her husband's authority.

("Une nouvelle proposition de la loi relative au CUS. Copie à revoir", *Droit de la famille,* Jurisclasseur, Chroniques, April 1997, p. 4).

[37] See J.-Cl. Bologne, *Histoire du mariage en Occident*, Paris, Lattès, 1995.

[38] In 1904, one hundred years after the final sanctioning of the contract based and lay marriage in Napoleonic Code, G. Renard defines marriage as being "*une institution primordiale soustraite, dans son essence aux variations législatives et dont aucune volonté privée ou publique ne saurait modifier le type naturel et immuable*" ("a basic institution that eludes the legislative variations by its essence and whose natural and unalterable character could not be changed by any public or private will") (quoted by J.-Cl. Bologne, *op. cit.*, p. 327).

[39] Similarly to what Irene Théry has pointed out in her report addressed to the Ministries of Justice and of Social Affairs: "*En effet, le mariage dans notre culture n'a jamais été l'institution du seul couple, mais aussi et d'abord le socle de l'établissement et de la sécurité de la filiation. "Le cœur du mariage, ce n'est pas le couple, c'est la présomption de paternité", rappelle le doyen Carbonnier*" ("As a matter of fact, in our culture marriage has never been an exclusive institution of the couple. It has also and mainly been the pedestal of affiliation establishment and security. "The heart of marriage is not the couple, but putative fatherhood", as dean Carbonnier reminds us") (I. Théry, Couple, filiation et parenté aujourd'hui: le droit face aux mutations de la famille et de la vie privée, rapport adressé aux ministres de la Justice, de l'Emploi et de la Solidarité, May 1998 p. 24).

[40] "The so called traditional family, as a haven of morality and security, anchored by a tightly united couple – the father going to work and the mother staying at home and taking care of the children – and extending its benefits to the ancestry, has never existed in reality, since it

In the name of natural order, patriarchical ideology has invented the myth of the stable and solid traditional family. But, as Stéphanie Coontz has shown, "*la famille dite traditionnelle, havre de moralité et de sécurité, ancrée par un couple soudé – papa au travail et maman à la maison s'occupant des enfants – et étendant ses bienfaits aux ascendants, n'a jamais existé qu'en pensée puisqu'elle cumule des propriétés apparues à des époques et dans des régions différentes de l'espace social*" [41].

In the meantime, significant changes have taken place in family life and despite the reactions of people nostalgically attached to stable marriage and to good old days, marriage has nowadays found its legitimacy in the very instability of individual freedom, in the freedom to get together and to separate. The introduction of divorce based on mutual consent in 1975 allowed spouses to decide themselves about the future of their relationship. Moreover, the matrimonial institution lost its monopoly on legitimate filiation, because since the reform of the Civil Code in 1972 the children born of married parents and those born out of wedlock have benefited from almost the same rights.

Pluralism, the dissolution of the traditional notion of family, and the diversification of household patterns – far from representing a degradation of family [42] – are the undoubted sign of the democratic aspect gained by it and a sign of the higher individual development of its members. As A. Benabent has remarked, "*l'évolution individualiste suivie par notre droit des personnes depuis la fin du siècle dernier a entraîné un déplacement de l'angle de vision sous lequel est examiné le mariage. On tend à le considérer moins du point de vue de l'institution familiale dont il est le pivot que du point de vue de la personne des époux*" [43]. Actually, according to Carbonnier, "*L'histoire de notre droit du mariage depuis cinquante ans est l'histoire d'une libération continue*" [44].

The lesbian and gay claim for the right to marry is a step forward in that democratization process. The legal claims of lesbians and gays are also to be seen

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accumulates features that have appeared at different times and in different regions of the social space". For a more detailed analysis of the law – nature – politics relationship see the article of Y. Thomas, "Le sujet de droit, la personne et la nature", *Le Débat,* 100, May-August 1998, Paris, Gallimard, p. 85-107.

[41] L. Wacquant, commentaire de l'ouvrage de St. Coontz, *The Way We Never Were: American Families and the Nostalgia Trap*, New York, Basic Books, 1992, in *Actes de la Recherche en Sciences Sociales "La famille dans tous ses états"*, 13 June 1996, p. 102.

[42] The current worries concerning the degradation of family already existed a century ago (see S. Mintz, "Regulation on the American Family", *Journal of Family History*, 14, 1989, p. 387-408).

[43] "The individualistic evolution, followed by our civil law since the ending of the past century has induced a shift in the point of view when examining marriage. We now tend to consider it less from the viewpoint of a family institution – the axis of which it is – and more from the viewpoint of the two spouses in person" (A. Bénabent, "La liberté individuelle et le mariage", *RTDC*, III, 1973).

[44] "For fifty years, the history of our marriage law has been the history of a continuous liberation" (J. Carbonnier, "Terre et ciel dans le droit français du mariage", *Etudes Ripert*, Paris, LGDJ, 325, p. 328).

as part of a political line which transcends them and in which other groups have already participated. The denial of the right to marriage to same-sex couples is based on a monolithic and essentialist idea of such union, which is closer to a sacrament than to a civil contract. There are no legal arguments for prohibiting homosexual marriage; if the natural or religious moral order is cited as a resort, it is likewise in former times when this argument was used to condemn the union of infidels, to ban mixed marriages or to justify domination over women. These social actors, formerly outside the norm, have reshaped the institution of marriage, developing in it a more democratic character.

The preceding has allowed us to show that different categories of persons have progressively acceded first to the sacrament and then, after its secularization, to the marriage contract. The Revolution annulled the monopoly of the Church over matrimonial issues and established the basis for a fundamental change in marriage. Thenceforth it has become a legal act and therefore a lay act. The Revolution brought a change in nature, and from whence nuptiality no longer depended on religious law, but exclusively on civil law.

Because of the lack of legal arguments, the recent decisions of the *Tribunal de Grande Instance* and of the Court of Appeal in Bordeaux have been founded on clear opinions, illustrated by some historical examples, such as the preliminary discourse on the Draft Civil Code of 1804, as the ancient fundamental rule concerning the putative fatherhood or the relics of terminological residues in the Civil Code which keeps using terms like “husband” and “wife” instead of “spouses” as in most of the other articles of the Code. The arguments produced by the judges in Bordeaux in order to defend the heterosexual nature of the matrimonial institution are all the less convincing since the international situation has evolved in the opposite direction.

B. On the international level

Same-sex couples already have the right to marry in the Netherlands and in Belgium. Spain will soon be the next country to extend marriage to homosexual unions, while Sweden has announced the setting up of a parliamentary commission that is going to regulate this issue.

However, the Tribunals have not been waiting for the Parliament to hand down their decisions. For more than ten years, decisions on such matters have been increasing in number in the United States.

On 5 May 1993, the Supreme Court of the State of Hawaii stated in *Baehr v. Lewin* case that denying civil marriage to homosexual couples would be discrimination and as such contrary to the State Constitution, unless the concerned authority could show “compelling State interests” for banning such unions. Since the so-called interest was not shown, the only way to continue denying the right to marriage to homosexual couples was by resorting to a referendum, in order to modify the Constitution [45].

On 20 December 1999, the Supreme Court of Vermont handed down a similar decision. As far as the *Baker v. State* case was concerned, the Supreme Court of

[45] Hawaii Supreme Court, *Baehr v. Lewin,* 74 Haw. 645, 852 P.2d 44, 5 May 1993.

Vermont considered that "It is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children (...) The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal" [46].

On 10 June 2003, in *Halpern et al v. Attorney general of Canada et al.,* the Court of Appeal of Ontario concluded that the common law definition of marriage was contrary to the provisions of the Canadian Charter of Rights and Freedoms. It reformulated the definition of marriage as being "the voluntary union for life of two persons to the exclusion of all others". To the argument concerning procreation, the Court of Appeal of Ontario replied: "Importantly, no one, (...), is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry". In its survey on the proportionality of marriage denials incurred by same-sex couples, the Court of Appeal of Ontario considered that "The ability to "naturally" procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to have any". The Court pointed out that "An increasing percentage of children are being conceived and raised by same-sex couples" and that "same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts" [47].

On 1 May 2003, the Court of Appeal of British Columbia came to the conclusion that the heterosexual common law definition of marriage [48] was contrary to the Canadian Charter of Rights and Freedoms. From now on marriage should be defined as "the lawful union of two persons to the exclusion of all others" [49].

To the same purpose, on 18 November 2003, the Supreme Court of Massachusetts delivered a decision in the case *Hillary Goodridge and others v. Department of Public Health*. The Court decided that "Fertility is not a condition of marriage, nor is it grounds for divorce". The Court defined marriage as being "the voluntary union of two persons as spouses, to the exclusion of all others", considering that a marriage denial to a same-sex couple was not compatible with the constitutional principles of respect for individual autonomy and equality before the law. As for the argument concerning procreation and family, the Supreme Court of Massachusetts considered that the State "affirmatively facilitates bringing children into a family regardless of

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[46] Supreme Court of Vermont, *Baker v. State* (98-032), 20 December 1999, p. 29.

[47] Court of Appeal of Ontario, *Halpern et al v. Attorney general of Canada et al*. (2003), 65 O.R. (3^{e}) 201.

[48] "The voluntary union for life of one man and one woman to the exclusion of all others".

[49] Court of Appeal of British Columbia, *Barbeau v. British Columbia (Attorney General),* 2003 BCCA 251 (CanLII).

whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual". The Court added that "The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status" and that "There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit". The Supreme Court of Massachusetts specified that: "While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples". In other respects, the Court states that "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized". In fact, in Massachusetts, a same-sex couple has been allowed to adopt a child since 2000.

Less than one year after the Massachusetts decision, on 19 March 2004, the Québec Court of Appeal decided that the right of marriage established by the Civil Code of Québec should be open to all partners, regardless of their sex [50]. On 14 July 2004, the Court in Yukon also decided to extend the right of marriage to same-sex couples [51]. On 9 December 2004, the Supreme Court of Canada delivered a favorable opinion to the government, with respect to the extension of marriage to same-sex couples, thus confirming the lower tribunals' decisions. A draft legislative proposal is currently under discussion in the Canadian Parliament.

C. The political function of marriage

The reaction to the marriage of Bègles and the intention of the French conservative government to improve the *Pacs*, in order to avoid the debate on the extension of marriage to same-sex couples raise again the question regarding the function of marriage in an open society, such as the French one today. It is obvious that marriage no longer founds a family and that concubines or single-parent families are protected in the same manner as marital families. If marriage no longer serves for the legitimization of filiation or the establishment of a family, what then is its function?

Its function is not a legal, but a political one.

The conjugal order that places marriage at the top of the couple oriented legal hierarchy implies the existence of a certain logic that functions at the same time as its political justification [52]. All the arguments opposing the full recognition of

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[50] *Ligue catholique pour les droits de l'homme c. Hendricks*, 2004 IIJCan 20538 (QC C.A.)

[51] Supreme Court of the Yukon Territory, *Dunbar & Edge v. Yukon (Government of) & Canada (A.G.)*, 2004 YKSC 54 (CanLII).

[52] D. Borrillo, "Pluralisme conjugal ou hiérarchie des sexualités: la reconnaissance juridique des couples homosexuels dans l'Union européenne", *McGill Law Journal*, 46, August 2001, p. 877-922.

homosexual unions are based on the same idea which consists of the differentiation of sexualities (homo- and heterosexuality) and the drawing of political consequences from this. The distinction between heterosexual unions and same-sex couples also refers to the sexual practices specific to each of the above mentioned unions. Just as it is impossible to designate a non-married couple without resorting to the notion of marriage, it is impossible to speak about the conjugal order without taking into account the essential phenomenon it relies upon i.e. sexuality.

The view according to which the institution of marriage must be reserved exclusively to heterosexual couples is due to the fact that they are supposed to have a certain type of sexual intercourse. Thus, the sexuality order emerges concurrently to the conjugal order, placing heterosexuality – through marriage – on a pedestal, as a model, as a canon according to which all sexualities are to be interpreted. While conjugal order places marriage at the top of its hierarchy, it only states the supremacy of heterosexual intercourse [53]. In the course of the debate relating to the *Pacs*, the psychoanalytical discourse denounced "the global economy of the *Pacs*", that did not have any other goal but to establish the almost absolute equivalence between homosexual and heterosexual couples [54]. Actually, if the law disturbs, this is not due to what it is, but rather to what it could lead to – the cancellation of the distinction between homosexuality and heterosexuality.

Yet, the promotion of heterosexuality is not officially a mission of the State. The fact that the Tribunal and the Court of Appeal of Bordeaux referred to the "*fondation d'une famille*" or "foundation of a family" as a justification for heterosexual marriage, as being the only one capable of procreation, somehow establishes the supremacy of heterosexuality over homosexuality. This type of appreciation raises a major political question with respect to fundamental rights and to the rule of law.

As the Court of Ontario remarks, the denial of marriage to same-sex couples implies the preservation of the privileged status of heterosexual couples. Such a privilege can no longer be justified in a free and democratic society.

3. The homoparental family

Since 1966, the law allows any individual, without any distinction whatsoever [55], either a single or a married person who is not separated *de corpore,* to adopt a child, on the condition in this latter case that the spouse approves [56]. Similarly, the law allows

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[53] The moral and physical superiority of vaginal heterosexual intercourse has been defended by J. Finis in his famous article named "Law, Morality and Sexual Orientation" (1993-4), *Notre Dame Law Review,* p. 1049. See also R. George, *In Defense of Natural Law,* Oxford, Clarendon Press, 1999. See the comments of N. Bamforth, "Same-Sex Partnerships and the Argument of Justice", in R. Wintemute & M. Adenas (ed.), *Legal Recognition of same-sex partnerships,* Oxford, Hart Publishing, 2001, p. 31f. On the arguments against homosexuals see D. Herman, *The Antigay Agenda, Orthodox Vision and the Christian Right*, Chicago University Press, 1997.

[54] Article by A. Magoudi in *Le Monde*, 9 October 1998.

[55] O. Laget, *L'adoption par une personne seule*, thèse doctorat en droit, Lyon II, 1972.

[56] Article 343-1, para. 2 of the Civil Code: "If the adopting person is married and not separated *de corpore,* he/she will need the approval of his/her spouse, unless the spouse finds himself/ herself in the impossibility of expressing his/her will".

married couples to adopt a child [57], whereas such opportunity is neither granted to cohabiting couples, nor to "Pacsed" couples.

As far as the integration level is concerned, adoption, as regulated by French law, can be either "simple" or "plenary". In the first case, the tie of adoptive filiation cannot replace biological filiation; it is juxtaposed and allows the adopted child, underage or major of age, to preserve the connection with his/her biological family, as far as succession rights or the keeping of one's surname is concerned. However we must point out that for underage children, parental authority falls to the child's adoptive parents, thus excluding any sharing of this authority with the biological parents. Even if at present it is *not* impossible for homosexuals to resort to "simple" adoption procedure, jurisprudence and doctrine reprove such practices, since they aim at institutionalizing a couple relationship [58].

In France, "plenary" adoption is the most common procedure. Unlike "simple" adoption, it replaces any previous filiation, it is irrevocable and the child loses every connection with his/her biological family, except when the adoption concerns the spouse's child [59].

Each of these two patterns of adoption is bound by its own legal system. Moreover in the case of the "plenary" adoption of children under fifteen and who are in State care or who have been abandoned from a judicial point of view or who are foreigners, the adoption is pronounced in judicial terms only after an administrative inquiry concerning the living conditions offered by the applicant with respect to family life, education and psychological support. This procedure is sanctioned by the delivery of an authorization. This appears to be an *a priori* inquiry allowing for the assessment of the applicant's capacity to adopt, even if the applicant has the judicial capacity to do so. Unlike "plenary" adoption, "simple" adoption does not require any previous authorization and it is pronounced by the judge after it has been ascertained having checked whether the parents meet the legal conditions, i.e. that they are more than twenty-eight years old or that they have been married for more than two years [60].

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[57] Article 343, para. 1 of the Civil Code: "Adoption may be applied for by a married couple who have not been judicially separated and have been married for more than two years or are both over twenty-eight years of age".

[58] Before the adoption of the *Pacs* and faced with the impossibility of organizing common life, certain same-sex couples would resort to the *simple* adoption procedure, in order to ensure inheritance by succession though this practice was blamed by jurisprudence (Cour d'appel, Riom, 9 juillet 1981, *JCP,* 1982 II, 19799, note Almayrac, also published in *RTDC*, 1984, 306, obs. Rubellin-Devichi; Judgments of *Tribunal de Grande Instance* of Paris, 3 February and 3 November 1982, published within the enclosed annex to P. Raynaud, "Un abus de l'adoption simple: les couples adoptifs", *Dalloz* 1983, chron. 39).

[59] Article 356 of the Civil Code : "Adoption assigns to the child a filiation that replaces its primary filiation: the adopted child no longer belongs to his biological family, under the reserve of the marriage bans listed by Articles 161 to 164. However, in the case of adoption of the spouse's child the primary filiation ties with this spouse and his/her family continues to exist. Moreover, it engenders the effects of an adoption by both spouses".

[60] Except for the adoption of the spouse's child.

As far as "plenary" adoption is concerned, it is not available to same-sex couples, since they cannot get married. For individuals – gays or lesbians – the situation is not favorable either, since administrative jurisprudence considers that the adoptive person's homosexuality can represent a legitimate obstacle to the adoption of a child.

A. Social emergence of a "homosexual parenthood"

For a long time, gay and lesbian parents have had to face different problems related to filiation. Concerning the custody of their own child as well as concerning the right of access/droit de visite to the child (in the context of a divorce) or the exercise of parental authority, justice has decided against the homosexual father or mother in many cases dealing with family disputes [61]. The Court of Appeal in Paris transferred for instance the custody of the children, which had initially been assigned to the mother, to the father, "for psychological reasons" and because the mother frequently saw her girlfriend in the presence of the children, whereas the father provided a better equilibrium than the pseudo-home of the mother, with the intermittent presence of her girlfriend [62]. Similarly, the Court of Appeal of Grenoble stated that the homosexual relations of the mother, at her domicile, had induced psychological disturbances for the children and therefore represented the serious reason required by Article 292 of the Civil Code to modify the assignment of the parental authority, by transferring this authority to the father [63]. The Court of Appeal in Rennes has denied to a father the capacity of exercising his parental authority over his children, considering that his homosexual relations were immoral and incompatible with the exercise of parental authority over underage children, and that they would be prejudicial to their health, their morality, their upbringing and their schooling [64].

A decision of the European Court for Human Rights has put an end to this jurisprudence, by stating that the denial of enforcement of his parental rights to a homosexual father is contrary to the principle of protection of private and family life (Article 8) and that it represents a discrimination contrary to Article 14 of the European Convention for Human Rights [65].

The innovation introduced by the current situation is not so much the recognition of a pre-existing family life, obtained with the decision *Salgueiro da Silva*, but rather the institutionalization of filiation ties *ex nihilo.* In this context, the development of a political claim was made possible through the organization of homosexuals into

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[61] D. Borrillo, "La protection juridique des nouvelles formes familiales: le cas des familles homoparentales", *Mouvements*, 8, March-April 2000, p. 54-59.

[62] Cour d'appel, Paris, IRE ch., section des urgences, 16 March 1984, juris-data no. 022604.

[63] Cour d'appel Grenoble, ch. des urgences, 20 July 1988, juris-data no. 88-44724.

[64] Cour d'appel, 6e ch., section 1, 27 September 1989, juris-data no. 048660.

[65] ECHR, *Salgueiro da Silva Mouta c. Portugal*, 21 December 1999, appl. 33290/96 (http://www.echr.ceu.int/hudoc). For a more detailed study on such evolution, see Th. Formond, Les discriminations fondées sur l'orientation sexuelle en droit privé, PhD, Université de Paris X-Nanterre, 2002.

associations fighting for the full recognition of family rights, and mainly of those related to filiation. The *Association des parents gays et lesbiens* (APGL) founded in 1986 counts nowadays more than one thousand and five hundred members. Despite its political action, it did not manage to introduce the filiation rights for same-sex couples in the *Pacs*. Moreover even the membership in the *Union Nationale des Associations Familiales* has been denied to the APGL and it has recently been excluded from the *Conseil Supérieur de l'information sexuelle* [66].

However, according to the polls, 7 % of homosexuals and 11 % of lesbians are currently parents and 30 % of them want to become parents. Despite this increasing demand, the law dodges this issue. The so called bio-ethical laws from 1994 deny to single women the access to medically assisted procreation. Only sterile heterosexual couples, within the age limits enabling procreation, can have access to such a procedure [67]. "Plenary" adoption by spouses is reserved only to married couples and the surrogate maternity is strictly prohibited by French law. Therefore a large number of lesbians are inseminated in Belgian, Spanish or English hospitals, while overseas French gay couples sign surrogate maternity contracts in order to fulfill a parental project. Despite the regular and constant actions of the associations for the defense of homosexual rights, the *Pacs* does not change the rules governing filiation. Only the members of a heterosexual couple can become parents and the French legal system gives no chance whatsoever to a double male or female adoption of a child [68]. Nevertheless, as we have already pointed out, beyond the issue of the homosexual couple, it is the very capacity of the individual to have access to adoptive filiation that French and European case-law seems to call into question.

B. *Refusal by the* Conseil d'Etat *and confirmation by the ECHR*

From 1990 onwards, the place of filiation within the "procreative order" based on the sex difference progressively shows through in the administrative control of the conditions of life offered by the applicant, for the delivery of the authorization. The chairmen of the *Conseils généraux* in charge of this delivery rejected the requests

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[66] P. Krémer, "Le conseil supérieur de l'information sexuelle fermé aux gays", *Le Monde*, 16 September 2002.

[67] Article L. 2141-2 of the Public Health Code: "Medically assisted procreation is meant to meet the parental demand of a couple. Its aim consists in remedying to the infertility whose pathological nature has been medically diagnosed. It can also aim at avoiding the transmission to a child of a particularly serious illness. The man and the woman must be both alive, must have the age to procreate, they must be married or they must be able to produce evidence of a cohabitation of at least two years; they must previously have consented to the embryos' transfer or to insemination".

[68] One must also point out the parliamentary initiative of the deputy Noël Mamère from the green party who, on 20 March 2002, submitted to the national assembly a draft bill (3671) tending to allow non married couples to adopt a child together. Yet, this bill was not discussed and it was sent to the *Commission des lois*.

submitted by singles – men or women – because of the mono-parental character of the adoption project [69].

And yet, the *Conseil d'Etat* decided in 1991 to extend its control over refusals of authorization, in order to censure each error of appreciation, including those not manifest, of the *Conseils généraux*, maybe inclined to choose, among the applicants, the ones corresponding to a bi-parental family model [70]. So, on 24 April 1992, the State Council quashed the refusal of authorization for a man whose "repressed homosexual tendencies" had been noticed by the Administration, as there was no precise element which might jeopardize the child's interest [71]. However, this decision already shows the limits of the administrative judge's sympathy for gay or lesbian singles: sexual orientation does not represent an obstacle provided it be concealed.

Since 1994, the administrative jurisdictions have turned the case-law around, by establishing the principle of the bi-parental family suggested by the position of social workers, psychologists or psychiatrists in charge of the inquiry for the request for authorization – a position which defines the psychical construction of the child with reference to male and female features. On 18 February 1994, for instance the *Conseil d'Etat* validated a refusal of authorization by stating that the adoption project of a female applicant revealed the "absence of any father image" and that the child was considered a "remedy for loneliness" [72]. Similarly, the Administrative Court of Appeal of Paris confirmed on 25 February 1996, the authorization rejection enacted by the administration with respect to the request of an unmarried woman who, according to her personal life concept, wanted to avoid the risk of failure in a couple relationship and thus obstructed the father function or the father representation [73]. The decision of the *Conseil d'Etat* of 25 October 1995 is even more significant, since it quashed an authorization rejection because the female applicant, according to the investigators' reports, did not reject the idea of the father presence within the family unit [74]. From then on, the adoptive person must either live with a partner at the time of the adoption request or start a family life within a certain time. It is only on these conditions that the case-law accepts the adoption by a single person.

It is not by chance that the case-law changed in 1994. Actually, in 1994 the French Parliament, after a long debate, finally adopted the so called bio-ethical laws in which medically assisted procreation plays a major role. For the first time, the law defined

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[69] Décision du président du Conseil Général des Yvelines du 2 mars 1988, sous Conseil d'Etat, 4 novembre 1991, *Rec. Lebon*, p. 372-373. In this case, the authorization application was submitted by a school teacher.

[70] Conseil d'Etat, Sect. 4 novembre 1991, *M. et Mme H., Département des Yvelines c. Mlle L., M. et Mme C.*, *Rec.*, p. 361, 372, and 373, concl. Patrick Hubert, p. 362f.

[71] Conseil d'Etat, 24 avril 1992, *M. T., Rec. Tables*, 718, *Revue administrative*, 1992, 328, Obs. H. Ruiz-Fabri.

[72] Conseil d'Etat, 18 février 1994, *Mme Francous*, *Rec. CE*, p. 79 ; *D.,* 1994, *IR,* p. 78.

[73] Cour administrative d'appel, Paris, 25 février 1996, Département de Seine-Saint-Denis.

[74] Conseil d'Etat, 27 octobre 1995, Département de Saône-et-Loire, no. 161788.

the couple as being the union of a man and of a woman and it stated that, to have access to artificial procreation, the couple should have reached the age of procreation and have proved the sterility of its members. This provision engenders consequences beyond the simple technique of medically assisted procreation and affects the whole legal logic of filiation [75].

On 9 October 1996, the *Conseil d'Etat* reaffirmed its doctrine, going even further, if the candidate admitted his/her homosexuality [76]. In this case, the applicant, Philippe Fretté, a Physics teacher at the French High School of London, the guardian of the child of a deceased friend, had not concealed his homosexuality to the social investigator, and had even explained that he was having a stable relationship with a man living in Paris and that he envisaged living with this man on his return to France. Despite the applicant's qualities and the promise of a regular and amicable feminine presence for the child, the administration refused to deliver the authorization. The *Conseil d'Etat* validated this refusal by notifying that, considering his living conditions and despite his undeniable human and educational qualities, the applicant did not offer sufficient guarantees concerning family, education and psychological support to adopt a child [77]. One of the arguments of the government representative used to justify the refusal of the authorization was precisely the rule that governs medical assistance to procreation, which is legally exclusively reserved to heterosexual couples.

In two decisions of 12 February 1997 [78], the *Conseil d'Etat* confirmed this solution with respect to a homosexual woman, repeating the same justification word for word.

The law of 15 November 1999 that sanctioned, with the *Pacs*, the unions of homosexuals did not question this jurisprudence [79] (this law does not provide for joint

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[75] On 25 November 1999 in an official study the *Conseil d'Etat* reminds us that the law has denied the surrogate maternity, the access to the medically assisted procreation to homosexual couples and to women that no longer have the proper procreation age. The aim was not to sanction a certain moral order, but to give to the child to be born the affective environment that would be the most naturally appropriate to ensure his harmonious development and to reject correlatively the recognition of any right to having a child, in *Les lois de Bioéthique: cinq ans après,* Paris, La documentation française, 1999, p. 32.

[76] For a more detailed analysis see D. Borrillo & Th. Pitois, "Adoption et homosexualité: une analyse critique de l'arrêt du Conseil d'Etat du 9 octobre 1996", in *Homosexualités et Droit*, Paris, PUF, 2nd ed., 1999.

[77] Conseil d'Etat, 1re et 4e sous-sections réunies, 9 octobre 1996, req. no. 168 342; Département de Paris, *JCP,* 1997, édition G, jurisprudence, 22766, p. 34-38.

[78] Conseil d'Etat, 12 février 1997, arrêt *Parodi* no. 161454 et arrêt *Bettan* no. 161455, comm. du gouv. Mme Maugüé.

[79] Article 515-1 of the new Civil Code defines the *Pacs* as a contract that has been concluded between two natural persons major of age, of different sex or of the same sex, in order to organize their common life. Article 515-8 of the same Code defines cohabitation as being "a *de facto* union, characterized by a life in common and by its stability and continuity, between two persons of different or of the same sex, who live together as a couple".

adoption, for adoption of the husband's/wife's child, for shared parental authority, for access to medical assistance to procreation) [80].

Two decisions of the Administrative Courts of Appeal of Douai and Nancy in October and December 2000 [81] resume identically the reasoning of the *Conseil d'Etat*. The administrative jurisprudence persists in reducing adoptive filiation to an imitation of sexual reproduction, which became the general pattern through the anthropological and psycho-analytical *vulgate* of the sex difference. Its acknowledged finality consists, at least in France, in imprisoning parenthood in an immutable model, since it is considered as being universal and unalterable, independently of time and place [82].

The issue was finally submitted to the European Court for Human Rights by Philippe Fretté whose refusal of authorization by the administration had been confirmed by the above mentioned decision of the *Conseil d'Etat* [83]. He maintained before the European Court that the right to respect for family and private life, as stipulated by Article 8 of the Convention, had to be ensured without any discrimination relying on the person's sex for instance (Article 14), the applicant claimed to be the victim of discrimination based on his sexual orientation. By a decision of 26 February 2002, the Court of Strasbourg, with a majority of four votes out of seven, confirmed the legitimacy of the French decision rejecting the application for authorization to adopt. First of all, it considered that this decision was mainly determined by the confirmed homosexuality of the applicant. In addition, it considered that the decision "to reject the applicant's application for authorization pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure". Ultimately, it stated that this differentiating treatment was objectively and reasonably justified by:

1) the existence of a wide margin of appreciation which must be left to the authorities of each of the contracting States, considering the absence of a common ground on the question,
2) the division of the scientific community over the possible consequences of a child being adopted by one or more homosexual parents,
3) the wide differences in national and international opinion,
4) the fact that there are not enough children up for adoption to satisfy the demand.

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[80] The situation has got worse in some respects, since by virtue of the jurisprudence of the *Conseil d'Etat* lots of individuals who have concluded a *Pacs* conceal this situation, being afraid not to be granted the authorization.

[81] Cour administrative d'appel, Douai, 26 octobre 2000, *Carbonnier et Galat c. Dép. du Nord*, arrêt no. 97DA01790, www.Jurifrance.Com ; Cour administrative d'appel, Nancy, 21 décembre 2000, *Emmanuelle X c. Dép. Jura*, *Dalloz*, 2001, no. 20, Jurisprudence, p. 1575.

[82] For a more detailed analysis of the expert discourse, see E. Fassin, "La voix de l'expertise et les silences de la science dans le débat démocratique", in D. Borrillo and E. Fassin (dir.), *Au delà du Pacs*, Paris PUF, 2nd ed., 2001.

[83] D. Borrillo and Th. Pitois-Etienne, "Différence des sexes et adoption: la psychanalyse administrative contre les droits subjectifs de l'individu", *Revue de Droit de McGill*, 49/4, October 2004, p. 1035-1056.

This decision deserves criticism for several reasons.

First of all, as far as the legitimate aim is concerned, the European Court implicitly believes that homosexuality represents a danger for the health and rights of the child, without explaining the grounds for such statement of principle, since the decision does not justify it by means of *de facto* or *de recto* arguments. If we follow the Court's implicit logic, we see that such argument amounts in fact to interpreting homosexuality if not as a disease, at least as a circumstance that may disturb the child or may condition him in terms of sexual orientation, which should be kept to the "healthy" pattern of heterosexuality. This incitement to heterosexuality seems to be extravagant at the least. A democratic State should not privilege a particular form of sexuality, as it should not encourage the prevalence of a certain race or religion. Regardless of their being Caucasian or black, atheists or believers, homosexual or heterosexual, all citizens should enjoy the same legal treatment.

Moreover, the interpretation of the Court with respect to the community of ideas on such issue is also questionable. All Member States of the Council of Europe which acknowledge the individual right to adopt, do not explicitly deny it to homosexuals. In that sense and according to the principle that what is not prohibited by the law is allowed, one can say that there is a community of viewpoint which consists in subordinating the right to adopt to the sexual orientation of the adoptive person.

The second argument about the division of the scientific community over the possible consequences of a child being adopted by one or more homosexual parents, is not supported by any scientific research. Though the applicant had submitted the conclusions of several studies, during the debate, the French State merely confined itself to referring to an inexistent scientific controversy. Actually, most investigation has proved that the sexual orientation of the parents does not have any impact on the child's psychological development [84]. In 1995, a report of the American psychological Association had already concluded that none of the forty-three studies carried out in the United States had revealed any specific disorders among children borne of homosexual parents or raised in homoparental families [85]. An English study concerning young adults coming from single parent families – half of them having been educated by heterosexual mothers and the other half by lesbian mothers – pointed out that there was no difference between the two groups, either in terms of the frequency of psychological disorders, or in terms of proportion of homosexuals. The American Academy of Pediatrics, which includes 55,000 practitioners, is categorical when declaring that there is no scientific reason justifying the exclusion of a homosexual individual or couple from a parental project [86]. The PhD in medicine defended by Stéphane Nadaud about the children raised in homoparental families comes to the

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[84] F. L. Tasker, S. Golombok, *Grandir dans une famille lesbienne. Quels effets sur le développement de l'enfant?,* Paris, ESF, 2002.

[85] http://www.apa.org.

[86] E. Jardonnet, "Homoparentalité et intérêt de l'enfant", *Le Monde*, 25 June 2002.

same conclusions [87]. In addition, a committee of experts appointed by the Swedish government in 1999 examined the conclusions of forty international studies, as well as those of an *ad hoc* inquiry ordered for Sweden. These surveys induced the above-mentioned committee to recommend not only the possibility of adoption for same-sex couples, but also the access to medically assisted procreation for single women or for lesbian couples [88].

The third argument based on the wide differences in national and international opinion used by the European Court for Human Rights seems superficial at the least. Public feeling may of course inspire the morals or the informal norms of societies, but it should not be considered as a source of law. Democracy of opinion cannot be of relevance to the principles that govern establishment and enforcement of the legal norm.

The final argument about the small number of children up for adoption seems questionable, both in terms of content and form. As for content, it is questionable because subordinating the availability of a right to its actual exercise is not allowed. For example, the right of property does not depend on the availability on the market and the right of free movement is not conditioned by the number of airlines. Of course, an abstract right that could never be materialized is useless; however, as far as the Court's arguments are concerned, if the children available for adoptions are few in Western Europe, the number of those waiting for adoption is much larger in other parts of the world. Actually, research done by Unicef shows that nowadays there are more than ten million orphan children who could be adopted [89].

The set of arguments produced by the Court – that in its opinion justifies a discriminating treatment of homosexuals – appears to be of little relevance. Likewise, the principle of the "reasonable relationship of proportionality between the means employed and the aim pursued" has not been observed. Of course, the child's interest should prevail over the adults' rights, but the aim pursued by the Court is achieved at the cost of complete and absolute exclusion of gay and lesbian adoptive parents. Actually, such a decision not only takes a position on the destiny of a particular child, but also on that of all children who could be adopted. It not only concerns one applicant in particular, but in fact all homosexuals claiming the right to adopt. At this point, we can say that in general and *in abstracto* homosexuality represents a legitimate obstacle to the right to adopt a child.

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[87] *Approche psychologique et comportementale des enfants vivant en milieu homoparental. Etude sur un échantillon de 58 enfants élevés par des parents homosexuels*, Thèse pour le diplôme d'état de docteur en médecine, Université Bordeaux II, 2000.

[88] *Children in Homosexual Families*, *Report of the Commission on the Situation of Children in Homosexual Families*, Stockholm, Graphium/Norstedts AB, 2001 (http://www.fritzes.se/). Subsequently to its recommendations, the Parliament adopted a law on 6 June 2002 (entered into force in February 2003) authorizing the adoption of children by homosexual couples.

[89] UNAIDS/UNICEF/USAID, *Children on the Brink 2002: A Joint Report on Orphan Estimates and Program Strategies,* July 2002 (http://www.unicef.org/publications/files/pub_children_on_the_brink_en.pdf).

This decision is all the more astonishing as it overturned the decision of the ECHR of 21 December 1999 in the case *Salgueiro da Silva Mouta v. Portugal*. This case concerned the exercise of parental responsability by a homosexual father who had been deprived of such responsability because of his ex-wife's intrigues. The Lisbon Court of Appeal accepted the wife's claim, considering that "the child should live in a family environment, a traditional Portuguese family (...)" and that "children should not grow up in the shadow of abnormal situations". The European Court condemned Portugal, arguing that the difference in treatment applied by the Lisbon Court of Appeal was "based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention" [90].

In 1994, the European Parliament had already made a pronouncement in the same sense. In a resolution of 8 February, it invited the Commission to submit a draft recommendation with respect to the equality of homosexuals' and lesbians' rights, in order to put an end to all restrictions of their rights to be parents or to adopt and raise children.

C. The incidence of the European decision on the jurisprudence of the Conseil d'Etat

Since the Decision in the *Fretté* case, the *Conseil d'Etat* was called on to determine the validity of a refusal of authorization opposed to a young woman involved in a stable homosexual relationship. Through a Decision of 5 June 2002 [91], the administrative jurisdiction confirmed the refusal of authorization and based this on three rather questionable arguments. First of all, the *Conseil d'Etat* considered that whereas Article 343-1 of the Civil Code permits adoption by single persons, this does not preclude the possibility that the administrative authority may check whether or not the applicant offers within his/her family or among his/her environment a paternal or maternal image or model. Moreover the decision states that the Administration has not made any legal error and that the inquiry is legitimated by the obligation to check whether the applicant would offer a suitable home, which would meet the needs and best interests of the adopted child, from a family, child-rearing and psychological perspective [92]. In case the presence of a paternal or maternal image or model constituted a condition from a family perspective, neither the administrative authority, nor the *Conseil d'Etat* tried to show that the concerned applicant, E. Berthet, did not provide an opposite sex model. Now it was in fact possible to identify such a model within her family (brother, uncle...) or among her friends. What is worse, by refusing to examine the specific living conditions, the administrative judge deprived himself of the possibility of checking whether, according to the social services inquiry, the applicant actually provided such paternal image or model.

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[90] ECHR, *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999, appl. 33290/96 (http://www.echr.ceu.int/hudoc).

[91] Conseil d'Etat, 5 juin 2002, *E. Berthet c. décision du conseil général du Jura*, Req. no. 230533, *AJDA*, July-August 2002, p. 615-623.

[92] Article 4 of the Decree from 1 September 1998.

Secondly, the *Conseil d'Etat* considered that by basing its refusal on the applicant's lifestyle – a euphemism referring to her homosexuality – the Administration had not at all founded its decision on a position of principle about the sexual orientation of the female applicant and has not applied an unreasonable differentiated treatment in the sense of Articles 8 and 14 of the European Convention on Human Rights. This argument was surprising, since it ignored or pretended to ignore the wording of the *Fretté* decision which explicitly states that homosexuality authorizes a discriminating treatment based on the interest of the child to be adopted. One can therefore wonder why the French judge ignored the European Court's motivation. The latter can be criticized but it has proved to be efficient against homosexual parenthood. Possibly the French judge wanted to preclude any argument that could justify a discriminating treatment of homosexuals. Therefore, the *Conseil d'Etat* is bound to accept all refusals of authorization, provided that the applicant cannot offer, according to its jurisprudence, a dual paternal and maternal image or model. It is true that it imposes this condition on non married heterosexual individuals and it validates the refusals but only after an appreciation *in concreto*, by pointing out the *de facto* elements in the administrative inquiry that justify such solution. In the *Francous* decision for instance, the *Conseil d'Etat* validated the refusal of authorization after having noticed that the child was less desired for him/herself, than for the purpose of helping the applicant to put an end to her loneliness, and consequently the child could have suffered from the absence of a paternal image [93]. But such an evaluation has not been carried out for a homosexual applicant since the *Conseil d'Etat* alleged *in abstracto* the impossibility of providing an image of the opposite sex. There is a *petitio principii* against adoption by gays and lesbians which finds its expression in the last argument of the decision mentioning the positive features of Miss Berthet's personality. These features are not those pointed out by the Administration in its enquiry, but the comments of the Administrative Court of Appeal, according to which considering her lifestyle and despite her undeniable human and educational qualities, the applicant did not offer sufficient guarantees from a family, child-rearing or psychological perspective to adopt a child.

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[93] Conseil d'Etat, 1re et 4e sous-sections réunies, 18 février 1994, *Mme Francous*, *Juridisque Lamy Conseil d'Etat et Cour administrative d'Appel*, vol. II, no. 142.912 ; *Rec. Lebon* 1994, 619 : "The file documents suggest that by rejecting the authorization request for adoption, for the double reason that the adoption project of the applicant reveals the "*absence of a paternal image*" and that the child was less desired for him/herself than as a means to put an end to the loneliness of the adopting person (…), the Chairman of the *Conseil général* (…) who has not based his opinion exclusively on the matrimonial status (…) did not inaccurately apply the legal and statutory provisions". See also the decision of the Cour administrative d'appel de Paris (IIe chambre), 25 avril 1996, Département de Seine-Saint-Denis, *Juridisque Lamy Conseil d'Etat et CAA*, II/95, PA03481 : the hosting of an adopted child "is not compatible" with the conception of life of the adopting woman, "considering that she wanted to avoid the risk of failure of a couple relationship and so to occult the paternal function or representation for the child".

Once more the *Conseil d'Etat* goes beyond the problem of homoparenthood, to cast doubts on the monoparental family. Actually, this new condition based on the sex difference introduced by jurisprudence would oblige the unmarried adoptive single woman or man to behave towards the child as if she/he were meant for life in heterosexual couple. This new case *E. B. vs. France* is currently pending before the ECHR; on the basis of this case the Court might begin to modify its case-law in the field.

D. *Legal* "bricolage" *in the French manner*

Leaving the adoption issue aside, let us now focus on the evolution of another figure of parenthood, also used by same-sex couples: co-parenthood. This legal reality refers to the relationship between an underage child and the partner of his/her legal parent. After a long period of evolution (analysed previously), a new jurisprudence has begun to emerge in France. A decision delivered on 27 June 2001 by the *Tribunal de Grande Instance* of Paris allowed a woman to adopt the three underage children of her female partner for the very first time. The two women had been living together for more than twenty years and they had been educating their daughters together, ever since birth. Since there was no paternal filiation, the children regarded the two women as their two parents. One of them was their biological mother and the other one was their social mother. Thanks to that "simple" adoption judgment, the children have now both surnames of their parents. The adoptive filiation had been added to the biological filiation and provided these three children with the guarantee of protection regarding their relationship with their two mothers, regardless of the hazards of life. But since *simple* adoption transfers the entirety of the parental responsibility to the adoptive parent, the biological mother was deprived of her parental responsibility, which appeared to be nonsense. They had to request delegation of the parental responsibility according to Article 377-1 of the law of 4 March 2002 on parental responsibility; this was granted in July 2004.

The decision of the *Tribunal de Grande Instance* of Paris that granted to the aforementioned couple of women the shared exercise of parental responsibility on 2 July 2004, three years after another French Court had authorized in 2001 the *simple* adoption of the children of one of these women by her partner shows the precariousness of the homoparental families : they had to resort to this legal "*bricolage*" in order to obtain rights that are less than those that are automatically granted to married couples. Actually, the delegation of parental authority concerns only co-responsibility in the exercise of parental authority and it does not imply sharing the authority in itself. This jurisprudence makes the extreme legal precariousness of homoparental families evident.

E. *The international situation*

The French situation contrasts with the evolution in legislation in other western countries. As a matter of fact, over the past few years, we have witnessed a constant change in the field of the recognition of parental rights to the advantage of same-sex couples. From the simple sharing of parental responsibility for the benefit of the step-parent to the putative motherhood for lesbian couples, the law tends to settle the

problems that homosexual parents still have to face today by putting an end – totally or partially – to the discriminations of which they are victims.

While France does not concede any parental right to homosexual couples, a certain number of States in the European Union and in North America provide such acknowledgement. Norway, for instance, allows, by legal decision, the transfer of parental responsibility to the surviving partner of a homosexual couple, regardless of the existence of a partnership contract [94]. Since 2001, Germany has been authorizing the joint exercise of parental responsibility for couples bound by a registered partnership contract [95]. In Denmark, the partner of a child's biological parent may adopt the child, if he/she is involved in a registered partnership contract and, of course, if the other biological parent is either deceased or deprived of his parental authority [96]. In Great Britain, homosexual concubines as a couple can adopt a child and since 2002 adoption of the partner's child has been allowed [97].

Since 1 February 2003, Sweden has authorized the adoption of the partner's child and the joint adoption of a child provided that the couple is bound by a registered partnership contract. Besides, homosexual concubines may become an adoptive family.

In the Netherlands, married or unmarried same-sex couples lawfully exercise their parental responsibility over the jointly adopted child or over the child of one of the partners [98]. More recently, on 16 February 2004 the autonomous community of Navarre became the first province of Spain to adopt a law authorizing the adoption of a child by stable homosexual couples, just as for married couples.

In several States of the United States, the adoption of the partner's child is now possible. Joint adoption is also allowed particularly in New Jersey, Vermont, Connecticut and Massachusetts. On 10 September 2002, the Supreme Court of South Africa recognized the right of homosexual couples to adopt children.

Québec seems to be the place where the most significant step forward has been taken. The law of 6 June 2002 established civil union and new filiation rules allowing for the sharing of parental responsibility and *plenary* adoption by same-sex couples. But it also established a presumption of motherhood to the advantage of the female partner of a woman who has given birth to a child by means of medically assisted procreation methods, provided that the couple – even living in a free union – had resorted to such technique in order to realize a parental project. The law of Québec will remain, in the evolution of family law, as the law that has definitively shaken the

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[94] The Children's Act of 8 April 1981, no. 6, para. 36.

[95] Law of 16 February 2001 establishing the *Lebenspartnerschaftsgesetz*.

[96] Law 360 of 2 June 1999 modifying the law on registered partnership of 16 June 1989.

[97] On 5 November 2002, the House of Lords, after the House of Commons voted an amendment modifying the "adoption and children bill" allowing unmarried couples and gay and lesbian couples to adopt a child.

[98] Articles 227, 251, 252, 253 et 282 of the first Book of the Dutch Civil Code.

naturalist ideology [99] which used to claim and still claims today that filiation should be based on procreation [100].

4. Conclusion

The legal protection of homosexuals in France is grounded on a schizophrenic policy that relies on the dissociation of the individual from his couple and from his capacity to establish filiation ties. Where the right wing, which was at the time in the Opposition, led a fierce campaign against the *Pacs*, the socialist left wing planned to grant some rights to same-sex couples, but at the same time denied them the right to get married and the right to filiation [101]. As far as this issue is concerned, there seems to be a consensus within the French political class. As a matter of fact, unlike the situation in the United States where the extension of the concept of marriage to same-sex couples seems to be far more problematic than the recognition of the right to adoption, to medically assisted procreation or to the sharing of parental responsibility, in France, the denial of the right to get married was closely connected with the consequences that such a situation might induce in filiation law. At this stage and faced with the confusion engendered by the French jurisdictions (partly supported by the ECHR) the autonomy of the law in the process of creation of a filial tie must be re-affirmed [102]. The reform of family law in 1972 started privileging "parental function" and getting detached from the sexual assignment of family roles. Dean Carbonnier, the author of that reform, even mentioned the "hermaphrodization" of a law that replaced the notions of "husband and wife" or "father and mother" by "spouses" and "parents", thus pointing out that, from the legal point of view, conjugality and parentality represent above all a function – i.e. a normative constraint implying a certain number of rights and obligations. Despite the importance that the reform gave to biological reality, the individual kept the first place [103].

The so-called bioethical laws of 1994 broke with that evolution [104], rooted in a voluntarist and liberal conception of family. The successive reforms would no longer be made in the name of spouses' liberty or in the name of filiation equality but in the

[99] In Western Australia, the Artificial Conception Act of 1985 amended in 2002 stipulates in Article 6A that when a woman living as a couple with another woman resorts, with the approval of her partner, to medically assisted procreation, she will be considered as the other parent of the child, ever since the conception.

[100] For a more detailed analysis, see M.-Fr. Bureau, "L'union civile et les nouvelles règles de filiation: tout le monde à bord pour redéfinir la parentalité", in *L'union civile, nouveaux modèles de conjugalité et de parentalité au 21e siècle, Actes du colloque du Groupe de réflexion en droit privé sous la direction de Pierre-Claude Lafond et Brigitte Lefebvre*, Québec, Yvon Blais, 2003.

[101] D. Borrillo and P. Lascoumes, *Amoures égales? Le Pacs, les homosexuels et la gauche*, Paris, La Découverte, 2002.

[102] See Th. Formond, *op. cit*.

[103] G. Raymond, "Volonté individuelle et filiation par le sang", *RTDC*, 1982, p. 538.

[104] D. Mehl, *Naître? La controverse bioéthique*, Paris, Bayard, 1999.

name of "sex difference" and of the "proper psychical structuring of the child" [105] in order to avoid the "loss of meaning", "the identity crisis", "the dictatorship of facts" and "the lack of landmarks", to mention only a few of the phrases used by the most recent reports on the reform of family law [106]. Thenceforth, "the Oedipus complex" or the "symbolic order" could seemingly be substituted for the democratic will. This represents a political failure but also a failure of the law, insofar as it is no longer the judicial judge who decides who may adopt and who may not, since the refusal of authorization prevents his intervention. The decision depends on the psycho-anthropological *vulgate* – that of the social investigators [107], taken over by the *Conseil d'Etat*, the investigators becoming thus the new holders of an "adoption license".

However, by the joint effect of the internal logic of law, of the concern for equality with respect to children and parents and of a pragmatic approach towards the parentality issue, the recent evolution of filiation law in some of the Member States of the European Union or in some States of North America has forecast a change in the jurisprudence of the European Court for the Human Rights, a change in the direction indicated by the political instance that represents the will of the European citizens. As a matter of fact, on 4 September 2003, the European Parliament: "Calls once again on the Member States to abolish all forms of discrimination – whether legislative or *de facto* – which homosexuals still suffer from, in particular concerning the right to marry and adopt children" [108].

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[105] For remarks about this new "law metaphysics" see *Au-delà du Pacs. L'expertise familiale à l'épreuve de l'homosexualité*, *op. cit.*

[106] I. Thery, Couple, filiation et parenté aujourd'hui…, *op. cit.*; Fr. Dekeuwer-Défossez, Rénover le droit de la famille. Proposition pour un droit adapté aux réalités et aux aspirations de notre temps, rapport adressé au ministre de la Justice (Paris, La documentation française, 1999).

[107] The social investigators only resume what was already decided by a majority of psychologists from within the French media.

[108] European Parliament Resolution on the situation as regards fundamental rights in the European Union (2002), 4 September 2003, para. 77.

The rights of gays and lesbians in the European Union – the Swedish experience

Hans Ytterberg

The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States [1]. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (in the following referred to only as the European Convention on Human Rights) and as they result from the constitutional traditions common to the Member States, as general principles of Community law [2]. Interferences with the private life of a person on the grounds of her or his sexual orientation require particularly serious reasons by way of justification [3] and a difference in treatment based on sexual orientation with respect to rights protected by the European Convention on Human Rights is only allowed if it can be shown that such a difference in treatment serves a legitimate aim and is also necessary to reach that aim [4].

The right to non-discrimination on the grounds of sexual orientation is also protected under different global human rights instruments [5].

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[1] Article 6(1) Treaty on European Union (TEU).

[2] Article 6(2) TEU.

[3] See int. al. *Dudgeon v. United Kingdom* (1981), European Court of Human Rights (ECHR), Series A, no. 259.

[4] *Karner v. Austria*, ECHR, appl. 40016/98, judgment 24 July 2003.

[5] Some of the most important ones are the two United Nations' Covenants of 1966 on Civil and Political Rights on the one hand and on Economic, Social and Cultural Rights on the other, the UN Convention on the Rights of the Child and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. A more comprehensive list

It has become increasingly apparent how the two European jurisdictions, EU law as interpreted by the Court of Justice in Luxembourg and European Convention law as interpreted by the European Court of Human Rights in Strasbourg, mutually influence each other. Two clear examples of this are the former court's ruling in *K.B. v. National Health Service Pensions Agency, Secretary of State for Health (United Kingdom)* [6] and the latter court's judgment in the case of *Goodwin v. United Kingdom* [7].

In *K.B* the Luxembourg court ruled that a marriage requirement to be eligible for employment benefits in the form of a pension does not in itself amount to sex discrimination under Community law. However if it is not possible for an employee to fulfil the marriage requirement for reasons related to a gender reassignment undergone by the employee or his or her partner, denying the employee the pension benefit constitutes unlawful sex discrimination [8]. According to the EU Court this is so because the European Court of Human Rights in Strasbourg has ruled that it is a violation of the European Convention on Human Rights to deny a person who has undergone complete gender reassignment the right to marry someone of the opposite sex compared to the acquired gender identity. The judgment from the European Court of Human Rights, referred to by the EU Court in Luxembourg, was delivered in the case of *Goodwin v. United Kingdom*. Under Article 12 of the European Convention on Human Rights "[m]en 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". When reaching its conclusion that this right includes the right of a person, who has undergone complete gender reassignment, to marry someone of the opposite sex compared to the acquired gender identity, the European Court of Human Rights, in its turn, referred to the wording of the Charter of Fundamental Rights of the European Union, in which the EU "no doubt deliberately" had eliminated the reference to "men and women" [9].

The development of human rights law with respect to non-discrimination and sexual orientation under both European Community law and the European Convention on Human Rights has had an impact on the corresponding development on a national level in all Member States of the EU. The importance of that impact, however, varies

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of UN human rights references to non-discrimination on the grounds of sexual orientation can be found on the web site of the International Commission of Jurists, www.dawn.org.fj/global/health/humanrights%20analysis%20mar04.doc

[6] Case C-117/01, judgment 7 January 2004.

[7] Appl. 28957/95, judgment 11 July 2002.

[8] Cf. the case of *P. v S. and Cornwall County Council*, C-13/94, where – unlike in the case of *K.B.* – there was a *direct* link between the issue of gender reassignment and dismissal from work, which led the EU Court to conclude that such treatment of an employee amounted to unlawful sex discrimination under Community law.

[9] According to Article 9 of the Charter, "[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". As a difference from Article 12 of the European Convention, the wording of this article does not include the words "men and women".

from one country to another. In the case of Sweden the impact has been less strong and more indirect than in several other Member States. This is shown by a quick glance at the time-line of the developments in Sweden.

Sexual relations between consenting adults of the same sex were de-criminalised in 1944. Equal ages of consent for gay, lesbian and heterosexual relations were adopted in 1978. Homosexuality was deleted from the list of mental disorders in 1979. The first public recognition of same sex families by the Swedish legislator came in 1973 when Parliament's Standing Committee on Civil Law Legislation acknowledged in a report that "from society's point of view, cohabitation between two persons of the same sex is a perfectly acceptable form of family life" [10]. Legislation conferring almost the same rights and obligations to unmarried same-sex couples as for unmarried heterosexual couples entered into force in 1988 and the Registered Partnership Act, giving registered partners almost all of the rights and obligations of married spouses was passed in 1994. An anti-discrimination provision banning discrimination on the grounds of homosexual orientation (N.B. not sexual orientation) with respect to the provision of goods and services, public as well as private, was introduced in the Swedish Penal Code in 1987. And civil law legislation banning sexual orientation discrimination in employment as well as setting up a specialised body to monitor this legislation [11] entered into force in Sweden in 1999.

Now, that the impact of international, including EC, law on the national developments in Sweden has been limited is true. Equally true, however, is that developments in EC law have speeded up and indirectly influenced the protection against sexual orientation discrimination also in Sweden. On the basis of Article 13 TEC two directives were adopted by the Council [12]. These directives had to be implemented into national law in all the Member States. The employment directive covered several protected discrimination grounds including sexual orientation while at the same time having a scope of application limited to employment and occupation. The race directive on the other hand covered more areas but only the grounds of race and ethnicity.

At the point in time when the two directives were adopted, Swedish employment law already provided for a protection against discrimination on the grounds of sexual orientation [13] that to a large extent fulfilled the requirements of the employment

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[10] Author's translation. In the original the text reads: "(...) *en samlevnad mellan två parter av samma kön är från samhällets synpunkt en fullt acceptabel samlevnadsform*", Standing Committee on Civil Law Legislation, report 1973:20, p. 116.

[11] The Office of the Ombudsman against Discrimination on grounds of Sexual Orientation, the web site of which can be found at www.homo.se

[12] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the race directive) and directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the employment directive).

[13] Mainly, this legal protection is found in the Employment Discrimination (Sexual Orientation) Act 1999:133 (*Lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*). Also before the introduction of this Act, generally applicable

directive. Some minor, but nevertheless important, amendments to this legislation have since been adopted to more fully comply with the Directive.

A clear albeit indirect influence from EC law can be seen in the Swedish civil law provisions that prohibit discrimination outside the employment area. As a consequence of the race directive, Sweden had to implement an effective prohibition on discrimination on the grounds of race and ethnic origin covering areas such as social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing. With respect to race and ethnic origin, the Swedish Penal Code [14] for a very long time had already made discrimination illegal in several of these areas, extending that protection to homosexual orientation in 1987. However, this penal provision over the years had proven ineffective, mainly due to the burden of proof rules necessary in penal law provisions to uphold the principle of innocent until proven otherwise. Therefore, clearly, the existence of the penal provision was not enough to live up to the obligation to fully and correctly implement the race directive in Swedish internal national law. To secure such implementation, civil law legislation was introduced and later amended to give more complete coverage [15]. The legislator came to the conclusion that there was no justification for allowing discrimination in this field on the grounds of sexual orientation when banning it on the grounds of race and ethnicity. So, the EU obligation to set up an effective system for legal protection against race discrimination in a number of different areas, in this sense also led to a more comprehensive and effective anti-discrimination legislation on the grounds of sexual orientation in Sweden.

To summarise, at present gays and lesbians in Sweden enjoy legal protection against discrimination in employment and occupation [16], as students at universities and other establishments of higher education [17] and in relation to access to goods and services (public as well as private), including housing [18]. Apart from this, there

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statutes and principles in Swedish labour law provided some protection against sexual orientation discrimination in employment. See further H. Ytterberg, "Chapter 16 – Sweden", in Combating Sexual Orientation Discrimination in Employment: legislation in fifteen EU Member States, a report of the European Group of Experts on Combating Sexual Orientation Discrimination about the implementation up to April 2004 of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which can be found at www.meijers.leidenuniv.nl/index.php3?m=10&c=98

[14] Chapter 16, Section 9, Penal Code "Unlawful discrimination" (*16 kap. 9 § brottsbalken "Olaga diskriminering"*).

[15] Discrimination Prohibition (Goods and Services) Act 2003:307 ("*lag (2003:307) om förbud mot diskriminering*").

[16] Employment Discrimination (Sexual Orientation) Act 1999:133 ("*lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*").

[17] Equal Treatment of Students at Universities Act (2001:1286), ("*lag (2001:1286) om likabehandling av studenter i högskolan*").

[18] Discrimination Prohibition (Goods and Services) Act 2003:307 ("*lag (2003:307) om förbud mot diskriminering*").

are also penal provisions banning hate speech with reference to sexual orientation [19] and establishing that homophobic motives for a crime are statutory aggravating circumstances leading to a more severe punishment [20].

The 1999 Employment Discrimination (Sexual Orientation) Act ordered the setting up of the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation [21]. The relevant provision states that "[f]or the purposes of enforcing this Act there shall be an Ombudsman against Discrimination on grounds of Sexual Orientation. The Ombudsman against Discrimination on grounds of Sexual Orientation is appointed by the Government" [22]. The Act conveys legal powers on the Ombudsman, ultimately the right to litigate individual cases of discrimination before the Labour Court on behalf of the injured party. Similar legal powers are given to the Ombudsman under the 2001 Equal Treatment of Students at Universities Act and the 2003 Discrimination Prohibition (Goods and Services) Act.

Through a Government Decree [23] the mandate of the Office of the Ombudsman has been extended. The Decree commissions the Ombudsman to combat homophobia and discrimination on grounds of sexual orientation in all walks of life. The Ombudsman shall inter alia give advice and support to individuals who have suffered discrimination, engage in education, information and opinion shaping efforts to combat homophobia and sexual orientation discrimination, propose to the Government legal and other measures that may be of use for that purpose and monitor international developments in these fields [24].

The opinions delivered by the Ombudsman in individual discrimination cases are not in themselves binding upon the parties. Within the scope of application of the 1999 Employment Discrimination (Sexual Orientation) Act, the 2001 Equal Treatment of Students at Universities Act and the 2003 Discrimination Prohibition (Goods and Services) Act, the Ombudsman can, however, ultimately litigate such a case in court on behalf of an individual injured party (although technically this would be done in the Ombudsman's own name). Outside the scope of application of these statutes, the Ombudsman can negotiate amicable settlements between the parties or

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[19] Chapter 16, Section 8, Penal Code "Incitement to Hatred" ("*16 kap. 8 § brottsbalken Hets mot folkgrupp*").

[20] Chapter 29, Section 2(7), Penal Code ("*29 kap. 2 § punkten 7 brottsbalken*").

[21] Article 16.

[22] Article 16 of the 1999 Employment Discrimination (Sexual Orientation) Act: "*För att se till att denna lag följs skall det finnas en ombudsman mot diskriminering på grund av sexuell läggning. Ombudsmannen mot diskriminering på grund av sexuell läggning utses av regeringen*".

[23] Government Decree (1999:170) with Instructions for the Ombudsman against Discrimination on grounds of Sexual Orientation ("*Förordning (1999:170) med instruktion för Ombudsmannen mot diskriminering på grund av sexuell läggning*"), available also in English at the web site of the Ombudsman against Discrimination on grounds of Sexual Orientation, at www.homo.se

[24] Article 1-2 of the Decree.

conclude an inquiry with critical comments. In the criminal law area the Ombudsman can request a public prosecutor to review decisions not to prosecute or to drop charges in criminal investigations regarding discrimination. Short summaries in English of the Ombudsman's decisions are, progressively, being published both at the Ombudsman's web site [25] and through the public, free of charge, internet based "Cersgosig" data base [26].

In practice, the main focus of effort of the Ombudsman's office is on prevention of discrimination, including education and information. The legal bases for these efforts are multiple. First of all, the Swedish Constitution obliges all parts of the public administration, including legislative bodies, to combat discrimination e.g. on grounds of sexual orientation [27]. Secondly, universities and other establishments of higher education have a specific statutory obligation to actively promote equal rights of students irrespective of sex, ethnicity, sexual orientation or disability [28]. This obligation includes the adoption of an equal treatment plan and yearly evaluations and revisions of such plans. The Ombudsman is commissioned to monitor the compliance with these obligations [29]. Finally, the already mentioned Government Decree regarding the Ombudsman's tasks confers a general obligation of combating homophobia and sexual orientation discrimination on the Office of the Ombudsman.

The year 2004 turned out to be another year of significant increases in terms of the overall workload at the Office of the Ombudsman. The total number of dossiers registered by the Office increased by about 8 %, reaching a total of almost 800, although there was some decline (from fifty to forty) in the number of formal complaints of discrimination by individual citizens. The Ombudsman also starts investigations on his own initiative.

Complaints from individuals included issues regarding harassment in the work place, refused employment and dismissals, all with a link to sexual orientation. In the higher education sector, complaints included the use of homophobic textbooks and harassment by university staff. With respect to goods and services, complaints involved e.g. discriminatory treatment by restaurants, discriminatory policies of newspapers regarding the publication of pictures from registered partnership ceremonies, refusal by a kennel to sell puppies to a lesbian couple, discriminatory bank forms, the filling out of which is necessary for the taking of loans, and discriminatory treatment by

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[25] www.homo.se

[26] The data base can be found at www.cersgosig.informagay.it and summaries of the Ombudsman's decisions are found under Decisions of Ombudsmen et al. not binding on the parties, by entering the search word "Sweden".

[27] Chapter 1, Section 2(4) of the Instrument of Government ("*1 kap. 2 § fjärde stycket regeringsformen: 'Det allmänna skall motverka diskriminering av människor på grund av kön, hudfärg, nationellt eller etniskt ursprung, språklig eller religiös tillhörighet, funktionshinder, sexuell läggning, ålder eller annan omständighet som gäller den enskilde som person*").

[28] Section 3 of the 2001 Equal Treatment of Students at Universities Act.

[29] Section 16.

public authorities, such as the National Prison Board, the National Board for Taxation and the National Migration Board.

The number of general enquiries from the public regarding issues concerning sexual orientation discrimination increased during 2004, phone calls by 14 % and enquiries by mail and e-mail by 19 %.

Representatives of the Ombudsman's office participated in external information and educational training activities on more than 150 occasions in the course of the year, throughout the country. In addition, the Ombudsman gave approximately 50 interviews to radio and television stations and newspapers. Around 1,700 articles dealing with issues around sexual orientation discrimination or dealing directly with the Ombudsman's office were published in Sweden in 2004.

The impact of the successive introduction of anti-discrimination legislation in more and more areas of Swedish society and of the creation of the Office of the Ombudsman is manifold. Firstly, of course, one shall not underestimate the importance of the existence in itself of a legal recourse, available for individuals who feel that their fundamental right to non-discrimination has been violated. Secondly, having a specialised body, which ultimately has the power to go to court on behalf of injured parties, also at least to some extent helps lowering the threshold and thus making access to justice more available also for persons of lesser economic resources. But most importantly these developments have helped raising the level of awareness, that equal treatment and non-discrimination regardless also of sexual orientation is a fundamental principle of human rights – not a negotiable concession – and as such it is everyone's responsibility to actively safeguard and promote it. Mainstreaming sexual orientation equality is becoming a serious task, especially for the different branches of public administration and the social partners.

Labour unions have clearly become much more active in this field since the creation of the Office of the Ombudsman and the passing of the Employment Discrimination (Sexual Orientation) Act in 1999. A number of specific projects have also been launched to combat discrimination and promote equality regardless of sexual orientation. Most notably the Swedish Armed Forces have undertaken extensive educational efforts in this respect, together with e.g. the Swedish Police. Also other law enforcement bodies are increasingly dealing with these issues. Training sessions for younger judges and new prosecuting attorneys now regularly take place several times a year, with a focus on sexual orientation discrimination and homophobia. Two other major projects, where the Office of the Ombudsman is playing a key role, are currently developing, dealing with school and youth issues. One focuses on norms and values in schools aiming at making schools into work places with an open environment where everyone can be safe regardless of their sexual orientation. It is a two-year project on a national level, involving teachers, headmasters, civil servants and politicians responsible for school issues in local governments as well as students and teachers of two university teaching programmes. The other project takes place in the province of Stockholm, aiming at a sustained integration in schools – from nursery schools through secondary schools – of gender equality and non-discrimination on grounds of sexual orientation, involving also the provincial Government and the city of Stockholm, the National Board for School Development, the Office of the

Children's Ombudsman and the Office of the Equal Opportunities Ombudsman. And, as already mentioned, universities and other establishments of higher education all over the country now regularly have to set up, evaluate and update yearly proactive equality plans, which must include the protection and promotion of sexual orientation equality.

The Office of the Ombudsman against Discrimination on grounds of Sexual Orientation has been in operation for almost six years. I have been its Director General and Ombudsman from the start. At a moment when my first term of office is coming to an end, I must conclude that it has been an interesting "journey" indeed. From a single employee and Ombudsman to a small national human rights institution with a staff of eight people. From a limited scope of legal protection covering only employment to an open mandate including a legal ban on discrimination also in higher education and with respect to the provision of goods and services, including housing, social services, social security and health care. And new constitutional provisions protecting against incitement to hatred and mainstreaming the fight against discrimination on grounds of sexual orientation throughout the public sector. From the constant encounters with the common gut reaction that "we make no difference in the way we treat people" to a slowly growing awareness of the role of majority/minority relations, norm and "deviation", power and subordination, i.e. in this case the intricate system of heteronormativity. From a "lone ranger" to a coordinating driving force in relation to many other actors, e.g. the social partners and human rights organisations, local governments, schools and universities, researchers and academics, law enforcement bodies and the armed forces, other government agencies, private business and employers. From trying to handle what ever was served on our plate to preparing for proper strategic choices.

Now everything is fine then? Of course not. As usual it is much more complicated. Still, one in nine children and teenagers reports sexual orientation harassment in school. A great number of employees experience prejudices, harassment and other forms of sexual orientation discrimination in the work place. Reported cases of homophobic crime have gone up by 76 % since 2000. And men holding hands (the very few that feel comfortable enough to do so in public) still automatically let go of each other when going down into the subway of Stockholm on a Friday night.

What conclusions – if any – can be drawn from all of this? Probably that law alone cannot do away with prejudices, stereotyping, discrimination, hatred and homophobic violence. But more importantly that good law, access to justice and a specialised body that can effectively act as a coordinating driving force goes a long way to combat discrimination and promote equality in dignity and rights, regardless also of sexual orientation. As bishop Desmond Tutu of South Africa once said: "There is only one way to eat an elephant, one bit at a time". That effort – to ultimately devour the elephant of heteronormativity, homophobia and sexual orientation discrimination – is everybody's business, everybody's responsibility. So – let's get on with it!

Greece: society, law and sexual orientation

Matthaios A. Peponas

"Return
Return often and take me,
beloved sensation, return and take me –
when the memory of the body awakens,
and an old desire runs again through the blood;
when the lips and the skin remember,
and the hands feel as if they touch again.
Return often and take me at night,
when the lips and the skin remember..."
Constantine P. Cavafy

Ancient Greek culture celebrated same-sex love in history, literature, and art, making high claims for its moral influence. Even though it is obviously wrong to judge historical sources by today's standards, even though sexual orientation did not even approach the connotation it has in the modern western world, being gay or lesbian was never considered a sin, a threat upon society or a mental illness. More importantly, contrary to "modern" beliefs, gay men and lesbians were considered to be excellent warriors and educators.

The arrival of the Christian era gradually changed the scene. It is equally unjust to read Saint Paul under today's light, especially his infamous *Epistle to Corinthians* where homosexuality is supposedly condemned for the first time in a "New Testament" text. It is almost certain that neither Saint Paul nor his readers had any concept of "homosexuality" as a sexual identity. It would seem more correct that Christian opposition to homosexuality in particular (as opposed to ascetic derogation of all non procreative sexuality) developed late and incidentally, along with hostility to other minorities (such as the Jews) [1]. Let us not forget that the early Christians still were citizens of the ancient world who worshipped Eros as a primary god and who would not easily accept the austere ideas on morality that developed with the new religion.

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[1] J. Boswell, *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, Chicago, University of Chicago Press, 1980.

Pre-christian Roman law did not consider homosexuality to be a crime. The earliest criminal law text about homosexual behaviour was an edict of 342 by emperors Constantine and Constas. Yet, it seems unlikely that it was ever used. It acted more as a threat against male prostitution.

Indeed, there has been only one documented hunt against homosexuals in the whole Byzantine era (IVth-XVth centuries) the one carried out by emperor Justinian in the early years of his reign, 528 or 529 AD [2]. Was this influenced by the writings and moral guidance of the "mainstream" canonic texts like those by Saint John Chrysostom and Saint Basil who condemned homosexuality? Other Christian writers of the same time opposed to such condemnations following the order of Jesus: "do not judge in order not to be judged". It seems that such incidents occurred only sporadically and quite often had political motives [3].

The official Church of the Byzantine times obeying the social demands kept the Roman practice of uniting members of the same sex and had ceremonies for same-sex unions [4]. One should not forget to mention the class of the eunuchs who enjoyed an important status in the Byzantine empire. Far from being asexual, several of them were certain to entertain same-sex inclinations and practices.

The expansion of the Ottoman Empire which gradually occupied this part of the world from the fifteenth to the early nineteenth century, when the modern Greek State was formed, has not affected the situation in any negative way. To the contrary, some Byzantine writers made fun of the ottoman habits which included male homosexuality. Some western eighteenth-century travellers like Pouqueville do not fail to mention the existence of openly male-male couples at the court of Ali Pacha for instance.

Ever since its recognition as an independent State in 1830, Greece has been balancing between east and west, between the heritage of the theocratic-totalitarian Byzantine and Ottoman Empires, and the humanitarian-democratic heritage of the distant past which through Renaissance, Enlightenment, revolutions and wars finally prevailed in the western Europe of the modern era.

People with alternative sexual orientations have not historically enjoyed both social and legal status together. At times society has been more progressive while at other times the law has. Today, the law has been left behind, a relic of the past, reflecting outdated ideas and practices, one more example of the so-called "hellenic paradox" [5].

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[2] K. Pitsakis, "The Position of Homosexuals in the Byzantine Society", in H. Maltezos (ed.), *Marginal people in Byzantium*, Athens, Goulandris-Horne Foundation, 1993, p. 171-269.

[3] Interestingly, a similar "moral" hunt mainly against homosexuals occurred within the Greek Church again in the late 1960s as a result of the military regime's effort to control the Church.

[4] J. Boswell, *The Marriage of Likeness: Same-sex Unions in Pre-modern Europe*, London, HarperCollins, 1995, p. 218.

[5] The Greek name for the country is Hellas and the adjective is Hellenic.

The first Greek penal law of 1834 was a translation of the Bavarian [6] penal law. Article 282 penalised sexual acts "against nature" in general (including all sexual acts between persons of the same sex, some sexual acts between persons of different sex, bestiality, necrophilia, etc.) punishing them with a minimum of one year's imprisonment and police surveillance. Even in the nineteenth century there was criticism against such a broad criminalisation.

The reform of the penal code which begun in the early 1930s incorporated a decriminalisation of homosexuality in general without the demand of homosexual or human rights activists. The official reason given was that such a general provision encouraged cases of extortion [7]. The truth I believe had more to do with social reasons.

The current [8] penal code distinguishes four forms of penalisation of "sexual relations against nature", all among males:

a) those resulting from an "abuse of power" against any subordinate person in any private relation,
b) those resulting from a seduction of a person under the age of seventeen by an adult (i.e. a person over seventeen),
c) those aiming at any kind of (pecuniary or material) profit and
d) those carried out as a profession (for a living).

If we examine the above provisions more closely, we find out that similar cases are already covered by other articles of the penal code.

For instance, Article 343 already covers sexual acts [9] resulting from *abuse of power* but in the public sector. Why restrict the protection of the private sector to acts among males only?

Adolescents younger than sixteen (or fifteen after the 1984 reform) are protected by Article 339 in general. Is the sole purpose of Article 347b to protect boys between fifteen and seventeen from the evil homosexuals who are looking to seduce them? If so, how constitutional is this provision?

The last two provisions do not have a non-homosexual analogy as prostitution is not generally prohibited but regulated. Again here we have a constitutionality question, as far as Article 347c is concerned. Furthermore, the recent law on prostitution refers to "persons" without excluding men, thus allowing men, under conditions, to offer services to other men. So, why are the provisions of Article 347 still in power? Just in order to stigmatise a group of people, especially by the derogatory headline of the article (acts against nature)?

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[6] The young Greek State was given a Bavarian Prince who became its first monarch, King Otto. Otto, who was underage during the early years of his reign, governed the country through Regents, one of which was count von Maurer, Professor of law at the University of Munich who introduced several German law texts.

[7] G. A. Magakis, *Crimes against sexual and family life*, Athens, Sakkoulas publishers, 1967 p. 98.

[8] Article 347 remains unchanged from 1950 when it was introduced till today.

[9] Regardless the sex of the perpetrators or the victims.

An important moment in the history of Greek homosexuals was the 1977 attempt to criminalise some typical gay behaviour and in particular gay cruising. The ill-fated draft law came out of nowhere. Under yet another derogatory headline, "*kinaidoi*" meaning persons who offend public decency, it sought to incriminate one's intention to get acquainted with other men, in direct opposition to the general principles of our penal system which punishes actions and not intentions. This draft law brought Greek gays, lesbians and transgendered people together for the first time. It resulted in the creation of a GLBT movement with the first group which was called AKOE, Hellenic Homosexual Liberation Movement, and which gathered thousands of signatures against the draft law, in Greece as well as in other countries. AKOE published its magazine, "amfi" [10] educating the Greek society on related matters for over two decades.

Ever since the 1960s there have been suggestions to either reform [11] Article 347 or to totally erase it [12]. Several gay activist and political youth groups are pressuring in this direction. The last government made an attempt in this direction which was not successful. The present government has promised to study the question.

Apart from the decriminalisation gay groups have consistently been asking for an effective antidiscrimination law and for the right to have same-sex unions recognised. In January 2005, the Greek government finally transposed Directives 43/2000/EC and 78/2000/EC with law 3304/2005 thus introducing equal treatment on the ground of sexual orientation at the work place. The law allows for a possible future expansion of the protection of the same ground for goods and services as well. It remains to be seen whether the new legislation, along with the efforts of the activists, will also act as an educator of the Greek society towards a more inclusive future.

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[10] www.amfi.gr

[11] K. Pitsakis, *op. cit*., p. 383.

[12] A. Koukoutsaki, *Drug abuse – Homosexuality*, Athens, Kritiki publishers, 2002, p. 168.

A closer look – the homosexual couple

The construction and recognition of private and public identity

A study on social norms concerning the homosexual couple

Frédéric Jörgens [1]

1. Introduction

The recognition of same-sex partnership can be regarded as one of the most fundamental social changes in the European Union of the last ten or fifteen years. Gay and lesbian marriage has become reality in three EU countries, with Spain very recently joining the Netherlands and Belgium [2]. Many other EU countries recognise same-sex couples through some other form of partnership institution, including Germany, France and the UK [3]. Overall, it can be said that the recognition of same-sex couples has become a mainstream fact within the EU. It is this observation that forms the starting point of the research project presented here.

This change has been characterised as both a legal and political event, present in public debates, with large media coverage, sometimes stretching over several years. As a result, the representation of homosexuality has been transformed. This

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[1] I gratefully acknowledge the financial support by the French Ministère des Affaires Etrangères. For help and comments on various drafts, I thank numerous friends, particularly Johan Andersson, Aphrodite Smagadi and Hans Selge. I am deeply indebted to all who have helped me throughout my project, especially to those who kindly accepted to participate in my interviews. Special thanks to Peter Wagner and Eric Fassin for supervision, help and support.

[2] In Spain, Parliament voted on opening same-sex couples in April 2005; in Sweden, marriage is equally planned to be opened to same-sex couples in addition to the existing registered partnership model.

[3] The *Pacs* in France since 1999, the *Eingetragene Lebenspartnerschaft* in Germany since 2000, *Civil Partnership* in Britain since 2005, and various forms of registered partnership institutions, notably in the Scandinavian countries. As most important exceptions, we can here note Italy and Poland.

transformation has been interpreted in contradicting ways: for some as a form of acceptance or normalisation, either symbolic or real, a symptom of progress or liberalisation, for others as a conservative backlash towards a revival of marriage through its extension into gay and lesbian lifestyles, and yet for others as a perversion of too permissive societies. However, once the transformation had become an established reality, the ideological fronts in the European version of the "gay marriage war" [4] have largely given way to a truce and complacency with the apparent social consensus that has come into place [5]. Not everywhere has this been the case, but even in those countries which have not moved towards partnership recognition, a sense of "lagging behind" has developed [6].

The media debates on homosexuality have covered various aspects of public life. In many cases, the recognition trend has been accompanied by the Coming out or Outings of public personalities, e.g. politicians in Germany, France, the United Kingdom, the Netherlands or in Italy. Within a couple of years, the public acknowledgment of homosexuality, as it seems, has become of little importance for MPs, ministers, mayors, party leaders and heads of regional administration, or has even turned into a bonus factor in election campaigns and a part of party strategies in order to appeal to voters [7].

Lawyers and social scientists, often after initial hesitations to include the *niche* subject of homosexuality into their research agendas, have started to show greater interest in the topic. The inclusion of same-sex couples into mainstream sociology of the family or family law proves that academia has equally responded to the trend. Indeed, in Europe [8], the field of study is in full-blown expansion. Numerous scholars have focused on comparative legal studies about the partnership institutions within

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[4] R. Mohr, "The stakes in the gay-marriage wars", in R. Baird and S. Rosenbaum (ed.), *Same-sex marriage: The moral and legal debate*, New York, Prometheus Books, 1997, p. 104f.

[5] Recent reaffirmation of positions by the Catholic Church, esp. in Spain but also by J. Ratzinger, not to mention the political climate in Poland after the 2005 elections, could be seen as counter-evidence to this. However, within the Western European political context overall, I believe that, *once introduced* on the national level, one can speak of such a consensus on legal recognition.

[6] See e.g. E. Menzione in P. Paterlini, *Matrimoni*, Torino, Einaudi, 2004, p. 184: "Italy is really the tail-ender in the field of positive rights for homosexuals" (own translation).

[7] Commenting on the victory of Nichi Vendola as the President of the Region Puglia (Southern Italy): "Let's say it, the electoral success of Nichi Vendola in Puglia has launched a new trend in Politics : gay is beautiful, very beautiful. And what is more: it wins" (own translation) (B. Jerkov in *Venerdí di Repubblica*, 15 April 2005, p. 45). Also, on the British Conservatives now embracing the idea of openly gay politicians, Alan Duncan, openly gay Tory MP, says: "We [the Tories] are in favour of having a fair share of them, you know, black, women, gay: great. That is after all society. But I think until I did it, they were really trying to do it, but they didn't quite know what it was about or why or how. (...) I just decided the time is ripe" (Interview conducted by the author, London, 16 December 2004).

[8] The development in Europe shows various interesting differences to the one in the US and Canada (e.g. in the latter two: earlier at universities, more through the courts). The nuances between European and Western trends in this domain will however not be explored here.

the EU and elsewhere. Sociologists have increasingly begun to look at homosexuality in ways that go beyond the study of sexuality. Gay and lesbian couples and families, as a research topic, have taken foot in sociology departments across Western Europe. This article and this book are equally proof of it.

In the study from which the material for this article has been taken, these two elements, the advent of the legal recognition of same-sex couples on the one hand and the social recognition of homosexuality on the other, are seen as fundamentally connected. The legal changes reflect the social changes and in turn affect the social acceptance and representation of homosexuality. They therefore jointly form the starting point for a sociological inquiry into the interconnectedness of these changes in the social realities of gays and lesbians.

While legal studies have repeatedly put an emphasis on the European and comparative perspectives on the topic, sociological analysis has most often been confined to the national scope, within which the differences e.g. between cities and rural areas have often been pointed out [9]. The approach chosen here deliberately ignores much of the national debates without denying their importance. Instead, it looks at the social change within a European social space.

In the first parts of the article, it is necessary to lay out what reasoning has led to the approach taken here. Throughout the article, the clarification of concepts are being intertwined with interview extracts. This intends both to catch the reader's attention and, perhaps more importantly, to underline the necessity of linking the conceptual query to the empirical one. In the first part, the question of homosexuality and identity is introduced. What does it mean to talk about homosexuality? How can it be defined and is it useful to speak of homosexual identity? Only thereafter, in part two, the empirical access to the field will be explained, i.e. the conducting of interviews in Paris, London, Berlin and Rome. While this structure may seem confusing, it proves useful because the fieldwork approach partly comes as a consequence of the preceding reflections. In part three, the concept of recognition is questioned. To what extent is it useful to speak of the recognition of homosexuality or of same-sex couples? What theoretical understanding of recognition is useful here? What is it that is being recognised?

Finally, in the remaining two parts, the appropriation of the legal and social changes in the discourses as taken from the interviews are looked at. Part four focuses on what interviewees think of the legal reforms; in part five, the question of social change in a broader sense is addressed.

As will become clear throughout the article, the aim here is not to present a clear-cut conclusion to the analysis of the social and legal change concerning homosexuality and same-sex couples. Instead, an attempt is being made to provide for a number of thought-provoking perspectives on how to look at the social change noted at the outset.

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[9] E.g. M. BARBAGLI and A. COLOMBO, *Omosessuali moderni*, Bologna, Il Mulino, 2001, or J. WEEKS, B. HEAPHY and C. DONOVAN, *Same-sex intimacies*, London, Routledge, 2001.

2. Public and private identities: constructions and transformations

To a certain extent, the question of partnership has become a new central norm in the study of homosexuality. On the one hand, the normalisation of homosexuality is noted: homosexuality is more often *represented* or, according to some, even more often *lived* as being about long-term partnership [10]. On the other hand, it is the definition of homosexuality itself that has been transformed, both in the outside perspective (what people in general think homosexuality consists of), and in the inside perspective (i.e. within a process of identity construction). We are then speaking of changes both in *who does what* and *who is called what*.

A. Defining homosexuality

Florence Tamagne, in her thorough historical study on homosexuality in Europe, points out that the definitions of homosexuality employed in historical and social science research are often "ideological":

> "*Ces questions sont au centre des recherches homosexuelles, et les réponses variables qui y sont apportées traduisent souvent une prise de position idéologique. La définition très restrictive de l'homosexualité et du lesbianisme adoptée parfois par les écrits homosexuels militants traduit une volonté politique forte de souder les communautés homosexuelles autour d'une identité claire et exclusive, en opposition complète avec la société hétérosexuelle dominante*" [11].

The question of where limits between political standpoints and social science research should be drawn opens up a large debate in itself. Of course, to a certain extent, analytical choices and research choices are always, at one level or another, connected to ideological positions. In the study of homosexuality, these choices often translate into a definition of homosexuality, centred either on a practice (e.g. sexual practice) or an identity as linked to a group of people. Yet again, auto-defining oneself as lesbian or gay can itself be considered a practice [12]. The recurrent problem concerns the question whom to exclude and where to draw the line.

What about bisexuality? What about priests who have hidden homosexual desires? What about male prostitution? What about prisoners who use homosexual practices as part of an inmate culture [13]? Etc. As there is no clear-cut solution to this problem, simplistic solutions should be avoided and the limits of each research approach be pointed out.

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[10] See e.g. H. Bech, "Commentaries on Seidman, Meeks and Traschen: "Beyond the Closet"", *Sexualities*, 2/3, 1999. On the normalisation debate see also Section 6F below.

[11] Fl. Tamagne, *Histoire de l'Homosexualité, Berlin, Londres, Paris 1919-1939*, Paris, Seuil, 2000, p. 11.

[12] See e.g. J. Weeks, B. Heaphy and C. Donovan, *op. cit.*, p. vii: "The book is based on interviews with self-identified "non-heterosexuals"".

[13] See e.g. E. Goffman, *Stigma. Notes on the Management of Spoiled Identity*, London, Penguin, 1963, p. 170f., footnote 7.

What has to be avoided is a one-dimensional definition of homosexual identity: two axes of multidimensionality have to be taken into account.

1. The definition of a homosexual identity applies to fundamentally different men and women.
2. The definition of homosexuality (potentially) applies to different aspects of an individual's identity.

As the first axis is generally acknowledged with references to diversity, the second axis, concerning the question of the individual's different social spheres, is often overlooked in defining homosexual identities. What different identities (of the same person) are constructed in different social spheres in which she or he moves her- or himself? What constraints or normative frameworks do these identities (public, private or secret identities) reflect?

B. Identity management

Indeed, the social changes of the last decade or so have surely had a most definite impact on how homosexual identities are managed within different social settings. Mostly, one cannot speak of *one* identity as such, but of the establishment of different identities according to the social context. This is not to say that homosexuality is characterised by double lives or schizophrenia. Instead, this observation reflects a general truth about all identity construction. An "identity management", between public, private and secret, is not specific to homosexuality. It may however be particularly interesting in the case of homosexuality because of the impact of the social change the field has undergone. Also, "identity management" may be particularly explicit and consciously reflected in the question of how homosexual intimacy relates to public identity; this at least is what a vast diversity in how identities are managed by the men and women encountered within this study suggests.

While public homosexual identities are not always problematic, mostly, possible difficulties and rejections and the long-term consequences of creating a gay or lesbian public identity are considered and weighed, with friends, colleagues, and the family. Annalisa [14] (Rome, 24) testifies on a long-term strategic position tailored on the necessities of her social environment at university :

> "You cannot tell everyone. (...) At university, only one friend of mine knows about it. With all the others, I first tried to find out what their attitudes were. Seeing that many of them are really closed-minded, or even find it disgusting, you avoid it. You avoid it because you will have to continue your studies with those people, and then the specialisation [in medicine]. People talk about it, and it's all a big village, so you avoid talking about it. Why? For what reason? It's already so difficult to continue with the studies, why should I also fight for that?"

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[14] All interviews conducted by the author between 2003 and 2005. All names are changed. Interviews held in French, German or Italian are translated by the author. Apart from age and city, any additional information about the respondents, such as socio-economic status, origin etc, have deliberately been left aside in the light of the explicative use made of the extracts within this article.

Many adapt to their social environment by forging a public identity suitable to it, thus “avoiding” potential problems, such as possible obstacles to a specific career plan. Pragmatic risk avoidance as identity management clearly reflects various levels of real, potential or imagined risk.

C. *Private lives and “secret gardens”*

Hostile environments are not the only factor for identity management; ideological positions play an equally important role. The ideological position here includes the question of what is considered “private”, as opposed to “public”, i.e. communicated only to a methodically restricted set of people, in relation to a given environment. Certain topics, questions and aspects of personal and emotional life are defined as inappropriate in specific contexts. The ideology of the “private life” has been constitutive of the concept of the “double life” of gays and lesbians – publicly mainstream, privately homosexual – which George Chauncey describes in his study of early 20th century New York [15]. The combination of constraints and available space for homosexual life made the double life the most common element of gay identity:

> “The complexity of the city’s social and spatial organization made it possible for gay men to construct the multiple public identities necessary for them to participate in the gay world without losing the privileges of the straight: assuming one identity at work, another in leisure; one identity before biological kin, another with gay friends” [16].

While comparatively, in Western Europe today, we surely live freer lives [17], identities still depend on the social and legal constraints and possibilities, hence the values that the individuals perceive to be constituent of what choices they can make in constructing their public identity. In other terms, while arrangements of homosexual identity management have often been regarded as deeply rooted in factual discrimination, they also need to be considered on their own account, independent of constraints.

Christophe (Paris, 39) for example describes his intimate life as his “secret garden” – to which neither colleagues nor parents should have access, despite his overall belief that no one would have a problem with his homosexuality:

> “In my work environment I don’t want to talk about my private life. I draw a clear line there. (...) With my family it’s the same. Well, they’re not stupid. Neither side asks about it. So, no question, no answer. [laughs] This being said, they have met my former boyfriend, they knew he was living with me, so, well, it didn’t disturb anyone. It doesn’t disturb anyone. (...) But it’s not necessarily a taboo. (...) But, what I mean, it’s my private life, they respect my private life. Even if they don’t know, even if I

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[15] G. Chauncey, *Gay New York, Gender, Urban Culture, and the Making of the Gay Male World*, New York, Basicbooks, 1994.

[16] *Ibid*., p. 133f.

[17] To explicit the context of Chauncey’s study, in 1903, for example, a New York visitor to a gay bath was sentenced to seven years state penitentiary. *Ibid*., p. 134f.

haven't had my coming out, they don't know, so they don't ask any questions. (...) If I told them (...), well, they are of a certain age, they are from a certain generation, but I think there would be a complete, complete tolerance, that's for sure. (...) No worries. But I haven't done it yet because it's my private life, so I keep my life private. I quite like to have my secret garden, as I often say".

The fact that Christophe refers to his "private life" also regarding his parents indicates the flexibility of the label itself. "Private" here coincides with "secret", and a no-question-no-answer-fence is built around Christophe's "garden" of intimacy [18].

D. Adapting biographies

The manner in which gays and lesbians adapt to the different social environments goes two ways: not only can the public identity be tailored according to the environment, but also the environment itself can, at least to a certain extent, be manufactured. Breaking friendships, founding other ones, moving to other cities or other countries and the choice of certain career paths rather than others are expressions of this [19].

In the case of Anne (London, 35) for example, the choice of leaving the finance and business world of the City of London and opting for a new start as a medical student is linked to the greater acceptance of her lesbian life style.

"A: Constantly, in your life, you are being asked: Are you married? At my age it's: Do you have children? I mean when you are not married. (...) Now, I find it relatively easy to say I'm not, I'm gay. And, well, I've been accepted by my professors, colleagues, the other students of all ages. I really wasn't confronted at all with any, well, but in my previous work environment it was far more difficult to say you were gay, actually virtually impossible. It was the City of London in its whole, well, as it is, where there are plenty of jokes about gays, about lesbians. I was working in an extremely masculine environment. In fact, I was one of the only girls in my team. So I had to confront all these jokes every day. So, well, I imagine in some work environments it's very easy to be gay. – In some jobs it may be better to be gay than straight. I have a friend, my friend in Paris, he works for Vuitton for example. [laughs]. – But in certain work environments it's clearly easier to be straight than gay I think. (...) And in fact, that's why I also decided to change my career, it's because, now that I'm in a gay relationship that I don't want to hide, and I don't really think that where I was working before, people would have accepted it. (...)

FJ: So it was also a reason to change your career you think?

A: It was not the main reason but it was a reason, yes".

[18] Broqua and de Busscher refer to "*la logique du* "don't ask, don't tell"", see C. Broqua and P.-O. de Busscher, "La crise de la normalisation", in C. Broqua *et al.*, *Homosexualités au temps du sida: tensions sociales et identitaires*, Paris, ANRS, 2003, p. 26.

[19] *Ibid.*, p. 27, see also e.g. D. Eribon, *Réflexions sur la question gay*, Paris, Fayard, 1999, p. 33-57.

While it is often the question of discrimination that dominates the talk about homosexual identities at the work place, in certain areas of work, on the contrary, according to Anne, it can even constitute an advantage [20].

E. Taboos and imagined risks

Often, the judgements on which such choices of identities rely in different social environments are determined by prejudices rather than on actual experiences of who is likely to accept and who is not. Jenny (Berlin, 20), for example, tells of her reluctance to present herself as lesbian to her Muslim friends:

> "Well, I have had positive experiences. And I think that at the end of the day, also my Muslim friends wouldn't have a problem with it either, but I don't really insist, because there's always a bit the fear that, you know, that they would somehow distance themselves, I don't know. Because I don't know how they would. I even have the suspicion that one friend of mine, she's Muslim too, that she wouldn't be against it herself, but I don't really mention the subject, because she's never had a relationship, neither with a man, nor with a woman. No idea, but somehow I also think that, I just have the feeling, I don't know why, but it's a feeling I have. And she doesn't, I think she wouldn't be able to cope with it".

Jenny's "feeling" that "they would somehow distance themselves" illustrates this imagined risk: the lived social consensus on what can be said to whom, and how an identity can be constituted in relation to friends, family, work colleagues, are most often based on presumptions and unspoken expectations rather than on concrete clashes of opinions. This taboo of homosexuality can be lived as a constraint or managed as a "secret garden" or yet again be avoided through an efficient choice of environment. In sum, in the construction of homosexual identities, as main factors we can distinguish between experienced conflict and taboos on the one hand, and ideological and pragmatic choices on the other.

F. Double lives again

Finally, the gay or lesbian identity of course goes beyond the question of the fact to be gay or lesbian, but is also, and probably most importantly, about how homosexuality is lived. Throughout the fieldwork of this study, needless to say, respondents had extremely different understandings of homosexuality, including sex life, whether or not to be in a long-term relationship, being faithful or not and under what circumstances, etc. Within gay and lesbian lives, different identities can in turn apply, as in the case of "double lives". Ian (London, 40), who discovered his long-term partner to be regularly frequenting cruising areas for casual sex encounters, points to his boyfriend's different sexual identities:

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[20] The question to what extent there are specifically gay and lesbian career choices of course implies various aspects that are here not pursued any further, see e.g. D. Eribon, *op. cit.*, p. 50-57.

"FJ: How did you find out about it, did he tell you about it?

I: He never told me about it, I found out about it. I caught him out, twice.

FJ: And how did you find out?

I: Probably just because he'd been in cruising grounds and it came out when I used to do the washing. I used to wash the clothes and I, I – the knees on his jeans were very dirty, and – he put them in the washer inside out. And I'd do the washing and pulled them back the other way and see that they were dirty, so I knew he'd been cruising, and – I just, – I just, – questioned him about it and he admitted it to me. – Twice.

FJ: Yeah.

I: I, I didn't question him, I told him I knew already, so then he admitted it.

FJ: Yeah.

I: But he had a history of cruising and stuff like that anyway".

As the various, surely not representative, examples throughout the interview material illustrate, the construction of different public and private identities plays a role at various levels, including the construction of different identities *within* gay and lesbian life choices. This latter view somewhat contrasts with a linear view of "being in the closet" and "coming out" [21].

In many cases, it is therefore on the background of these different constructions of public and private identities that the question of legal recognition has to be understood.

G. No longer "private"?

It has often been pointed out that in the Western world and within the distinction between the public and the private sphere, homosexuality, even since its legal toleration, is restricted to a private (and shameful) practice. In this perspective, it is seen as inferior to the heterosexual public sphere. As Didier Eribon points out: *"[L]'espace public est hétérosexuel et les homosexuels sont relégués dans l'espace de leur vie privée*" [22]. All of a sudden, one can argue, with the State recognition of lesbian and gay partnership and the banalisation of the coming out of public personalities, this affirmation seems to have become obsolete. The legal document of partnership recognition is by definition public, and the act of marriage or partnership registration can be regarded as an encouragement precisely to drag homosexual identity into the public sphere [23]. However, precisely on this point, a certain resistance to trust the

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[21] On the question of "coming out" from a discourse analysis perspective, see K. PLUMMER, "Coming out, breaking the silence and recovering. Introducing some modernist tales", in *Telling Sexual Stories: Power, change and social worlds,* London, Routledge, 1995, p. 50-61.

[22] D. ERIBON, *op. cit.*, p. 148.

[23] One should point out that in France, the public access to the names of the "pacsed" partners has specifically been prohibited in order to avoid the public access to knowledge about the homosexuality of the persons involved: "*le registre n'est pas ouvert au public car il est susceptible de comporter des éléments touchant à la vie privée des intéressés*", *Circulaire du 10 novembre 1999*, in C. MÉCARY and F. LEROY-FORGEOT, *Le Pacs*, Paris, PUF, "Que sais-je?", 2000, p. 63.

acceptance of the "public sphere" *as such* fully from the part of gays and lesbians can be observed. Gérard Ignasse in his analysis of "marriage ads" in newspapers for gay and lesbian *Pacs* celebrations, notes the absence of surnames in most of the newspaper ads:

> "Isabelle-Aude et Isabelle
> Sont heureuses de vous annoncer qu'elles se sont pacsées
> Pour cent ans de bonheur et +
> Le 15 février à Paris – 3e arrdt" [24].

Ignasse refers to the fear of homophobic persecution to explain this phenomenon; anonymous ads are clearly unusual in the case of heterosexual marriages [25]. Here again, we should point to a careful and often pragmatic case-to-case management of various public identities. Factually, the legal recognition of same-sex partnership offers one further possibility of a public homosexual identity, where the signature before the State authorities *per se* represents a public expression. The management of the various aspects of most homosexual identities apparently (and probably increasingly) escapes a clear-cut classification into the categories public, private, or secret.

After these reflections on the different forms of public and private identities, it is useful to briefly consider what a fieldwork strategy can take on the methodological level.

3. A fieldwork approach: what field?

Before turning to the concept of recognition which has been used in the title of this paper, it is necessary to explain the approach which has been taken in the collection of the interviews within this study. How do the problems encountered in defining homosexuality translate into a research design in a sociological research project?

First, the problematic definition of homosexuality has been a main concern in deciding on an approach. As outlined above, the concept of homosexuality employed in various sociological approaches often varies between those based on a *practice* (e.g. sexual, frequenting sub-cultures or location various locations, self-definition etc.) and *essentialist* views, linked to the idea of sexual *orientation* [26]. Interestingly, the increasing focus on the question of the homosexual *couple*, now omnipresent in legal, philosophical and more and more in sociological studies of homosexuality, is often implicitly accompanied by a conception of homosexuality based on *sexual orientation* (i.e. a person "*is*" lesbian or gay, instead of "*does this or that*"), and the latter is in turn closely linked to the notion of homosexual rights [27].

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[24] G. Ignasse, *Les pacsé-e-s*, Paris, L'Harmattan, 2002, p. 42.

[25] *Ibid*.

[26] This problem is expressed both in the philosophical positions of either constructivism or essentialism in the study of homosexuality (see e.g. M. Barbagli and A. Colombo, *op. cit*., p. 10-13), and in the choice of access and sampling in every empirical study (see the discussion in J. Weeks *et al*, *op. cit*., p. 200-206).

[27] See M. Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject", *EJIL*, 14/5, 2003, p. 1023-1044.

A sociological study that aims to analyse the people concerned by the social change of the recognition of same-sex couples (lesbians and gays) always faces the dilemma to be accused either of not well representing homosexuals (when the study is based on a *practice*), or to establish a field around a more or less convincingly pre-tailored concept (when it tries to represent *the homosexuals*). Who belongs to this set of people? As mentioned above, a clear line cannot be drawn for representing homosexuality as such. Any empirical study on homosexuality necessarily will have to restrict itself to a specific field.

A. The metropolitan gay and lesbian bar scene

The route that was taken here – and there is probably no unproblematic access in this area of study – was to choose a clearly restricted field which is linked to a practice, namely the field of gay and lesbian bars and cafés, in which respondents have been directly approached. This may sound like an odd approach to a question that starts off with the couple: about half of the respondents are single or in a short-term relationship. But of course, not only lived partnership experiences are of importance here. Rather, discourses *about* the couple and the role of social and legal recognition are the main interest.

The main problem of the bar approach is that it filters out all those who would not frequent gay and lesbian bars. However, this disadvantage, as a bias, on the contrary can be seen as a useful limitation of the scope of what is being looked at: it is a specific type of gays or lesbians we are looking at, namely those frequenting the gay and lesbian *bar scene* [28]. The findings therefore need to be linked back (ultimately, not in this paper) to the field that has been under study and will have to be evaluated in this light [29]. The advantages as compared to other routes of access are to avoid limiting the interview sample to respondents *a priori* interested in the study (as through ads in the gay press, internet sites or gay locations), or to an implicit ideological or socio-economic bias (as could be the case in a snowball system). A set of gay and lesbian bars and cafés has therefore been selected within which respondents have been recruited on a random basis. The sample is clearly limited to a certain type of gay and lesbian life style, reflecting differences of bars and of the role of the bar culture in the different cities where the fieldwork has been based.

Additionally, the specifically European perspective to the topic has guided the choice of a cross-national approach. The field has been restricted to a metropolitan urban environment, but extended to four countries. In short, the four capitals of the

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[28] Throughout the article, I refer to gays and lesbians, while e.g. bisexuality is not further mentioned. This corresponds to the idea that we are looking at homosexual aspects of identity, which, to be sure, may not exclude heterosexuality altogether; in fact, the larger part of the respondents within the study could, dependent on the definition, be considered bisexual over their lifetime.

[29] These restrictions and what the sample represents on the whole cannot satisfactorily be explored here but will have to be born in mind by the reader. In particular, the questioning of the socio-economic factors within the sample and the question of what types of bars are chosen are disregarded in this context.

four largest EU countries have been included in the sample, London, Paris, Berlin, and Rome. Here, again, the restriction carries an inherent bias which is deliberately taken on board: rural areas or even secondary cities have been left aside. Yet again, this introduces a sharp restriction, where the chosen urban environment can be considered, at least relatively, to constitute an avant-garde environment concerning gay and lesbian culture [30]. At the same time, part of its potential strength lies in its cross-national character, which allows for a shift in perspective away from the national context – in viewing the social change under study as one that transcends the political developments within one country. As a result, and slightly counter-intuitive for some, the sample reflects a European metropolitan gay and lesbian bar milieu, without aspiring to a strictly comparative methodology. The material from the four cities is instead to a certain extent considered to reflect one single field within which various social, cultural, gendered, generational and other cleavages are important.

B. "Let's marry in Amsterdam"

In countries where no legal recognition of same-sex partnership has been introduced (here: Italy, and the UK before 2005), it is remarkable to what extent the existence of this institutional recognition in other countries is referred to. As a symbolic recognition which feeds into the construction of identities, borders are often transcended, and an institution, such as marriage opened to same-sex couples, e.g. in Spain, can have a symbolic effect beyond its borders, probably to a similar extent as TV shows and Hollywood productions that reflect gay life styles can impact on changes of how homosexuality is viewed in society. The existence of gay partnership institutions abroad can even provide an (imaginary) option for life choices, as in the case of Laura (Rome, 34) who considers the option of marrying in the Netherlands:

> "L: Every now and then we got into this talk and it was a way to, yes, also to stress the importance of the relationship, right?
>
> FJ: Mm.
>
> L: Anyhow it was very, very important, so, perhaps jokingly, as a game, this thing came out: Oh, come on, let's go to Amsterdam and we marry there. Then again, as we don't have it here. Or, anyhow, as the story is over, there was no way to do it; there was also some lack of maturity. So, I don't know when I could do a thing like that. I mean, I should also find the right person, [laughs] to say, ok, [laughs], I marry her".

As to the political and legal developments, the European context is relevant in two respects. First, the influence of initiatives originating from the European Parliament and the European Commission should not be underestimated, which have had a certain influence on various legal reforms, most recently concerning non-discrimination at the workplace. Second, the high degree of interaction on all levels (from the parliamentary to the personal) makes cross-references between the European countries omnipresent. Legislators compare their country's position in the degree of social progress that has been achieved or evaluate how far they can or should go in legal changes according to the experience in other countries.

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[30] See e.g. the discussion on the role of the city in J. WEEKS *et al*., *op. cit*., p. 82-86.

Also, on the personal level of the individual, the milieu under study in particular is marked by international and cross-European exchange: frequent travel to other European cities, partnership and friendship experiences with foreigners, knowledge of social acceptance or the lack of it in other parts of Europe and the world, are a commonplace in the bars of London, Paris, Berlin and Rome. Not rarely, apart from inner-country migrants who have moved to the "big city" [31], the individual life stories of those encountered stretch through more than one country, as in the case of Miguel (London, 23):

> "M: I've been living here [in London] for one year now. I used to work [in Spain], and then in Andorra (...) I came here to improve my English and blablablah. – And the next step is Berlin, next year, to live there. Yeah. (...) I have a lovely boyfriend. German obviously, that's the reason I'm moving. (...) We met on the net.
>
> FJ: Ah, ok.
>
> M: In March. And we met face to face in June. [The interview is held in October 2004]
>
> FJ: Yes.
>
> M: In June we started something, but not a formal relationship. – And we needed to know each other better. So from June to August we were talking on the phone every day. One hour, two hours. And finally in August, I went there again, and I met all his family, and since the 14th of August I'm married. [laughs] Not married, no. We are together. (...) He lives close to Berlin, that's the reason I'm going there".

Miguel's life plans reflect a perspective on mobility that includes pan-European career options and cross-national internet dating with the aim of intimacy construction. He explores to a maximum both the freedom of movement in deciding on a workplace within the EU and the technological possibilities that smash geographical distances even on the love market. While it may be an extreme example, it reflects a certain social reality, at least for some within the sample of the study.

So, does it make sense to choose four cities, and to decide to understand them as one field, choosing not to adopt a comparative methodology? Similarities in the discourses encountered in the fieldwork, but in particular the repetition of similar differences *within* each of the city-samples overall seem to validate the cross-national approach taken here.

The research is based on some fifty open semi-conducted interviews of approximately one hour each. The material is considered a non-quantitative collection of discourses from the field under study; it is important to understand the non-representative but instead explicative and illustrative character in both the approach and the presentation of quotes in this article. In a similar line, a further necessary clarification regards the use of the concept of "recognition" employed in analysing the social and legal changes subject of the study.

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[31] For a quantitative approach to the move to the big city within the Italian context, see M. BARBAGLI and A. COLOMBO, *op. cit.*, p. 193-196.

4. Recognition, a slippery concept

The concept of recognition, which is easily employed in this context, requires some clarification. This is because it can largely be regarded as a slippery concept, due to the different theoretical strands within which it has been employed.

A. Community and identity?

Within the last decades, "recognition" has become a buzz word in social and political philosophy, in particular since the rise of contemporary communitarian thought. In the latter, a political claim to recognition is often derived from the importance that common identities, such as cultural, linguistic or ethnic identities, have for the individual. In a "politics of recognition", recognition of diversity and group identities are therefore seen as a central claim for the construction of just institutions [32]. In contrast to liberal universalist perspectives, this approach to recognition can be seen as based on the view that the individual acquires meaning only through culture and community. The individual is not seen as free-floating, but as embedded in a specific cultural context, such as in Sandel's concept of the "encumbered self" [33]. Surely, the embeddedness of the individual in a social and cultural context of meaning constitutes a fundamental basis for the sociological and anthropological understanding of what societies are about [34]. However, communitarian or multiculturalist approaches to recognition arguably lead to various problems and flaws [35].

The recurring problem is that of defining identities as group identities, the recognition of which will inevitably fail to grasp the fluidity and changeability inherent to both individual and group identities [36]. A "recognition politics" approach such as Charles Taylor's is based on the question "Who am I?" while, as various critics have pointed out, it may be necessary to consider identities as "wide selves", transcending friendships, family relationships, ethnic and national identities, etc. [37]. As Nancy Fraser puts it:

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[32] C. Taylor, "Politics of Recognition", in A. Gutman (ed.), *Multiculturalism: Examining the Politics of Recognition*, Princeton, Princeton University Press, 1994, or A. MacIntyre, "Is patriotism a virtue", in R. Beiner (ed.), *Theorizing citizenship*, Albany, State University of New York Press, 1995.

[33] M. Sandel, *Liberalism and the Limits of Justice,* Cambridge, Cambridge University Press, 1982.

[34] See P. Wagner, *Theorizing Modernity: inescapability & attainability in social theory*, London, Sage, 2001, p. 64f.

[35] To be sure, Will Kymlicka's often cited understanding of multiculturalism, in contrast to communitarian positions, represents an instrumental defence of group rights within liberal theory (W. Kymlicka, *Multicultural Citizenship*, Oxford, Oxford University Press, 1995). It nevertheless leads to similar problems.

[36] See e.g. A. Appiah, "Race, Culture, Identity: Misunderstood Connections", in G. Peterson (ed.), *The Tanner Lectures on Human Values*, Salt Lake City, University of Utah Press, 1996.

[37] D. Copp, "Social unity and the identity of persons", *The Journal of Political Philosophy*, 10/4, 2002, p. 365-391.

> "The overall effect is to impose a single, drastically simplified group-identity which denies the complexity of people's lives, the multiplicity of their identifications and the cross-pulls of their own affiliations. Ironically, then, the identity model serves as a vehicle for misrecognition" [38].

The implications of the debates on recognition and identity in social and political philosophy cannot satisfactorily be clarified within this paper, if at all. But it seems important to outline the theoretical line that was pursued at the outset of this project, for which Axel Honneth's approach to recognition has been a major source.

B. Honneth: recognition as love, law and solidarity

In a very different approach, Honneth has used the concept of recognition as the foundation for his contemporary reformulation of Hegel's early work. In *Struggle for Recognition* [39] Honneth sees intersubjective forms of recognition as the baseline for a social theory that explains the position of the individual in State and society. His approach is useful as a framework for study, particularly because of the different spheres it proposes. Here, it has the advantage that it takes the complexity of identity formation in multifaceted social environments as the core of the analysis, where three degrees of recognition are distinguished: love, right and solidarity.

1. Love

Based on Mead's and Hegel's conceptions of self-constitution through intimate love relationships, Honneth sees love, i.e. mutual affection between mother and child, lovers or friends, as the fundamental basis of "autonomous participation in social life" [40]. As the primary form of social life, love has the double function of symbiosis and individuation, as most clearly exemplified by the mother-child relationship [41]. It is the trust in a stable affection that allows for the possibility of independence and autonomous self-constitution through the supporting acknowledgement of the loving person [42].

2. Law

While (traditional) law initially refers to the ascribing of rights and duties to a person whereby she acquires a certain status within society, modern legal systems are based on universalist egalitarian principles from which privileges and exceptions have been banned. Rights to personal freedoms, to civic participation and to welfare

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[38] N. Fraser, "Rethinking recognition", *New Leftist Review*, 3, May-June 2000, p. 112.

[39] A. Honneth, *Kampf um Anerkennung*, Frankfurt, Suhrkamp, 1994.

[40] *Ibid.*, p. 174: "*[E]rst jene symbiotisch gespeiste Bindung [Liebe], die durch wechselseitig gewollte Abgrenzung entsteht, schafft das Maß an individuellem Selbstvertrauen, das für die autonome Teilnahme am öffentlichen Leben die unverzichtbare Basis ist*".

[41] *Ibid.*, p. 158-169.

[42] *Ibid.*, p. 173: "*[E]ine durch Zuwendung begleitete, ja unterstützte Bejahung von Selbständigkeit ist also gemeint, wenn von der Anerkennung als einem konstitutiven Element der Liebe die Rede ist*".

form a fundamental basis of self-respect. To be recognised as a bearer of rights allows for direct procedural access to socially accepted claims, where legitimacy is assured through its formal and public character. The denial of (equal) rights, on the contrary, undermines self-respect [43].

3. Solidarity/Social acceptance

Honneth refers to the third form of recognition as solidarity, but uses the term "*soziale Wertschätzung*" to describe how solidarity is achieved. To apply the idea of solidarity (a community of values in a broader sense) to our context, the terms "social acceptance" seem to convey the idea more easily. To acquire honour and pride in society in a way that allows for the recognition of being a valuable part of society, a horizon of common values is necessary. In the context of modern pluralism, solidarity requires a partaking in the others' preferences, goals and achievements. This needs not be equivalent to a collective value frame as such (as it could be in a community of values in the stricter sense), but is rather understood as an agreement on the space that is given to each in a struggle for recognition. This (democratic) space implies the possibility for every person "to experience oneself as valuable to society" [44]. Importantly, Honneth claims that the concept of struggle for recognition as a struggle for social acceptance bridges the gap between a collective ethical "horizon" on the one hand and the "most diverse life aims" on the other [45]. Unlike in liberal neutrality for example, the latter are not held in a zone of non-interference, but instead staged at the centre of society as a struggle that forms an inclusive dialogue about social life. It remains an open question what role the State plays here. But in our context, we can speak of the importance for the individual to experience her aims and achievements, including the construction of intimate partnerships, as valuable within the society she lives in.

C. Reciprocity, symmetry and equal autonomy in recognition theory

Concerning law and solidarity, Honneth points to the difference between the sphere of recognition as a formal structure on the one hand and its (modern) normative content, on the other. Here he notes that law traditionally referred to a specific status as a position in society [46], while modern citizenship implies the recognition as bearer of rights among equals. While the normative specificity of the society that Honneth has in mind is also made clear for the sphere of solidarity (or social acceptance), it is largely understated or denied for love, where certain (traditional) forms of "love" recognition could arguably be seen as relating to role models rather than to mutuality and reciprocal granting of independence. The concept of domination and asymmetric recognition is here left aside. Overall, a solid defence of liberal egalitarian values is implied in all three spheres of Honneth's theory of recognition: a normative position

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[43] *Ibid.*, p. 174-195.

[44] *Ibid.*, p. 210: "*als wertvoll für die Gesellschaft zu erfahren*".

[45] *Ibid.*, p. 196-210.

[46] *Ibid.*, e.g., p. 176f.

that equally forms the basis of the work undertaken here. It however remains an open question what form the role of the State should be in defending these values that transcend all spheres. In other terms, Honneth's social theory approach does not in itself prescribe a political agenda concerning recognition, but has to be seen as deeply linked to reciprocity, equality and a democratic civil society.

Surely, all three spheres are involved in the question of the recognition of the same-sex couple. First, concerning love-recognition, a crucial question regards the role that the legal and social framing of partnership and family has on its function as a fundamental basis of self-construction and self-consciousness. The question should be raised what form of partnership, family or friendship relations in a broader sense, can fulfil this function.

Second, concerning law-recognition, we can easily think of the often repeated argument that "restricting marriage to opposite-sex couples is a denial of *equality*" [47]. This institutional denial is experienced as a misrecognition, in which "an institutionalised pattern of cultural value constitutes some social actors as less than full members of society and prevents them from participating as peers" [48].

Finally, solidarity-recognition is most clearly touched by the inclusion into a shared set of values that the recognition of same-sex couples represents. The committed same-sex couple has arguably entered the collective ethical horizon of Western European societies. For other gay and lesbian life-styles, in which a focus on couple life is rejected, this drive can be interpreted either as equally approaching the ethical horizon, or instead, being further marginalized by the reinforced partnership norm. As a conclusion, it can be said that Honneth's framework to recognition provides space for various aspects that seem crucial to the study undertaken here, where the approach of "politics of recognition" appeared to be too one-sided.

At this stage, at least two more points require clarification. First, how important is the legal recognition to the individual in contrast to love and social acceptance? Second, what, in contrast to certain identity-based understandings of recognition, is being recognized?

D. The role of the law and the State

What can be said about the degree to which the legal and State recognition is important to the individual? Using Honneth's three spheres approach seems to indicate a preconceived answer to the question of how much the legal recognition matters to the individual. But instead, one has to bear in mind that the importance accorded to State registration of partnership is determined in a social context, where sometimes the role of the State is of relatively little importance. Annalisa (Rome, 24) in the following extract seems to say that, according to her, the Church would ultimately be the more relevant institution to establish recognition through the blessing of partnerships:

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[47] R. Wedgwood, "The fundamental Argument for Same-Sex Marriage", *The Journal of Political Philosophy*, 7/3, 1999, p. 225. As there are various problems with the equality argument (discussed but discarded by Wedgwood), in this context it should simply be noted that respondents within this study often referred to the denial of same-sex marriage as an inequality of rights.

[48] N. Fraser, *op. cit.*, p. 114.

> "And so, I think that civil marriage, here in Italy, is not sufficient to make things change. – You would also have to have a change from the side of the Church. Because the State, yes – but legalization by the State only is not enough in a country like ours, that is seen as, where you feel the influence of the Church a lot".

This example, in which Annalisa underlines the influence of the Church as opposed to that of the State, helps to bear in mind that the question of what role State legislation itself has or can have for the individual and her own social environment is part of the question, and it is not settled at the outset. It may, in particular, depend both on the country and on the individual's personal cultural context.

E. Recognizing norms

From what has been said above about the variety of homosexual public and private identities, the idea of recognition cannot be understood as recognizing a "gay and lesbian identity" as such. Instead, it is the recognition of certain norms that has to be talked of. By some, this recognition, for example of a certain public homosexual identity, can indeed be lived as the non-recognition of individual life choices that may stand in conflict to them. While the legal recognition of same-sex partnership enforces an identity choice based on proclaimed partnership, it can be lived as a setback for those who identify with a don't-ask-don't-tell conception of homosexuality, such as defended in Christophe's "secret garden". In the case of Nicole (Paris, 54), a Parisian journalist, this feeling of a setback through the recognition of a new norm is expressed in her dislike of her colleague's partner's photograph on the office desk:

> "Every day, he talks about his boyfriend. He's got his picture like we would have the photograph of our child, next to the computer, next to the ashtray. For him, it's the picture of his partner. I find that completely, a bit too much you know. But he's like that, he needs to be [ironically:] *reassured*, he is very [ironically:] *proud*. (...) Say, when you ask him, have you had a nice week-end, he says "we have", it ends up being a bit annoying. (...) I don't like that way of putting yourself on display. Because it's a guy who for the rest of it is rather dry, it's not a sweet one at all. He's always showing that [accentuated:] *he* has got feelings, while in fact, he thinks only about himself, he's a bit like everyone else. (...) Yourcenar [a French writer], nobody has ever dared to bring in her private life. That's what I like – (...) living peacefully, openly, without making a religion out of it (...) and without being bothered by others".

In Nicole's case, the rising norm of public same-sex partnership coincides with a putting into question of the value given to the self-made woman who had publicly focused on her professional identity [49]. The dominant norm where homosexuality is restricted to the private domain, as has been noted above, seems to have been altered, at least in Nicole's office in Paris. The question of public identity, I believe, successfully illustrates the shift in norms, hence the recognition of a value rather than of a person. This shift in turn influences the construction of identities, where the

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[49] On the self-made woman, see J.-C. Kaufmann's subtle analysis in J.-C. KAUFMANN, *La femme seule et le prince charmant*, Paris, Nathan, 1999.

concept of homosexuality moves along with value shifts in society. This can be seen especially on the generational level but not only. Recognition is always the recognition of values in the first place. The question has to be: *what aspect* of the person is being recognized? And *how* is the person being recognized?

The various realities of how public identities are created in divergent social environments, where a case-to-case management of openness or privacy remains a dominant feature, provide the background for the question of how partnership institutions are judged by the respondents. The discussion on the notions of identity and recognition in connection with a fieldwork approach are fundamental to a study of social and legal recognition of same-sex partnership as it is understood here. As has been shown, partly through the illustrative use of interview extracts, the fieldwork material largely feeds back into the theoretical positions that stand at its basis concerning homosexuality, identity, and recognition.

In the following, the analysis of how recognition of partnership is equally experienced as a change in norms for identity construction is taken to a more concrete level. A closer look is taken at what respondents say about gay marriage and partnership bills such as *Pacs*, *Civil Partnership*, and the *Eingetragene Lebenspartnerschaft*.

5. Normative discourses: It's a good thing, but…

In reviewing what opinions the respondents have about the developments in the recognition of same-sex partnership, the first observation is the prompt positive evaluation of the reforms that has been encountered.

A. A good thing overall

Most often, in the interviews, the recognition of homosexuality through the partnership status is seen as a form of social progress, an expression of an open society, rather than as an institution that corresponds to a lived reality or personal desire. All respondents somehow see it as a "good thing overall". Mostly, the idea is that the acceptance in partnership institutions has and will have a positive effect throughout the different social spheres. The idea of progress is often represented as coming from the political level from which slowly, and in the long run, it triples down to every corner of society.

> "Katharina (Berlin, 22): For me it is not that much the question of marriage that is important, but rather [its] consequences in the social environment. And I think that it is simply a fact that contributes to recognition in general.
>
> FJ: To what extent?
>
> K: Let's say that in large parts of society, it is still not seen as normal if two women or two men are together. And I think that if at that political level it is possible to marry, or to register as a couple, in a way it contributes to its acceptance. Even if it is something that has to be deepened. Of course it will need quite some time until it goes through to all social layers".

In Katharina's description, the legitimacy that the law introduces is regarded as having something like an educational effect on society at large. While for some, it is the law itself that serves this function of progress, for others this role is rather played by the debates and the media coverage that have accompanied the legal changes.

Increased information and more widespread knowledge on homosexuality and gay life styles is what many see as key aspect of the legal changes around partnership laws. In this line of thought, one could presume that the political elite would figure as the avant-garde social actor who pushes things forward. But this is only rarely what the discourses here encountered imply. Instead, an inner logic to social progress seems to be the driving force, a broad necessity to create a more liberal society. At best, political elites are viewed as responding to this necessity; often the political response is viewed as arriving "late".

> "Karl (Berlin, 47): It's a good thing of course, and sad however, that we really had to wait for the new millenium for it to arrive. And a shame for Germany, while for a long time we had seen ourselves as more tolerant, as a frontrunner, well frontrunner not really, I guess the Netherlands were the avant-garde in it".

Interestingly, the feeling of "being late" is not restricted to any of the countries present in the study:

> "Caroline (Paris, 30): I think it's rather that they catch up with other countries, to get to the same level, because we are quite behind on these things. So I think they've given us that, well, the *Pacs*, to tell us, well, us too, we have made a bit of an effort on this".

In these social debates, the law sometimes becomes an accessory among various forms of media events. *Civil Partnership*, *Pacs* or gay marriage are often competing with TV shows, soap operas, the coming out of a well-known politician, an artist, or the Gay Pride. As Caroline continues:

> "They talk a lot about it on TV. Anyhow, you watch all the soap operas they are showing at the moment, there's always a gay guy in the series. In movies it's the same. It's really about being more present in the media. So, obviously, it gets more into people's mentalities. But I think it's not accepted yet as it should be, as a normal couple, fully and completely. I think we are always treated as being something different".

B. … but not for me

However, the picture becomes much more diversified when the respondents consider the use they could personally make of partnership institutions [50]. While the respondents generally share a positive view of the consequences of legal recognition as regards the acceptance of gays and lesbian in society, the attitudes towards the use they would personally make of it differ greatly. While some fully embrace the idea to marry or register their relationship, and some have thought through and discussed the options and legal consequences with their partners, others reject the idea completely, independent of whether they are in a long-term relationship or not.

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[50] It has to be kept in mind that the presentation does not aim at being representative, but rather to illustrate different logics within which the (possible) changes are appropriated.

> "Gemma (London, 36): People say why can't we get married? But to me it's like: why would you want to? – Can you not commit to each other?
> FJ: Yes.
> G: [laughing:] But maybe that's to ask them too much".

Christophe (Paris, 39), coherent to his idea of a "secret garden", says that both when he had been in a long-term relationship and now, thinking of future relationships, the idea to marry or sign a *Pacs* has never crossed his mind:

> "I don't want to sign anything before a court or a town hall or anywhere, I'm not interested in it. I mean, it's good that it exists, but as for marriage, I'm not interested. (...) The same for the *Pacs*. Even if it is for financial problems or anything, it doesn't interest me. That's my point of view. But then, this being said, I am not against the *Pacs*. I am in favour of it to exist. Then everyone puts into it whatever he wants. I don't see any advantage or disadvantage in it. No, it leaves me without any particular opinion. (...) I had a partnership for five years and never have we had the idea to sign a *Pacs* or anything".

While Christophe claims to be indifferent to it, his dislike of signing a *Pacs* or marrying goes at least as far as to renounce financial benefits it may imply. A similar point of view is expressed by a gay couple in Rome, who say gay marriage is a very good thing, but not for themselves:

> "Paolo (Rome, 50): Actually, I'd rather not be registered at all myself. (...) If you could be wholly anonymous as a person.
> Giacomo (Rome, 27): If you could, I don't know where my name is registered, but if you could scrap your name from the list. [laughs] Even by yourself. (...) For me, I said it already, marriage is something I have never thought of".

Finally, in talking about options of partnership registration, it is often assumed at the outset that fundamentally most or all want to be in a couple. However, sometimes, the idea of the couple, in its conventional form, is altogether rejected. Gareth (London, 45) for example, who has a regular lover, who himself is in a relationship with another man, does not consider partnership an aim at all:

> "G: I'm not, I haven't got a partner, or anything. And – it never really bothered me, but, so, –.
> FJ: Yes.
> G: Never. There was no: "Ah, don't you want to meet someone?" Not really. I don't know. (...)
> G: I don't know. But I've never really – probably, sometimes I think, oh yeah would be nice, and then I think, oh no it wouldn't, 'cause, I don't think I see that many happy relationships about.
> FJ: Yes.
> G: My friend Paul, should I talk about him? Right? He's been with this guy for two years. And there's no way they're happy".

Still, as noted above, the approval of the reforms is virtually unanimous; the various critical views concerning the institutionalisation of a love relationship here never translate into a (political) opposition to the legal recognition of same-sex couples.

C. Embraced and appropriated

Registered partnership and same-sex marriage as an option [51] seem to face a vast amount of different lived situations, desires, life plans, practical and ideological constraints. Many, however, do consider partnership institutions an option for themselves, whether they are in a long-term relationship and have actually talked about it and sometimes have concrete plans, or whether they think of it as an option or an aim to pursue in the long-run, e.g. once they would have found the right person to do it.

Anne and her girlfriend Rebecca have been together for five years, currently live together, and have already decided to sign a *Civil Partnership* as soon as the law takes effect, in December 2005. For Anne (London, 35), this decision is linked to various motivations: pragmatic, moral, symbolic, and political ones. She invokes inheritance rights, the societal importance and the celebration as a rite in itself:

> "A : I own my flat. If I die I would want Rebecca to inherit it, without paying all the taxes on it. So, it would be for a financial reason, really. – And also for a question of, – recognition. – Moral recognition. – To be on an equal footing with straight couples, that's important. So, yes, we will sign it. – I think it will be effective from the fifth of December. (...) We are very sure about our relationship. So there's no doubt about it. (...) Now that it will be possible to do it we have to do it. Because if now nobody uses it, if no one does it, it will affect the value of the act itself.
>
> (...)
>
> A: Oh yes. I think we will have a party. Yes. Oh yes, it will be a celebration. That's the beautiful thing of marriage, to be able to get the people together who would never meet, but who have counted in the lives of the two persons. To get everyone under the same roof, on that unique occasion. So, yes, clearly, of course, it will be a celebration of our partnership, and of the friendships that we have made on the way. (...) All those who want to come.
>
> FJ: Yes. [laughs]
>
> A: The family, yes, the family, friends, the close friends, the friends who've been important. (...) To get them together and have a party".

The act of registering a partnership is often very differently connoted. Some see it as a contractual union without aspiring to values such as monogamy or lifelong commitment. Others fully embrace traditional values and the romantic view of marriage [52], such as Robert (London, 29) who is cohabiting with his partner of five years. Only Robert's boyfriend still has some doubts:

> "Not right now. But, at some point yes, that will be an option. (...) He's not a romantic type of person. I am. I love the idea of, not just the idea of getting married,

[51] For the interviews in Rome, the question is hypothetically addressed; so is the question of *marriage* itself in all four cities.

[52] The question of family plans as including raising children has been an important, sometimes controversial, aspect within the interviews, often promptly referred to, either positively or negatively. Here, this highly interesting question however was left aside for reasons of space.

but the commitment that it brings. And yes, so does he. So, at some point when it's a lot more accepted by society, I think that's when he will probably nod his head. Or when I just force him to do it. No, that's a joke. (...) Knowing that we are cemented to spend the rest of our lives together, gives me peace of mind, will give him peace of mind. (...) It's just, well, that's us, and this is us, we are a union, we are a couple, and to the whole world: "This is who we are"".

The idea to formalise a partnership is also something that many singles envisage, as a perspective for the future, dependent on finding the right person. Fabienne (Paris, 55) sees the *Pacs* as something to aim for, provided that there is "real love", and it is not just done for specific advantages:

"F: I only see advantages [in the *Pacs*]. For me the question is not really relevant now, because I am not in a love relationship that develops quite in that way. But I think that if I had a stable relationship, yes. Well, also because of my age again, yes, I would quite like things to be institutionalised, concerning our property, things we have, well, everything we will put together. In sum, yes, the *Pacs* is a good thing, a very good thing. [laughs]

FJ: Is it a perspective or also an aim in way?

F: No, it's not an aim.

FJ: Or a possibility?

F: It's a possibility. And as long as there is no real love, where I tell myself that I will commit to that person for a long time, as long as that's not there, I wouldn't do it, that's clear. I wouldn't do it for the papers either, because I'm not European. [Fabienne is from Switzerland] But, no, because I think it's a love tie after all. And I take it as a rather serious thing, the *Pacs*. – Yes. [laughs]".

Most of the younger respondents indeed take the idea of forming a long-term relationship as an aim of what they are looking for, sometimes immediately, sometimes at a projected later stage in life. And then, the idea of some legal recognition often goes with it. Sebastian (Berlin, 26) compares the moment of deciding to opt for a registered partnership with leaving the flirt market in order to enter the "safe haven of marriage":

"Well, yes, I can imagine it for myself. But at the same time, it's a question whether, well, to find somebody, I think that's, whether that will happen remains to be seen. (...) Let's say that at the moment, I don't think about it at all. But in general, I would say ok, a registered partnership would at some stage be something to aim for. Well, you know, it always depends what the situation is like then, in order to, so to say, enter the safe haven of marriage, and to be off the market. [laughs]".

But even those who reject marriage – on ideological grounds – quite often do not exclude the pragmatic and practical use of a registered partnership option for themselves. The institution is often reinterpreted and appropriated according to various needs and personal ideologies. Gabriella (Rome, 39) for example identifies with a feminist perspective against institutionalising relationships, but subsequently limits her critique as dependent on the way in which it is used.

"In fact, I am against marriage. I have always been against it. – But in the sense that I believe that love cannot be quantified. It cannot be sanctified by a signature. – But marriage is a good thing though, to the extent that, when, let's say, you really

want to leave an inheritance, leave your belongings to a person you have loved for all your life. In that case, you leave a signature – at the legal level! – So, as there is marriage for heterosexuals, there has to be the *Pacs* for homosexuals. Or even for unmarried couples" [53].

Thus, in this view, partnership registration is seen as fully justified and as a realistic option when used pragmatically. Reappropriation can take various forms. Sometimes, it can go as far as detaching completely the institutionalised partnership from the idea of the couple itself. Karl (Berlin, 47) for example considers the idea of marrying [54] his "ex-boyfriend", while in the meantime pursuing a new relationship with a boyfriend: "We still think about whether we shouldn't marry anyhow, even if we're not together anymore".

In France the proposal to conceive of the *Pacs* as an institution not necessarily limited to sexual relationships was discussed at the political level [55], however largely in order to play down the fact that homosexual couples would be recognised. But, according to Gérard Ignasse, quite a few have subsequently used the *Pacs* in this way. While less numerous than the "romantic" couples in the sample of pacsed couples in his study, Ignasse has pointed at this category as "solidarity couples", where sexuality is not part of the partnership, but instead fully lived outside of it ("*sexe extérieur*"):

"*des couples de même sexe ayant un "lien affectif fort mais sexe extérieur" (H., 41 ans, sol., 25). Certains sont des couples " homosexuels tendant vers la solidarité". Dans ce cas qui concerne des relations d'amitié, parfois après une période de vie sexuelle commune, le* Pacs *offre un cadre intéressant*" [56].

On a theoretical level, the idea to link non-sexual and homo-sexual couples is striking in that also the question of sexual orientation ultimately becomes obsolete if the choice of a partner does not coincide with sexual activity: the categories are then substantially blurred. The thought of non-sexual partnerships is seen by some as an anti-conformist choice that transcends the conventional understanding of the couple. Others instead see the lack of sexuality in long-term committed couples as a commonplace in both hetero- and homosexual "conventional" couples, as Lasse (London, 37) reports from his experience of being "married" [57] to a man for seven years in Denmark before moving to London:

"L: This here I know it sounds strange, but – the last seven years of our partnership, we had, we didn't have sex. It was only friendship.
FJ: Ah ok.
L: Mm.

[53] Within this extract, the concepts of marriage and *Pacs* seem to be considered equivalent.

[54] Signing an *Eingetragene Lebenspartnerschaft* (often called *Homo-Ehe*) is mostly referred to as "marrying".

[55] E. Fassin and M. Feher, "Parité et PaCS: anatomie politique d'un rapport", in D. Borillo, E. Fassin and M. Iacub, *Au-delà du Pacs*, Paris, PUF, 1999, p. 13-44, see p. 23.

[56] G. Ignasse, *op. cit.*, p. 17.

[57] Here referring to the Danish model of registered partnership.

FJ: So basically, when you, already when you got married you didn't, you didn't have any sex, …

L: No.

FJ: … sexual relationship?

L: No. – Also because – one year after that, it was difficult, after the accident it was difficult for me to have sex. But, eh, it totally, eh, yeah, – died. – The feelings there. But we, we still like each other, as persons, and respect each other. – I think it, it's not unusual to, to tell this.

FJ: Yes.

L: … because I think a lot of straight people as…

FJ: Yes.

L: … homosexual couples have the same. – But then I was desperate, because, if I had been in my sixties, it would have been ok. But now? – I'm thirty-seven. So you can see, it was a little bit, – it was too early to stop having sex, wasn't it? [laughs]".

While in his case, the initial absence of sex after entering a registered partnership was linked to a medical difficulty, Lasse sees the resulting disjuncture both as a widespread phenomenon and as frustrating.

D. Registered partnership or marriage?

Additionally, sometimes it is differences between the legal frameworks such as marriage and alternative institutions (e.g. the *Pacs*) that give grounds to embrace or reject one of them as an option. For Andrea (Berlin, 38), who had seriously considered registering with her long-term girlfriend, the rights accorded in an *Eingetragene Partnerschaft* do not go far enough to be a serious option to take:

> "The State gets more rights to interfere, but as to the rights that go with normal marriage, you only get a small part of them. I find it a limited victory, and I wouldn't do it like that. (...) You hardly get any advantages from it, and I find that a pity, really. (...) Under the present conditions, as they are now? No. (...) I find it a half-way solution. (...) As I said, concerning questions of inheritance, and there is no right to your partner's pension in the case of death, and, I think it's all rubbish, really".

The thought that it is "all rubbish" is mainly linked to the feeling of inequality. The recognition on an inferior level, where many rights of married couples are withheld from same-sex couples, is felt as a form of misrecognition, and this misrecognition in turn is seen as possibly worse than no recognition at all. While for some, the set of rights included in the *Pacs* and *Eingetragene Lebenspartnerschaft* are insufficient, for others, it is the symbolic inferiority to marriage that is regretted. Caroline (Paris, 30) for example is comparing the *Pacs* (which represents a rather restricted set of rights as compared to marriage) to "crumbs [thrown] to a dog":

> "Compared to marriage and all of that, it's as if you'd throw some crumbs to a dog. Ok, let's give them that and they'll be happy, and we won't hear from them anymore".

But for others again, the opposite is true: a "lighter" form of partnership does not carry the ideological baggage of marriage and is easier to break. Florence (Paris, 25), for example, sees the *Pacs* as a much more realistic option for a future partnership

of hers, than marriage (if marriage in France was opened to same-sex couples) could be:

> "FJ: Personally, could you imagine to formalise your partnership, or if you were in a partnership, for example with a *Pacs*? What advantages or on the contrary, what disadvantages would you see in it?
>
> F: Well, listen, disadvantages, no, I don't see any, because it's something that is very easy to break, contrary to marriage. To me it has always been marriage that made me freak out, especially because it has very heavy consequences. But the *Pacs*, well, it's rather a relaxed thing. So, for me it's clear that if one day I happen to find the right person, I'd quite like to do that".

Mostly, however, the precise legal implications are unknown to the respondents and are looked at in depth only if registering becomes a realistic project. In the respondents' discourses, the differences between marriage and alternative forms of partnership have only rarely been addressed by the respondents themselves, even in France, where this difference had been analysed in depth in the political and media debates [58].

In this section, a certain paradox has been noted between the overall support for the opening of same-sex partnership institutions, on the one hand, and the personal use that respondents may or may not want to make of it, on the other. In their general support for the reforms, discourses were surprisingly similar, noting an overall opening of society that is moving towards greater acceptance and the question of social change has been found to be inherently linked to gay and lesbian discourses on same-sex partnership.

6. Discourses on social change: Things are easier now, but…

In reviewing the respondents' discourses on social change, a certain parallel arises to the dichotomy between the overall opinion and the personal use of partnership recognition. We can find the abstract discourse on society at large on the one hand, a discourse mostly shared by the respondents, and the discourses about the personal lives and concrete experiences of the interviewees, which are often worlds apart, on the other hand. These latter ones, as we have seen at the beginning of the paper, provide an explanatory ground for the construction of gay and lesbian public identities: the potential use to be made of partnership registration is part of diversified identity management.

A. Social progress

A more open society, an easier gay or lesbian life, or even a trendy fashion which is admired by others – things have changed. Society has moved towards a greater acceptance according to the opinions encountered. Jenny (Berlin, 20), a young woman living in Berlin, says she is lucky to live today rather than in the past, in which, being

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[58] Within the four countries, it is also only in France that an alternative verb to marrying, "*pacser*", is widely used.

gay or lesbian was far more difficult. Using the metaphor of the stake, she implies that up to the 1990s, being homosexual meant being publicly persecuted:

> "The young ones, they find it absolutely cool to be gay or lesbian. And then they also want to be it themselves. (...) Well, because today, it's simply more in the spotlight, it's more present in the public debate, in the media. The mayor [of Berlin, Klaus Wowereit] as well for example. These are all things that fifteen years ago, nobody would have imagined. They would all be burnt at the stake, those who were gay. Plenty of things have changed, for sure. I would not have wanted to be public or to be outed ten or fifteen years ago. I'm glad it's now and not ten years ago. I think that would have been much more difficult for me".

Despite recurring generational variations, the trend towards greater acceptance is nevertheless quasi-universally observed. Only a few have doubts about the continuation of progress towards a brighter future with increased social acceptance. However, in the concrete social environment of the respondents, many are said to refuse to accept it. Those who used to be opposed to homosexuality are still opposed to it, and for most lesbians and gays, fear and caution persist. The fact that people talk about it more simultaneously increases the attention drawn to homophobic violence and discriminations that have not ceased to exist. In certain areas, affection to a girl- or boyfriend would never be publicly shown in order to avoid problems or the risk of aggression. Some refer to gay areas such as *Soho* in London or the *Marais* in Paris as "safe havens". As Julien (Paris, 30) points out, maybe, after all, not that much has changed in people's attitudes towards homosexuality: "People have not changed their opinions. If they have, it's because before they had no opinion at all".

B. Not everywhere, not everyone

What has changed is often situated on a symbolic level. It seems that today, it is no longer society at large that excludes gays and lesbians and discriminates against them, but concrete persons: "my parents", "colleagues", "my daughter's friends' parents", "the people in my village in Brandenburg", "my male colleagues at the police", "those in my home town in Sicily"… Other times, specific social groups or institutions are pointed to as remaining hostile to homosexuality: "people on the country side", "people in the suburbs", "the Catholic church", "Muslims", "the bourgeois society of Bordeaux", "old people"… Concerning these groups, optimism and the belief in progress are less unanimous: some believe that resistance will eventually cede. Others think that the hard core of "homophobes" will never change.

These observations link back to what has been said above about identity management: public identities have to be seen in the light of the discourses on society and acceptance. The discourses help to explain the identity construction on a case to case basis, often dependent on the open-mindedness within a specific context. Often, the parental home or the work place are judged as being "backwards", and homosexuality will therefore not be exposed.

C. Symbolism and imagery

Despite the resistance to progress that has been encountered in various social settings, the symbolic level proves to be important. With symbolic recognition,

images, references and social legitimacy are established. The construction of a lesbian or gay identity fundamentally depends on the images that are available. The recognition of same-sex couples, whether through registered partnership, *Pacs*, or same-sex marriages, provides one image among others – an image centred on the idea of the committed long-term relationship.

Karl (Berlin, 47), recalling his childhood in the 1960s, links the marginalisation he experienced because of being gay to the absence of images of homosexual life options:

> "I would have liked to live my childhood like this, with these kind of images simply existing, showing that all kind of different things are possible. – But I enjoyed being an outsider anyway".

At this level, the social changes through the social recognition that has occurred stirs up the marginal position of gays and lesbians, rendering secrecy as much as revolt somehow obsolete. With reference to the social pressure of following a conventional life style, Erika (Berlin, 45) says that much of her revolt attitude stemmed from it:

> "Maybe I would not have been running around as a punk for example. It was really being against everything".

D. *The recognition trend: shifting norms and homosexual identities*

To a certain extent at least, as implied in the social change on the symbolic level, homosexuality has become a defendable option. It no longer consists of a choice between shocking or hiding. Through this shift in social norms, certain choices can be put into question or loose some of their coherence in this "new" environment. Let us return to Nicole (Paris, 54) here, who in the following passage refers to her choice not to tell her fourteen-year-old daughter about her homosexual relationship:

> "FJ: So she does not know about it…
>
> N: No. Well, she knows that it exists, and of course – a clever kid who lives in Paris knows many things. – But I haven't told her that I am concerned. I am so afraid. I am still afraid of her reaction, because she is very much of a type "what do the others think of me". Oh well, I don't know, I was probably wrong, but I don't know. – And I had talked to someone who agreed with me that it was better to wait. I think that was a mistake, but that's how it is".

It is striking how the pedagogical considerations that had previously been established are judged a "mistake". To a certain extent at least, Nicole questions the identity she had constructed in relation to her child, which had been based on secrecy as to her lesbian relationship of several years [59]. The construction of a homosexual identity does no longer take place within the same normative constraints; the images available at the symbolic level are different ones.

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[59] See Broqua and de Busscher's analysis of the decline of the "don't ask don't tell" identity, C. Broqua & P.-O. de Busscher, *op. cit.*, p. 26f.

E. Partner wanted

While the identity constructed around secrecy seems to have lost grounds, the same decline is often equally claimed to have taken place concerning the homosexual identity based on sexual libertarianism. This development however is often seen as referring mainly to gay men and more rarely to lesbian sexuality. As Barbagli and Colombo point out:

> "For this generation [gay men in the 1960s and 1970s], casual sex constituted a reference and a resource for their identity. But, from the period between the late 80s and the early 90s, the historical and cultural framework in which homosexual men moved changes again, and the new generation seeks also other instruments for the legitimization of their desire" [60].

With data at hand, this development is shown to have been to a large extent a reaction to the advent of AIDS in the 1980s [61]. In a large quantitative analysis of gay sexual behaviour in France, Michael Bochow *et al*. point to a similar, in particular generational change in sexual behaviour in consequence to AIDS, with the rising importance of the monogamous partnership model. However, they underline that this development is often relative, in that it is mostly altered with age and with the duration of the partnership on the one hand, and undermined by a new rise in multi-partnership during the early 1990s on the other [62].

But they equally point to a strong rise in the proportion of those who "*déclarent rechercher une relation stable, puisqu'ils étaient 18% en 1985 et sont 59% en 1997, ce qui correspond sans doute à une évolution de l'acceptation sociale de l'homosexualité, concrétisée par exemple par la possibilité pour les homosexuels de recourir au* Pacs » [63]. It is interesting to note the much clearer evidence in the *declared aims* of the respondents as compared to the factual relationship practice found in the samples, which instead remains remarkably stable, at least since the end of the 1980s [64].

F. Recognition, inclusion, normalcy?

The desire to form stable relationships has often been referred to as the *normalisation* of homosexuality. But as we have seen, normalisation can take many forms. Indeed, in many analyses of the normalization of homosexuality, the concept has been used in fundamentally different and sometimes contradicting ways, mostly including

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[60] M. BARBAGLI and A. COLOMBO, *op. cit.*, p. 115, my translation.

[61] *Ibid*, p. 111-116.

[62] M. BOCHOW et al., "Les évolutions des comportements sexuels et les modes de vie à travers les enquêtes réalisées dans la presse gay en France (1985-2000)", in C. BROQUA & P.-O. DE BUSSCHER, *op. cit*. See p. 41, referring to Enquêtes Presse Gay.

[63] *Ibid*, p. 40.

[64] *Ibid*. The results here show that between 1985 and 2000, the proportion of gay men in stable relationships oscillates between 49 and 58% without indicating a clear trend. Within relationships, the proportion of exclusive (as opposed to open) relationships increases in 1987 (from 17 to 26% of the whole sample) to fall again in 1997 and 2000 (22 and 19%).

1. the adaptation of gays and lesbians to heterosexual societal standards, in particular monogamous partnership models [65];
2. the increasing acceptance and social legitimacy of homosexual life styles within mainstream society [66].

It is not feasible to explore the various perspectives in the normalisation debate here. However, in the context of what we have looked at within the scope of this paper, it seems that we should place the concept of *normalisation* at the level of both symbolic acceptance and the couple imagery, a twofold development which has had an important effect for gays and lesbians in their construction of identity. It seems indeed that an increase of the couple imagery exists, an imagery that has been provided a fundamental backing with the creation of the new legal options in various European countries.

Also, as has been noted, one could tentatively claim that through this process of social change, which is omnipresent in the discourses encountered within this study, the construction of gay and lesbian identities has become less connected to the idea of a subversive sub-culture. Despite continuing resistance and discrimination, the recognition on the symbolic level which we have referred to, implies that homosexuality is no longer lived as being “us” (lesbians and gays) against “them” (a hostile society). Instead, discrimination is experienced as more differentiated according to specific people, groups and institutions. Thereby, at least to a certain extent, stigma and secrecy give way to a “legitimate” choice in the construction of public gay and lesbian identities.

It is in this sense that we can speak of a *normalisation* process: instead of the taboo of homosexuality, many lesbians and gays find themselves confronted with new models of identity construction. Socially and legally, the recognition of same-sex couples has reinforced the imagery of the stable couple – publicly displayed, monogamous and linked to the tradition of the romantic love marriage. This image does not necessarily represent an affirmation of what gays and lesbians are like; instead, it has established itself as a central norm of reference. Surely, other references have not ceased to exist, and the couple norm is often either rejected or treated ironically or yet again re-appropriated in various ways. Lived realities are far more diverse than this, but at the symbolic and the referential level, this aspect of *normalisation* seems to take place. Thereby, to a certain extent, the secret and the taboo have often moved from being linked to homosexuality as such, to specific choices of sexuality and intimacy (such as arguably casual sex, unfaithfulness, large age differences, cruising, fetish, etc.).

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[65] See e.g. A. Sullivan, “The marriage moment”, *Advocate*, 20 January 1998, p. 61-6. Also: Warner’s critique: M. Warner, “Normal and normaller – beyond gay marriage”, *GLQ,* 5/2, 1999, p. 119-171, or Broqua and de Busscher’s interpretation of the effect of “*semi-reconnaissance*” through the *Pacs*, C. Broqua and P.-O. de Busscher, *op. cit*., p. 27f.

[66] For an analysis of this perspective on normalisation see e.g. H. Bech, *op. cit*.

It needs to be seen whether what we could call a historical moment of the recognition of same-sex partnership as a norm of reference will be upheld, grow throughout society, or decline again once the novelty of the wedding bells has lost its appeal.

7. Conclusion

In this paper, legal recognition of same-sex couples has been linked to the question of the social acceptance of homosexuality and the construction of gay and lesbian identities. Conceptual and methodological considerations on recognition, identity and homosexuality have been combined with a tentative reading of interview material from fieldwork in gay and lesbian bars of London, Paris, Berlin and Rome.

It has been argued that various forms of identity management have to be taken into account to understand the different ways in which public and private identities are constructed according to both social constraints and ideological choices. In this context, the legal partnership option can be considered one further feature of a construction of public identity. While an overall unanimous approval of a trend towards legal partnership recognition has been observed, personal attitudes vary greatly as to the use to be made of it. They represent a spectrum that goes from the embracing of traditional marriage perspectives to the rejecting of couple life on the whole. The recognition of same-sex partnership, while mostly linked to an overall greater acceptance of homosexuality *per se* in the discourses encountered, equally and foremost represents the recognition of a public partnership norm that can in some cases undermine choices of identity such as those related to secrecy.

In the field studied here, it seems a commonplace to say that on the symbolic level, homosexuality has become far more accepted within recent years. For the individuals' concrete lives, however, the negotiations of intimacy and management of identity continue to move between the secret, the private and the public, according to the different social realities encountered.

Beyond the laws: right to marry, citizenship and inclusion models in Belgium [1]

David PATERNOTTE [2]

The topics of legal recognition of same-sex unions and "gay marriage" [3] have been widely discussed in recent years and they probably constitute one of the hottest issues concerning gays' and lesbians' rights, at least in Western Europe and Northern America. Following the Netherlands and Belgium, the Spanish and Canadian Parliaments have lately opened up civil marriage to same-sex couples. More broadly, the first British civil registrations took place in December 2005 and Switzerland finally adopted a similar legislation through a referendum in June 2005. In all cases, these measures have been presented as the ending of discrimination and the gaining of a new right. More precisely, the notions of citizenship and equality have generally been mobilised in associative and political discourses in favour of those decisions. The links between the process of legal recognition of same-sex couples and citizenship will also be at the centre of this paper and will be studied through the Belgian case.

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[1] This text is a part of a more general research, which has been carried out for my final-year dissertation under the direction of Bérengère Marques-Pereira (Université libre de Bruxelles) and Ursula Vogel (University of Manchester). D. PATERNOTTE, Homosexualité et citoyenneté: quel statut pour les couples de même sexe? – Le(s) débat(s) concernant le mariage ouvert aux couples homosexuels: un modèle de citoyenneté identitaire-pluraliste-minoritaire?, mémoire présenté en vue de l'obtention du titre de licencié en sciences politiques, orientation sociopolitique, Brussels, Université libre de Bruxelles, 2004.

[2] I am grateful to Jean-Paul, Ute and Wes for their comments.

[3] Despite their common use, the expressions "gay marriage" or "homosexual marriage" are misleading, as they tend to describe a specific way of recognition. But the opening-up of civil marriage to same-sex couples does not fit into the same inclusion model, as it operates through the broader universalisation of an institution, which was previously prohibited to homosexuals. For this reason, I will not use those expressions in this paper.

However, before presenting my research, two preliminary remarks are needed. Firstly, applying the concept of citizenship to the issue of homosexuality is not erroneous. By citizenship, I refer not only to a particular set of rights and obligations, but also to a status of belonging to the polity. On that basis, we may consider that, from a historical point of view, the LGBT condition has directly or indirectly deprived those persons of many citizenship rights and obligations (legal, political and social rights) [4]. Through that process, LGBT persons were not regarded as full members of the political community. In addition, the prohibition of marriage, which was imposed on same-sex couples, implied the symbolical and material loss of an important civil right and constituted a fundamental oppression mechanism, which can be compared with Bourdieu's "institution rite" [5]. For these reasons, the opening-up of civil marriage to same-sex couples appears as a step forward towards a more inclusive citizenship and the process of legal recognition of these unions may thus be regarded as a path to greater inclusion. Secondly, even if I focus only on Belgium and the debates that have taken place there, there is much of relevance to the broader question worldwide because Belgium was the second country to allow same-sex couples to marry and still one of the few to have passed such a law. Furthermore, even if we observe some issues and attitudes that are specifically national in their flavour, due to distinct political cultures or different forms of gays' and lesbians' political mobilisation, at least some of my conclusions can be extended to other Western countries, especially those where this topic is currently under discussion or has been recently adopted, such as France, Canada, Spain or the Netherlands.

In this paper, I focus on the inclusion models proposed through the process of legal recognition of same-sex couples, instead of analysing the legal content of every bill or law [6]. Indeed, only paying attention to legal norms would not be sufficient to identify the true essence of inclusion, such as advocated by gay activists or political parties and finally recognised by State institutions. Moreover, the concept of inclusion appears highly variable and central to citizenship, especially in the case of minority groups. By the notion of "inclusion model", I refer to the different ways of materialising specific definitions of equality, in order to include more fully marginalised social

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[4] For a general overview of the literature on this topic, see R. Lister, "Sexual citizenship", in B. S. Turner & E. Isin (ed.), *The Handbook of Citizenship Studies*, London, Sage, p. 191-209 and D. Richardson, "Sexuality and Citizenship", *Sociology*, 32/1, 1998, p. 83-100. For an application to the Belgian case, see D. Paternotte, *op. cit.*, chapter 2.

[5] P. Bourdieu, *La domination masculine*, Paris, Seuil, 1998, p. 42-43.

[6] For a legal analysis of the Belgian case, see in particular P. Senaeve, E. Coene, *Geregistreerd partnerschap: pleidooi voor de institutionalisering van de homoseksuele tweerelatie*, Leuven-Appeldoorn, Makklu, 1998; A. Weyembergh, O. De Schutter, "La cohabitation légale. Une étape dans la reconnaissance des unions du même sexe?", *JT*, January 2000 and A. Weyembergh, O. De Schutter, "Statutory Cohabitation Under Belgian Law: A Step Towards Same-Sex Marriage?", in R. Wintemute and M. Andenaes (ed.), *Legal Recognition of Same-Sex Partnerships. A Study of National, European and International Law*, Oxford, Hart Publishing, 2001, p. 465-474.

groups into the polity. This concept allows one to focus on the relationships between equality and difference as well as between the individual and its group, and also to investigate the question of whether the opening-up of civil marriage to same-sex couples corresponds to an equality claim and/or the affirmation of a specific identity. These models have been identified from an analysis of the values and social norms underlying the discourses of gay and lesbian activists from both sides of the Belgian linguistic border and of Members of Parliament. More specifically, I have attempted to go "beyond the laws" to grasp how equality and inclusion have been defined in each associative or political proposal and to understand how similar arguments can be used to advocate measures whose legal contents differ. Even if the opening-up of civil marriage constitutes the focal point of this paper, the whole process of legal recognition of same-sex couples has been investigated.

This contribution is organised into two parts. Initially, the process of legal recognition of same-sex couples in Belgium is briefly overviewed in order to provide a chronological framework (1). This is followed by a description of the different definitions of equality which have been proposed, how they have been given concrete expression through inclusion models, and how they are intertwined with the way the LGBT group is conceived, and with some recent transformations of civil marriage (2). Given the limited length of this paper, a more theoretical and abstract approach is adopted [7]. As this paper is based on analyse of discourse, it does not encompass any investigation of public opinion.

1. A brief outline of the process of legal recognition of same-sex couples in Belgium

Without describing the whole process, which took fifteen years and thus far exceeds the scope of this paper, some reference points are needed for further analysis. The Belgian process of legal recognition of same-sex couples can be roughly divided into two periods of time, each one ending with the passing of a new law. The first period begins at the end of the eighties and deals with the advocacy of a kind of civil partnership offering an alternative to marriage. This was accessible to both same-sex and different-sex couples, generally regardless of the nature of their ties (*instapregeling voor samenwonenden*, *contrat de vie commune*, *contrat de cohabitation légale*), or reserved to same-sex couples (*geregistreerd partnerschap*). The second period has finally led to the opening-up of civil marriage to same-sex couples in 2003.

In addition, this process has also observed two logics, which have been named according to the linguistic region, where they have been historically predominant [8].

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[7] For a more empirical investigation on the subject, see D. Paternotte, "Quinze ans de débats sur la reconnaissance légale des couples de même sexe", *Courrier hebdomadaire du CRISP*, 1860-1861, 2004.

[8] The Belgian State is composed of three regions (Flanders, Wallonia and Brussels) and three cultural communities (Flanders, the French Community and the Dutch-speaking Community) and its federal structure strongly influences both political parties and LGBT associations. First, it does no longer exist a Belgian political party and every ideological family has split up over the linguistic border. Besides, as regards LGBT associations, even though

The "French-speaking logic" links legal recognition of same-sex couples to the issue of the legal status of cohabitants. Even if it has been mostly used in the French-speaking part of Belgium, it characterises initial debates as well as some first Flemish positions. On the contrary, the "Flemish logic", which emerged in 1997, considers those issues as different and presents the opening-up of civil marriage as the only solution regarding same-sex couples' marital status. Many French-speaking activists have increasingly backed this logic and it has been enacted through the *loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil* [9] in 2003.

On both sides of the linguistic border, the first associative debates [10] concerning the legal status of same-sex couples appeared at the end of the eighties in reaction to the Danish partnership and in the context of AIDS [11]. However, even if we can already find some political demands concerning that issue during this period, Tels Quels, a French-speaking association, in 1993, presented the first real proposal. Called "*contrat de vie commune*" and inspired by the French debates about the "*contrat d'union civile*", it was a kind of civil partnership designed to recognise the ties between two persons, regardless of the nature of their relationship. Olivier Maingain (FDF), Yvan Mayeur (PS), Henri Simons (Ecolo) and Mieke Vogels (Agalev) brought it into parliament in 1994. Guy Swennen (SP) had already proposed another bill, in July 1993. Through it, the Flemish socialist representative was advocating a thorough reform of family law, which included the legal recognition of same-sex couples by means of a new institution: the *instapregeling voor samenwonenden*. While this institution was more or less similar to Tels Quels' proposal in its legal contents, it was not the result of activists' mobilisation. Besides, Guy Swennen had already considered the opening-

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they share some common roots through the Centre culturel belge (CCB), the first Belgian homosexual organisation, they are also divided according to the main linguistic and cultural cleavage and their respective stories have followed radically different paths. In addition, while the recognition of many legal rights depends on the federal level, others matters, such as patrimonial law, are ruled by the regions or the communities and some are organised by all levels of power (e.g. antidiscrimination and equal opportunities policies).

[9] Chambre, *Documents parlementaires* DOC 1602/001.

[10] Three associations are studied in this paper: the FWH/Holebifederatie, Tels Quels and the FAGL. The Flemish Federatie Werkgroepen Homoseksualiteit (FWH) was founded in 1977 and changed its name into Holebifederatie in 2002. Nowadays, it gathers more than ninety LGBT associations, is well backed by the Flemish authorities and constitutes a powerful lobby. At the French-speaking side, the situation is less clear and two associations/federations endeavour to represent LGBT's interests. Both are poorly funded and not as influential as their Flemish sister. Tels Quels was founded at the end of the seventies and has rapidly become the main French-speaking homosexual organisation. However, it has recently lost some of its authority and a new federation was set up in 1999: the Fédération des associations gayes et lesbiennes (FAGL).

[11] At this time, a competing proposal was still being advocated by some activists, especially in Flanders: the full individualisation of rights. According to that conception, all rights should be recognised on an individual basis and no right could be gained by means of a relationship status.

up of civil marriage to same-sex couples but, even though he did support this idea, he thought it was too early for it to be demanded [12]. Despite some demonstrations and the involvement of a few Members of Parliament (MPs), these bills were not discussed until July 1997. Given this situation, local politics had temporally become a new scene for mobilisation and political action. At the end of 1995, the Antwerp city council set up the first Belgian municipal register for unmarried cohabitants and this initiative led to a wide public debate, especially in Flanders. In June 1996, the Home secretary was obliged to recognise this (symbolic) right to every Belgian, wherever he/she lives.

In June 1997, an agreement on legal recognition of alternative lifestyles was reached by the two Flemish ruling parties, the CVP and the SP, as a result of exclusively Flemish debates. Called *Vaderdagakkoord* (Father's Day Agreement), it included, among others, a kind of cohabitants' legal recognition through what would be termed the *contrat de cohabitation légale* and the working-out of a specific form of civil union for gays and lesbians based on Danish law (the *geregistreerd partnerschap*). This agreement rested upon what is referred to as the "Flemish logic", which was emerging at the same time among Flemish associations [13]. The law concerning the *contrat de cohabitation légale* was passed in November 1998 but, unlike the Flemish ones, French-speaking political parties were still applying the "French-speaking" logic to this measure. For this reason, they considered it a solution for gays and lesbians as well as for cohabitants and the bill concerning the *geregistreerd partnerschap* has never been turned into a law because of a lack of parliamentary majority.

The 1999 elections marked a turning point in this political process. Christian Democrats lost the elections and a new coalition, composed by Socialists, Liberals and Greens, came to power. The new "rainbow" (or "purple-green") government wanted to embody political change and decided to resolve some ethical issues, which were previously blocked because of allegedly religious considerations, to prove its secular nature. In that context, it announced in its governmental programme that legal recognition of same-sex couples would be improved. It also pledged a general Anti-Discrimination Act, which would explicitly condemn any discrimination based on one's sexual orientation. This was passed in 2002. After many internal discussions about the way of giving a concrete expression to the legal recognition of same-sex couples, this government decided to open up civil marriage to same-sex couples in 2001. With little social debate, the Belgian Chamber of Representatives voted this law

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[12] Chambre, *Documents parlementaires* 1143/1, p. 11-12.

[13] At the end of 1996, the Federatie Werkgroepen Homoseksualiteit (FWH)/Holebifederatie launched a wide internal consultation on legal recognition of same-sex couples. In February 1997, it decided to demand both the opening-up of civil marriage to same-sex couples as the only solution to the lack of legal recognition for homosexual unions, and the working-out of a valuable civil partnership for the couples who do not want to marry. By these demands, it gave birth to the associative version of the "Flemish logic". Indeed, the issue of legal recognition of same-sex couples had been dissociated from that of unmarried couples.

in January 2003 [14]. Although the law gives the right to marry to same-sex couples, it nevertheless denies them adoption and filiation rights. Besides, it only allowed two Belgians or a Belgian and a Dutchman to marry, to be consistent with the commonly accepted rules of international private law. This latter point was changed in 2004 to allow the wedding of a Belgian and a foreigner or of two foreigners who are residents in Belgium. The government also promised to improve the legal recognition of same-sex marriages. Since 2003, many bills permitting homosexual couples to adopt and recognising them "children rights" have been brought into parliament and this issue is currently under discussion [15].

2. Which inclusion models of LGBT persons?

I will now go deeper into the analysis of the inclusion models which have been proposed through the process of legal recognition of same-sex couples in Belgium. These models have been identified from a thorough analysis of both gay activists' and MPs' discourses, as expressed in a large number of associative documents, bills, laws and parliamentary debates. Furthermore, the marriage claim will be at the centre of my reflection and I will consider other proposals in order to understand the true essence of the former.

In essence, two competing models of inclusion may be distinguished. The first model has been called "Marriage +" and refers to the simultaneous demand of the opening-up of civil marriage to same-sex couples and the working-out of a real form of legal recognition for cohabitants. The second one, which could be termed "Alternative Contract to Marriage" (ACM), refers to the advocacy of an alternative contract to marriage as a single solution for both same-sex couples and cohabitants. If many legal proposals may be gathered under this category, they all share some common features, which will be described below [16]. Both models will be analysed

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[14] This law has been voted by French-speaking and Flemish Socialists and Greens, as well as by Flemish Liberals. Some French-speaking Liberals have backed it, while others, joined by the members of far-right parties and French-speaking Christian Democrats, have rejected it. Flemish Christian Democrats have finally changed their mind and decided to endorse the measure, providing that it does not recognise adoption and filiation rights.

[15] CHAMBRE, *Documents parlementaires* DOC 51 0664/001, 51 0666/001, 51 0667/001, 51 0980/001, 1144/001.

[16] Among the Belgian LGBT associations, the "marriage +" model corresponds to the positions of the FWH/Holebifederatie since 1997 and the FAGL since 1999, as well as to the standpoint of the Policy Unit of the FWH before 1997 and of some groups of the French-speaking Tels Quels. It has been embodied at a political level, among others, by the positions of Guy Swennen (SP), of the Flemish Liberal Party (VLD) during the debates concerning the *contrat de cohabitation légale* (CCL) and by the rainbow coalition since 1999. At an associative level, the "ACM" model includes some initial positions of Tels Quels or FWH members (e.g. Luc Legrand, Alain Bossuyt, Ria Convents), Michel Duponcelle's arguments (Tels Quels) and early proposals related to a complete invidualisation of rights. Amongst political standpoints, discourses in favour of the *contrat de vie commune*, the *contrat de cohabitation légale* or the *geregistreerd partnerschap* may also be brought together.

using four lines of investigation: their definition of equality (A), the way the former have been given a concrete expression through an inclusion model (B), their links to a specific conception of the group formed by LGBT persons (C), and to recent evolutions of civil marriage (D).

A. *Competing definitions of equality*

Equality is a cornerstone of the idea of modern citizenship and each proposal of legal recognition of same-sex couples may be regarded as a path to a fuller equality. However, as Bérengère Marques-Pereira has pointed out, "equality does not have an undoubted definition" [17], and this concept appears to be historically variable and highly disputed. Therefore, it is worth specifying the specific definition equality has been given. Staying within the general framework of this paper, two competing meanings may be distinguished.

On the one hand, the "marriage +" model presents a relatively formal definition of equality, which is characterised by the principles of equal treatment and non-discrimination [18]. On the other hand, the "ACM" model confers a more substantive meaning to this concept, by which the latter is given a more normative contents. The main reason seems to lie in the specific relationship, which has been developed in the "ACM" model, between equality and a certain vision of society. This connection inserts equality into, and often subordinates it to, a broader social project. As writed Bob Carlier, one of the founders of gay and lesbian studies in Belgium, who was also involved in associative life, "the idea of equality of opportunity is only given a sense within a certain vision of society, in particular as regards the manner relationships are recognised" [19]. As a result, this social project alters the nature of equality and assigns it a normative content through two mechanisms. Firstly, the content of equality is regarded as related to some political and social aims, concerning for instance secularity, sexual revolution, progressive politics or the achievement of a specific community. This social project can also refer to more "conservative" or "Christian" values in political arguments, as Flemish Christian Democrats have shown through their defence of the opening-up of civil marriage. Secondly, the content of equality is also articulated through a certain image of what gays and lesbians are or should be (harbingers of a new society, representatives of a specific culture,…). Both mechanisms limit the spectrum of acceptable definitions of equality.

Conversely, the "marriage +" model imposes a "duty" of reserve and neutrality towards the preferences of each "homosexual" on the social movement. Therefore, the aims of equal treatment and non-discrimination are given a more central place than in

[17] B. Marques-Pereira, *La citoyenneté politique des femmes*, Paris, Armand Colin, 2003, p. 84.

[18] A conception similar to the "marriage +" model, even though transposed into the parliamentary sphere, characterises the Marriage Bill, which has been proposed by the rainbow government in 2001.

[19] B. Carlier, "Is een homohuwelijk emancipatorisch?", *Homo- en Lesbiennekrant*, 1991, p. 3.

the former approach [20] and even often constitute the social project, which is pursued. In that context, equality is defined as an equality of possibilities [21]. Each individual deserves the same rights [22], whatever one's sexual orientation, and the movement has to seek the recognition of all rights, which are not yet recognised to homosexuals, independently of every other social project. In that context, more relevance is conferred to the individual homosexual, who can decide for himself or herself amongst the same set of possibilities as those to heterosexuals. Therefore, equality is ultimately given a concrete expression through freedom of choice and the latter includes freedom of self-definition and identity. As a member of the Flemish FWH asserts, "the question is not so much whether we should choose among one of three solutions [complete individualisation of rights, partnership, marriage] and, therefore limit the gay's or the lesbian's possibility of choice as an individual, but whether we should rather enhance this possibility of choice by not choosing any of these three solutions, but making the three of them available" [23]. More recently, another Flemish activist was wondering: "Aren't we fighting for diversity? Hence, why do we not defend it in this issue? Some asserts that the gay and lesbian movement has to choose one of these possibilities, because we will otherwise not be really clear, even divided and weakened. I do not agree. When two products are good and people ask for them, both are sold. So as to make more buyers happy, to defend with us our business" [24]. At a parliamentary level, a similar conception may be noticed, for instance, in Karine Lalieux's standpoint. She presents the opening-up of civil marriage not "as an obligation, but as a freedom, a freedom of choice" and, to her mind, "every woman or every man should be allowed to choose and to take on his/her personal choices thanks to the legal arrangements that they are offered. This is really the legislator's role: to offer legal arrangements, which respect everyone's life choices" [25]. In conclusion, in the "marriage +" model, equality implies an identical number of similar rights, among which the homosexual movement or the State cannot privilege some and which the individual dispose of according to one's will. The only limit to this notion of freedom of choice lies in any potentially discriminatory nature of the individual's behaviour or choice. On the contrary, in the

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[20] Those aims are often present in the "ACM" model, but their subordination to a broader social project generally alters their centrality. Hence, they are frequently relegated to a more peripheral position.

[21] In the French meaning of "*opportunité*". But the English "equality of opportunities" is misleading and does not correspond to the French "*égalité d'opportunités*".

[22] As it will be shown below, these rights are identical as regards their form as well as their philosophy.

[23] G. Groeseneken, "Het homohuwelijk. Het verschil tussen strategie en tactiek!", *Homo- en Lesbiennekrant*, Summer 1993, p. 10.

[24] Y. Aerts, "Zodat meer kopers tevreden zijn, die mee onze winkel verdedigen", in P. Van Hecke, "Samenlevingscontracten en huwelijk : meningen. Kiezen voor later", *Zizo*, 19, November-December 1996, p. 10.

[25] Chambre, *Compte rendu intégral*, plenary session of 30 January 2003, PLEN 318, p. 38.

"ACM" model, equality is more regarded as the right to enjoy something considered as intrinsically better on the basis of a particular social project.

B. Two inclusion models

1. The politics of rights

If equality undoubtedly constitutes a fundamental background to citizenship, inclusion models need to be developed to give it a concrete expression. Through these models, marginalised groups can enjoy a more extensive set of rights and duties and a broader citizenship status, which is basically understood as a full belonging to the polity. As many analysts have underlined [26], the place conferred to difference within those models is of particular significance. Keeping within the competing meanings of equality presented above, two inclusion models may be distinguished, although, as will be pointed out, both models have subtle shadings of different meanings within them.

The "marriage +" model commends a complete lack of differentiation between homosexuals and heterosexuals as regards rights and its proponents generally assert that "what is good for heterosexuals is also good for homosexuals and should thus be accessible to them" [27]. As a result and in opposition to recent analyses such as those proposed by Will Kymlicka, Iris Marion Young or Charles Taylor [28], difference is deemed as fundamentally irrelevant to the politics of rights and should not be taken into account into the form and/or into the philosophy of the recognised right. Discussing the idea of a right to difference, Jean-Paul Bouchoms, a former associative leader, defines it as "the right to have no right". In addition, "contrary to what is too often said, [homosexuals] seek less the recognition of a right to difference than the recognition of the right not to be treated differently. (…) [They] ask neither to be better tolerated, nor to be more protected. They request their right to sexuality to be recognised, which implies an equality of treatment with heterosexuals" [29]. In Parliament, the members of the rainbow coalition also fiercely reject the idea of a group-differentiated right. For instance, a Green MP, Zoé Genot, has pointed out that "[it is] important that [they] have not tended to an institution which would have been specific to homosexuals, an equivalent institution, but with another designation. For it would have meant the institution of a ghetto right, which would have muddled the message of a true fight against discriminations, that the government wants to send" [30].

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[26] Among others, J. Jenson, M. Papillon, *The Changing Boundaries of Citizenship: A Review and Research Agenda*, Ottawa, Canadian Centre for Management Development (CCMD), 2000, p. 3.

[27] See e.g. G. Groeseneken, *op. cit.*, p. 10.

[28] W. Kymlicka, *Multicultural Citizenship*, Oxford, Clarendon Press, 1995; I. Young, *Justice and the Politics of Difference*, Princeton, Princeton University Press, 1990; C. Taylor, "The Politics of Recognition", in A. Gutmann, *Multiculturalism: examining the politics of recognition,* Princeton, Princeton University Press, 1994, p. 25-75.

[29] J.-P. Bouchoms, "Elio Di Rupo blanchi. Les homosexuels condamnés à la différence", *Tels Quels*, 154, April 1997, p. 10-11.

[30] Chambre, *Compte rendu intégral*, plenary session of January 30, 2003, PLEN 318, p. 52.

In the same spirit, the Flemish nationalist Els van Weert has strongly emphasised that MPs were not allowing "the first gay marriage, but the first marriage whose future partners would be of the same sex", which would make "an important shading" [31]. For this reason, as will be further discussed, this inclusion model has been called "equality within difference" ("*égalité dans la différence*"). At this level, it is worth keeping in mind that it implies the rejection of difference from the sphere of rights, for it is regarded as potentially discriminatory and, consequently, irrelevant.

On the contrary, "ACM" model supporters advocate a way of inclusion that could be termed "equality through difference" ("*égalité par la difference*"). Although difference is differently taken into account, all proposals gathered under this category tend to consider it as a medium of inclusion and a gateway to citizenship. On the one hand, by advocating a kind of civil partnership for same-sex couples while marriage remains restricted to different-sex couples, they are proposing a differentiated path to what is regarded as equality of rights. More fundamentally, on the other hand, in accordance with the specific meaning of equality presented above, the inclusion model expressed through legal recognition of same-sex couples has to take into account some peculiarities that characterise homosexuals or that they should embody. This model implies that equality cannot exist without an inscription of difference into the politics of rights.

However, three remarks need to be made in order to avoid any amalgams. First, although they sometimes overlap, we can make a distinction between at least two kinds of "difference". Indeed, as I have already indicated above, "difference" can be related to the existence of a specific community, which implies more profound differences with heterosexuals (culture, lifestyle, etc.). This position is particularly embodied at the associative level by Michel Duponcelle's position, who prefers an alternative contract of marriage than the opening-up of marriage, for the latter would entail gays' and lesbians' assimilation into heterosexual norms and traditional family life. Moreover, he does not understand "why the privation of these pleasures which are so specific to us [32] will allow us to live less secretly?". Indeed, according to him, it would imply "to believe that there is no salvation outside heterosexual standards of life, which means that we have to learn to live like them, that we need to "integrate" their habits (…)". In other words, "[homosexuals] will not gain anything at this game of "fellow creatures", because [they] will never be as similar as them" [33]. But, in some argumentations, "difference" may rather refer to a distinctive social project and to the specific role gays and lesbians have been given in that context. In that perspective, which originally ensues from May 68 and the social movements of the seventies,

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[31] *Ibid.*, p. 60.

[32] Cruising, sauna, anonymous sex, etc., which are considered as fundamental components of a gay and lesbian culture or lifestyle. M. Duponcelle, sans titre (éditorial), *Tels Quels*, 195, May 2001, p. 3-4.

[33] M. Duponcelle, *op. cit.*, p. 3. See also M. Duponcelle, "A force de vouloir trop vivre comme les hétéros", *Tels Quels*, 159, November 1997, p. 7.

gays and lesbians are often regarded as "intrinsically" progressive and may almost be imposed a duty of social creativity [34].

Second, a distinction between the form and the philosophy of a right as the site of inscription of difference within equality is necessary. This distinction helps us to understand why, although all associations' proposals and many political projects have explicitly rejected any kind of group-differentiated right [35], many have demanded the inscription of some distinctive particularities into the right itself. Indeed, further analysis reveals that difference has generally been inscribed into the philosophy of this right – that is, the way it has been conceived and who it is designed for – while its form remained perfectly universalistic. Although advocating the accessibility of this right to both homosexuals and heterosexuals, this kind of civil partnership had not the same meaning for each social group [36]. It was an additional form of legal recognition for different-sex couples – which implied a possibility of choice –, but the only one that would be demanded for same-sex couples. Besides, given their "specificities", homosexuals were often seen, by activists themselves, as intrinsically opposed to marriage because of their "nature" or their alleged political convictions. On the contrary, the Belgian "registered partnership" would have led to a group-differentiated right, both in its philosophy and its form. It was presented as designed to meet some specific needs – those of homosexuals, which were seen as intrinsically different – and its enjoyment was therefore restricted to this social group.

Third, the concept of "difference" may receive a different status, depending on the level to which it has been used. Whereas it has always been given an emancipating meaning within activists' stands, it sometimes fits into a more prescribed meaning in political arguments, for instance when they are evoking an "objective difference", tied to procreation, as justifying a kind of civil partnership. This ambivalence is particularly exemplified by the French-speaking Christian Democrats positions during the debates about the opening-up of civil marriage. Indeed, if the members of this party claim that "the best way to fight against discriminations is to recognise differences" [37], they also assert that "it is fundamentally different to live in a society organised around heterosexuality in which homosexuality is accepted, than to live in a society where it makes no difference to be heterosexual or homosexual, or even bisexual" [38] and that " it is fundamental in a human society not to symbolically and legally undifferentiate what is different" [39]. In that context, we may ask ourselves if this inscription of difference does not constitute a perpetuation of second-class citizenship.

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[34] See e.g. R. Convents, "Het huwelijk hoeft voor mij niet. Maar: intussen blijft het wel bestaan en hebben homoseksuele en lesbische koppels geen mogelijkheid ervoor te kiezen", in P. Van Hecke, *op. cit.* This vision is close to Pierre Bourdieu's one in "Quelques questions sur le mouvement gay et lesbien", in *La domination masculine*, *op. cit.*, p. 161-168).

[35] Which would be the only one accessible to same-sex couples in accordance with Kymlicka's or Young's citizenship theories.

[36] At least if marriage continues to exist and remains prohibited to same-sex couples.

[37] Sénat, *Documents parlementaires* 2-1173/3, p. 6.

[38] Sénat, *Annales parlementaires*, plenary session of 28 November 2002, 2-246, p. 14.

[39] Sénat, *Documents parlementaires* 2-1173/2 (Amendment 2), p. 10-11.

2. Public expression of singularity

Whereas the inclusion model underlying the "marriage +" approach regards difference as irrelevant to the politics of rights, it does not imply its rejection from the public space and it is worth returning to it in order to understand its very essence. Indeed, public expression and social recognition of difference (generally understood in the individual meaning of singularity) are usually defended by this model's proponents and the individual is not obliged to leave behind one's particularities before entering the public sphere. For this reason, if the "marriage +" approach differs from recent multiculturalist and pluralist conceptions of citizenship (Will Kymlicka, Iris Marion Young, Charles Taylor, etc.), it does not imply a return to more traditional ones, such as liberal or republican traditions of citizenship. Furthermore, public expression of difference historically appears to be the prerequisite of any right claim and, more specifically, the possibility of the rejection of difference from the sphere of rights. It highlights issues which were previously invisible or regarded as essentially apolitical. Besides, as Iris Marion Young has shown [40], public acknowledgment of marginalised groups first requires their expression as distinct in the public space. Such considerations rest upon the conception of the construction of the public/private divide as an instrument of oppression, as emphasised by feminist researchers, and also refers to the coming out, understood as the overt social appearance of an LGBT person as a sexualised being and as the condition to every struggle concerning those issues [41]. In short, if the direct integration of difference into the right which has been recognised, has been rejected, this stand does not entail that its existence is regarded as a mere private fact. On the contrary, public expression of difference, seen as legitimate, constitutes the ideological context and the sociological background of the "marriage +" model. This explains why the latter has been called "equality within difference" instead of "equality without any difference".

As a result, equality and difference are lived in a more complex relationship than in the "ACM" approach. This relationship operates through what could be both regarded as a "doubling of the public space" and as a distinction between two moments. On the one hand, the relationship between equality and difference, which underlies this inclusion model, is embodied at two different levels of a single space, which corresponds in both cases to the public sphere. Apparently, this phenomenon depends on the circumstances and the interlocutors the movement is faced with [42]. On the other hand, it can also be explained through the temporal distinction which has been worked out by Jeffrey Weeks in *The Sexual Citizen* [43]. Keeping that scheme, the relation to the State would correspond to the "moment of citizenship", while the other is similar to the "moment of transgression". However, although they help us to

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[40] I. Young, *op. cit.*, p. 157-158.

[41] M. Blasius, "An Ethos of Lesbian and Gay Existence", *Political Theory*, 20/4, 1992, p. 642-671.

[42] The State as the organiser of citizenship or the whole society, regarded as a more comprehensive reality.

[43] J. Weeks, "The Sexual Citizen", *Theory, Culture and Society*, 15/3-4, 1998, p. 35-52.

understand better this inclusion model, both explanations seem at least partly non-efficient. Indeed, the example of Belgian Lesbian and Gay Pride (BLGP) shows how those distinct levels or moments can overlap, as it is both the climax of a claim process which is here based on the rejection of difference from the politics of rights, and a particularly important form of public expression of sexual minorities.

C. Definition of the group and inclusion model

Empirical research indicates a connection between the way the group, which is formed by gays and lesbians or LGBT persons is conceived and the nature of the above-mentioned inclusion models. This link helps us to understand some groupings which have been observed above, and also brings us closer to the topic of identity politics, at least on the associations' side. Indeed, at both political and associative levels, the manner of defining the "homosexual" group seems to create an intellectual background in which inclusion models are articulated and, therefore, it tends to limit the potential forms inclusion might adopt. At least two levels need to be taken into account to define how a group has been defined: external and internal differences. External difference refers to the difference(s) unifying homosexuals or LGBT persons and differentiating them from the rest of society, while the notion of internal difference highlights how dissimilarities inside the group are considered and the place they are given. Those internal differences are due to the impacts and interactions of other social relationships, such as class, sex, age or religion, on the members of the group.

On that basis, the "marriage +" model is characterised by a low relevance of external difference and a high significance of internal diversity, which reminds in some way queer theory. The binary oppositions between homosexuals and heterosexuals or gays and lesbians are put into perspective and give way to more diverse group (self-)definitions. Homosexuality or bisexuality are seen as mere variants of human sexuality and presented on the same level as heterosexuality. Accordingly, they all deserve the same rights. On that basis, the only differences between them would reside in historical processes of legal and social discrimination and in the fact that heterosexuals are more numerous. As Jean-Paul Bouchoms, from Tels Quels, underlined in 1997, if marriage was forbidden to people with blue eyes, "it is hardly believable that the eye colour would not overnight become an identity factor" and, in his opinion, this remark raises the only true question: "In what are homosexuals different if not because they have no right?" [44]. This position is also symbolised by the term used by the Flemish associative federation since 1997: "*holebi's*" [45]. Presented as an acronym of "*homoseksueel*" (gay man), "*lesbisch*"

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[44] J.-P. Bouchoms, *op. cit.*, p. 11. On the same topic, also BLGP, *Eisenplatform – Plate-forme de revendications. Gelijke rechten nu! Holebi-rechten zijn mensenrechten. Droits égaux maintenant! Les droits des gays et des lesbiennes sont des droits humains*, Brussels, [5 May 2001], p. 1 and A. de Waele, "Ben je zeker dat je hetero bent? Anke Hintjens zwaait af", *Zizo*, 59, July-August 2003, p. 34-35.

[45] The FWH began to advocate the opening-up of civil marriage to same-sex couples and the working-out of a valuable civil partnership for cohabitants at the same time. This is probably more than a mere coincidence.

(lesbian woman) and "*biseksueel*" (bisexual), it breaks the binary opposition between gays and lesbians while introducing bisexuals in their claims. This latter point also reveals how internal diversity is taken into account. Its valorisation both within and outside the "gay and lesbian world" has recently been considered as one of the main goals of the movement for the future [46] and constitutes a key element of 2004 and 2005 editions of the Belgian Lesbian and Gay Pride. This approach explains the centrality attributed to individual freedom of choice within the inclusion model and, at a political level, it has been advocated among others by Guy Swennen and most members of the rainbow coalition.

On the contrary, the "ACM" model shows far more an identity approach, as traditionally understood. The different approaches gathered under this category generally recognise the existence of internal differences amongst gays and lesbians and may for instance insist on lesbians' diversity in the case of lesbian feminism. However, these internal differences are subordinated to the difference between homosexuals and heterosexuals in the same way as equality was inserted in a specific social project. For that reason, those internal differences are given less significance than in the former approach and are not really considered in the context of political action. Besides, bisexuals or transsexuals are often not included in their proposals and may be explicitly excluded from claims. In conclusion, reminiscent of certain previous developments, in the ACM model, homosexuals and heterosexuals are regarded as two different and/or opposed social groups, concept generally ensuing from a situation of social struggle and/or from a more essentialist approach (close to communitarian politics) [47]. In Parliament, many proposals were based on the assumption of a homosexual "community", which would present some specific needs or characteristics deserving special attention or treatment by the legislator (e.g. *contrat de cohabitation légale*, *geregistreerd partnerschap*, French-speaking Christian Democrats' argumentation). The evolving position of Flemish Christian Democrats is particularly relevant here, as they have moved to the acceptance of the claim of the opening-up of civil marriage because of a change in both their conception of marriage and of homosexuals (which are henceforth seen as really and fully comparable to heterosexuals). If their advocacy of a registered partnership was strongly tied to a conception of homosexuals as equal but different (and separate… because of the inability for their unions to procreate), they suddenly changed their mind, partly because of a shift in their definition of what are homosexuals. Indeed, as they overtly recognise, this is to some extent because social evolution has shown homosexuals' ability to fulfil marriage conditions (stable and long-term relationship, loyalty,…) that this institution must be opened up to them [48].

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[46] Holebifederatie, *Minister Vogels en holebi-beweging zien taak voor FWH voor volgende 25 jaar*, Ghent, [9 December 1992].

[47] Both conceptions may sometimes overlap.

[48] Sénat, *Annales parlementaires*, plenary session of 28 November 2002, 2-246, p. 16.

D. The impact of civil marriage transformation

At last, we probably cannot understand the opening-up of civil marriage to same-sex couples without paying attention to some fundamental transformations of the representation and the nature of civil marriage itself. From this perspective, we can assert that it is not the same marriage which oppressed sexual minorities and which has recently been opened up to them. This phenomenon is quite obvious in Spain, where the new socialist government is simultaneously renewing divorce law and extending the right to marry [49]. It is consequently useful to comment on current general trends in marriage status to understand why legal recognition of same-sex couples has led to a broader universalisation of marriage instead of to a kind of civil partnership.

As regards social representations, which are often essential in understanding social change, one needs to look to both associations' as well as parliamentary debates. As shown by early claims concerning legal recognition of same-sex couples (full individualisation of rights and first proposals of civil partnership), the opening-up of civil marriage was not demanded before it appeared potentially emancipating to do so. In this context, the question of the immutable and oppressive essence of this institution has been a key issue. Indeed, the negative conception of marriage has been one of the main reasons for advocating an alternative form of legal recognition [50]. This institution was mainly regarded by early activists as a patrimonial contract which united two families more than two individuals, a mechanism of control which is intrinsically opposed to sexual and relational freedoms, and a linchpin of patriarchy [51]. But, through the demand of opening up civil marriage, the latter has progressively appeared as a contractual device which could meet some individual's wishes, as well as a precious tool to increase the social visibility and a wider acceptance of homosexuality by the society and homosexuals themselves [52]. A similar evolution can be identified at a political level, especially among left-wing political parties, which have historically been most prone to condem marriage.

Furthermore and mainly on this latter stage, the true nature of marriage had to be disconnected from procreative purposes to potentially include same-sex couples. From an embodiment of the nuclear family of the XIXth century, it is now regarded as exclusively based on the partners' binary relationship. Again, it is the evolution of thought within the Flemish Christian Democrat party, which best illustrates this shift.

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[49] Both laws were adopted by the *Congreso* on the same day. See *El País*, 21 April 2005.

[50] Although combined with the long political and strategic impossibility of demanding civil marriage.

[51] See A. Bossuyt, "Ça bouge!", *Tels Quels*, 144, April 1996, p. 9.

[52] See e.g. Cel Politiek FWH, *Argumenten contra de openstelling van het huwelijk en hun weerlegging*, Ghent, 2002; Holebifederatie, *Holebifederatie erg blij met goedkeuring openstelling huwelijk*, Ghent, 30 January 2003; F. Sant' Angelo, "Les homosexuels et le mariage: une réponse à l'article de J.-L. Renchon dans le Journal des tribunaux, 29 juin 2002", *JDJ*, 218, October 2002, p. 3; A. Bossuyt, "Mariage… impressions et réflexions", *Tels Quels*, 182, February 2000, p. 12-15.

In 1998, despite being in favour of a kind of legal recognition of same-sex unions, which would grant the same rights as marriage (except those regarding children), this party could not accept to open it up to them because of an "objective difference" that would differentiate homosexual unions from heterosexual ones. This difference rested upon biological reproduction and explains why they proposed the *geregistreerd partnerschap*, a sort of "quasi-marriage" [53]. But by 2001, this link between procreation and marriage suddenly vanished, so that civil marriage could henceforth encompass same-sex couples. One of the main reasons lay in the new definition given to this institution, which appears as exclusively based on the partners' relationship and, more specifically, on the fostering of its durability [54].

We may also consider that the opening-up of civil marriage to homosexual couples comes within a broader transformation of the nature of marriage and, as Daniel Borrillo has pointed out [55], that in addition, it contributes to it. As Ursula Vogel has shown [56], the close ties between that institution and the patriarchal order have increasingly weakened and marriage has more generally moved from a public institution to a private contract, which is first ruled by the will of the two individuals involved. This evolution occurs within a context of democratisation of private relationships and of the generalisation of what Anthony Giddens has called "pure relationships" [57]. This process of pluralisation of the meaning of marriage and of the disappearance of its prescriptive function allows civil marriage to embrace different kinds of lifestyles and relationships, as well as its opening-up to same-sex couples. Moreover, we may assume that the recognition of the right to marry for same-sex couples will deepen this transformation process. Indeed, through the inclusion of gays and lesbians, civil marriage symbolically ceases to be the union of a man and a woman, with all the implications regarding patriarchy [58]; its secular nature has been strengthened by the attitude of the Catholic Church and procreation is no longer its ultimate goal. Through this trend, civil marriage has moved away from a family-based definition to be exclusively founded on the partners' relationship. This point is particularly illustrated by the preamble of the Marriage Act, which solemnly declares

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[53] K. Waaldijk, "Others may follow: the introduction of marriage, quasi-marriage and semi-marriage for same-sex couples in European countries", *New England Law Review*, 38/3, p. 569-590.

[54] Chambre, *Documents parlementaires* 50 0712/002, p. 4.

[55] D. Borrillo, "Le mariage homosexuel: hommage de l'hérésie à l'orthodoxie? ", in Forum Diderot, *La sexualité a-t-elle un avenir?*, Paris, Presses Universitaires de France, 1999, p. 39-54.

[56] U. Vogel, "Private contract and public institution", in M. Passerin d'Entrèves & U. Vogel (ed.), *Public & Private. Legal, political and philosophical perspectives*, London, Routledge, 2000, p. 177-199.

[57] A. Giddens, *Transformation of Intimacy. Love, Sexuality and Eroticism in Modern Societies*, Cambridge, Polity, 1992.

[58] Even if it is obvious that it does not exclude patriarchal practices from marriage, but those are not as institutionalised as they were previously.

that, "in our contemporary society, marriage is lived and experienced as a (formal) relation between two persons which has the achievement of a durable community of life as main goal. [It] offers to the partners the opportunity of overtly asserting their relationship and their feelings for each other" [59].

Finally, we may reflect on the global consequences of this evolution of marriage to our understanding of citizenship. Citizenship has been gender-specific for both sexes and, "from Aristotle to Beveridge, the idea of citizenship equality has been linked to a hierarchical ordering of the marriage relation" [60]. Therefore, if the universalisation of the right to marry partly results from its radical transformation, may we conversely anticipate a radical transformation of our understanding of citizenship through the opening-up of civil marriage to same-sex couples? To conclude, it may at least be pointed out that it reflects a profound mutation in what defines the tie to the political community and the citizen figure.

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[59] Chambre, *Documents parlementaires* 50 1602/001 (2001-2002), p. 4.

[60] U. Vogel, "Is citizenship gender-specific?", in U. Vogel & M. Moran (ed.), *The frontiers of citizenship*, Basingstoke – London, MacMillan, 1991, p. 67 and 82.

PART II

A better place for gays and lesbians in the new Member States

The impracticability of active citizenship beyond the closet in Slovenia

Roman KUHAR

1. Introduction

Mobitel, the leading Slovenian mobile telecommunications company, recently launched an extensive advertising campaign featuring two plastic bridegrooms on a wedding cake. The slogan of the campaign was "Congratulations to the newlyweds". Although Mobitel was advertising its new internet portal with newfangled features for their mobile users, the advertisement was unmistakably alluding to the notorious homosexual marriages. Namely, the new internet portal was set up from two previously separate internet portals. Since the grammatical gender of an internet portal in Slovenian language is male, the underlying idea was that two "males" united into one (just like a man and a woman are said to become one when married).

The advertisement was unavoidable; it was featured on the big posters on the side of the roads, in full page in newspapers and magazines, on bus station posters, on promotional postcards, displayed in postcard holders in pubs, bars and outside toilets. The original picture of a cake with two bridegrooms on the top was soon followed by a series of new pictures "from everyday life of newlyweds". The bridegrooms stepped off the cake and became a Ken-like plastic figures, swimming in a lake on their honeymoon trip, watching a football game, having their first argument and similar. At the moment Slovenia's public place is steeped with pictures of a married gay couple. The sight is however misleading. The position of gays and lesbians and especially same-sex couples and families is far from the happy image the advertisement is trying to push forward.

Due to the popular culture with its gay (and much less lesbian) characters in American, but also Slovenian sitcoms and movies, the public debate on the registered same-sex partnership bill and media attention to gay and lesbian questions, homosexuality became a household issue. With its twenty-one year old gay and

lesbian movement, a certain level of tolerance and legal protection of gays and lesbians was established in Slovenia. Therefore putting plastic homosexual couple into the center of an advertisement campaign represented a save, yet unusual and bold enough decision to attract attention. In this way Mobitel's ambitions were achieved; their campaign is by no means political, but it is rather using "hot political issues" for consumerist ends.

In this paper I address the current legal and political situation of gays and lesbians in Slovenia and briefly discuss the history of the LGBT movement. Focusing on some latest developments regarding same-sex partnership bill I explore how European Union anti-discriminatory regulations and recommendations on same-sex partnership helped gay and lesbian movement to push forward its political agenda as well as how these resolutions are often surpassed by allegedly more important (but certainly more populistic) protection of the pillars of the society: the traditional family. I argue that human rights protection is only "vertical" (tolerance is imparted from above), whereas "horizontal" relation between homosexuality and heterosexuality remains untouched; heterosexuality is desired and positively valued, while homosexual minority – although tolerated to a certain extent – remains "minority" by its undesirability. In this fashion homophobia is no longer based in biological/psychological traits of homosexuals, but rather in the societal values, ascribed to homosexuality. With the focus on the research of everyday life of gays and lesbians – first of its kind in Slovenia – I conclude this paper by exploring the status and praxis of gays and lesbians as intimate/sexual citizens in contemporary Slovenian society.

2. Encouraging start, disappointing present

Unlike some Western European countries and the United Stated of America where the existing gay and lesbian movement pushed (or is still pushing) for the decriminalization of homosexuality, homosexual acts among consenting adults were decriminalized in Slovenia in 1976, eight years before the first gay organization was established and two years after the new Yugoslav Constitution of 1974 introduced the non-federal Penal Codes. Each of six republics and two autonomous provinces that constituted former Yugoslavia had a chance to separately address the issue of homosexuality. Previously Article 186 of the Federal Penal Code criminalized "unnatural act of fornication between persons of the male sex". The Penal Code however did not address any such type of unchastity among women. With few exceptions, when Article 186 was used as a means of "character smearing, occasionally targeting Catholic priests" [1], the law was not *de facto* in use in Slovenia since the late fifties. Slovenia's new Penal Code of 1976 decriminalized homosexuality and equalized the age of consent to fourteen for both heterosexual and homosexual relationships. The same year homosexuality was decriminalized in Croatia, Vojvodina and Montenegro. Homosexuality was legalized in Serbia and Kosovo in 1994, three years later in Macedonia and in Bosnia and Hercegovina only in 1998.

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[1] B. Lesnik, *Melting the iron curtain: the beginning of the LGBT movement in Slovenia*, Bucharest, Queer Bulgaria, 2005, in print.

At the time of decriminalization of homosexuality in Slovenia, there was almost no public reaction to it and the change of the law went through silently. The "non-existing public debate" on the issue was limited to three newspaper interviews published in 1974, when the first initiative to drop the offence emerged, and in 1977, when the new Penal Code came into force. In these interviews the judge of the Supreme Court and a psychiatrist addressed homosexuality within the psychoanalytical and liberal framework as an emotional/psychological shortcoming, but at the same time as a private matter in which the State should not interfere. Sinkovec, the judge of the Supreme Court, advocated the abolition of the offence not only to reduce violence towards homosexuals, but also – as a precise reading of his statements reveals – to normalize homosexuality, that is to say to encourage homosexuals to seek medical treatment:

> "After all, many homosexuals, as indicated by many confidential columns in various magazines, want to be helped and would like to get rid of such inclinations. But with the Penal Code hovering above their heads, they have to face another obstacle – they live in fear of accusations and contempt and perhaps that is one reason why they decide not to seek help" [2].

Nevertheless, as Lesnik argues, the argument to abolish the Article was eminently liberal.

> "Slovenian nationalism fed on the idea that Slovenia was the most "advanced" or "progressive" Yugoslav republic in both economy and social liberties, and therefore the best example of what distinguished Yugoslavia as a whole from the rest of Eastern Europe" [3].

In 1984 the gay and lesbian movement was initiated as a part of the new social movements, which emerged in the eighties in Slovenia. Feminist, environmental, peace, gay and other social movements – interlacing and supporting each other's causes and aims – played an important role in political transformations of the late eighties and early nineties. The same year the first gay organization Magnus was established, called after the German scientist Magnus Hirschfield. It was not only the first Slovenian gay organization, three years later followed by the first Slovenian lesbian organization LL, but also the first one in former Yugoslavia and in Eastern Europe. Magnus soon succeeded in repositioning homosexuality from the psychiatric and medical to the political, social and cultural frameworks. As early as 1986, the gay organization issued a Manifest demanding the insertion in the Constitution of a clause prohibiting discrimination on the basis of sexual orientation. The activists required the change of the school curriculum so as to include homosexuality as part of the official school syllabus. The group also demanded that the Serbian, Bosnian and Macedonian authorities decriminalize homosexuality in their Penal Codes and that

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[2] J. Lorenci, "Med moralo in svobodo: Sodnik vrhovnega sodisca SRS Janez Sinkovec o homoseksualnosti (Between morality and freedom: The judge of the Supreme Court Janez Sinkovec on homosexuality) ", *ITD* (and so forth), 12 February 1974.

[3] B. Lesnik, *op. cit.*

Yugoslav government put across a protest against governments in Romania, Soviet Union, Cuba and Iran, where homosexual minority was ill-treated. Needless to say none of the requests was ever met.

The early political demands to change the second class position of gays and lesbians, set forth by Magnus, put Slovenia in the frontlines of the (developing) gay and lesbian movements in Eastern Europe. However because of the latest political developments Slovenia has lost its “pioneer role”. After years of attempts gay and lesbian organizations have not succeeded in putting forward a bill on registered same-sex partnership, there has been no success. It seems that human rights issues and protection of minorities are by rule pushed back due to allegedly more important issues of national significance. Same-sex partnership bill is understood as a marginal and particular problem, which can be resolved only after more important issues are taken care of. Although, as I argue later, European Union context played and important background (and backup) role in pushing forward the human rights issues, the needed and obligatory harmonization of national legislation to the European Union standards resulted in “priority issues”, where same-sex partnership had no place. In the meantime Croatia and Hungary have adopted some legal measures for same-sex partnerships, although far from being satisfactory and non-discriminatory. Similar attempts are taking place in other new European Union Member States, all of them leaving Slovenia far behind. In the light of recent political developments in Slovenia, which I discuss later, the European Union parliamentarian and the member of European Parliament’s Intergroup on Gay and Lesbian Rights Sophie in’t Veld characterized Slovenia in her interview for *Mladina* as the only European Union Member State where not only there has been no progress in regard to registered same-sex partnership, but “there has been a visible step backward” [4].

3. The European Union resolutions and the Slovenian legislation

As mentioned before the European Union context was and remains an important tool throughout the political agitation for gay and lesbian rights, especially in the case of registered same-sex partnership. Various initiatives for legal recognition of same-sex partnership as well as the political agenda of the Slovenian LGBT movement itself permanently refers to and frames its demands around European Union recommendations, resolutions and other human rights documents. In the context of the contemporary political situation in Slovenia, as I sketched it above, one might say that the effect of referring to these standards was somewhat more successful in the period before the enlargement in May 2004. It seemed that parties from both spectrums of political continuum would do much to please European Union institutions in order to gain as many political points as possible. On these grounds (among others) the Penal Code was changed in 1995. Article 141 now explicitly prohibits any kind of discrimination on the basis of one’s sexual orientation. Discrimination is punishable

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[4] B. Hocevar, “Slovenija naredila korak nazaj (Slovenia took a step backward) ”, *Delo*, 15 February 2005, http://www.delo.si/index.php?sv_path=41,35,43231.

with a fine or one year's imprisonment. Similarly – but not explicitly – Article 14 of the Slovenian constitution guarantees equal rights to gays and lesbians and protects them from being treated differentially due to their "personal circumstances". As it is elucidated in the explanatory text to the Constitution, personal circumstances include sexual orientation. Sexual orientation is explicitly mentioned in three other Slovenian laws: the Personal Data Protection Act (adopted in 1991), the Labor Legislation Act (adopted in 2002) and the Equal Treatment Act (adopted in 2004).

The Personal Data Protection Act prohibits collecting any information about one's sexual behavior without his or her consent. The Labor Legislation Act penalizes employers who would deny equal promotion to employees on the basis of their sexual orientation. Direct and indirect discrimination at the workplace on the basis of one's sexual orientation is also prohibited. However it is interesting to note that the law does not explicitly mention sexual orientation as an inadmissible reason for dismissal from employment. Among the intolerable causes race, color of the skin, gender and age are listed, while sexual orientation is not. According to the research on everyday life of gays and lesbians in Slovenia [5], which I discuss in more details later, 94% of people surveyed believe they have not experienced any discrimination at work place due to their homosexuality, whereas 4% suspect that their same-sex orientation was the hidden reason for their dismissal from employment. However it is important to note that 49% of gays and lesbians surveyed are not out at work place or are out to only few of their work colleagues. It seems that participation at work place as a *homosexual* person is still somehow limited and often impossible.

The Equal Treatment Act introduced various means of implementing the principle of equal treatment at asserting one's rights, duties and liberties at all levels of social life, especially at work place, in schools, at social security issues and at obtaining goods regardless of one's gender, religion, race... and sexual orientation. Based on the requirements of this law, the Advocate for Equal Opportunities was founded in 2005 as an independent agency within the Office for Equal Opportunities. Like Ombudsman, Advocate can only point at discriminatory praxis and call for its change, but his/her opinion is not obligatory for the offender.

4. The never ending story: the registered same-sex partnership bill

The first initiative to change the Marriage and Family affairs Act came in 1993. The Women's Policy Office (now changed to the Office for Equal Opportunities) suggested the change of those articles of the matrimony legislation which discriminated on the basis of gender (and consequently sexual orientation). The initiative was backed up with a considerably extensive media attention, when two gay men, Aleksander Perdih and Silvo Zupanc, appealed to the Constitutional Court in 1993, claiming that several articles of the Marriage and Family Affairs Act were in contradiction to Article 14 of the Slovenian Constitution. The said article states

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[5] A. Svab and R. Kuhar, *Vsakdanje zivljenje gejev in lezbijk: preliminarna analiza (Everyday life of gays and lesbians: the preliminary analysis)*, Ljubljana, Mirovni institut, 2004, p. 62-65.

that "everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of (...) any personal circumstances", which includes sexual orientation. They argued that their fundamental right to get married is not guaranteed due to their "personal circumstances", that is due to their homosexuality. However, after being told that they have no chances of winning the case, they later dismissed the appeal and the Constitutional Court never discussed it. In 2002 Tatjana Greif, one of the leading LGBT activists in Slovenia, filed a new appeal to the Constitutional Court on the same grounds, but the Constitutional Court has not addressed the issue yet.

The first bill on registered same-sex partnership was drafted in 1998, after an expert group was founded within the Ministry of Labor, Family and Social Affairs. Although representatives of LGBT organizations participated in the expert group, their efforts were often overruled by the conservative, but very influential lawyer whose participation in the expert group made it impossible to draft a satisfactory registered same-sex partnership bill. He found equation of heterosexual and homosexual partnerships – in the light of legal protection of (nuclear, heterosexual) family – absolutely unacceptable. The bill therefore introduced only two legal consequences for registered same-sex partners: the right and duty to support partners without income and the regulation of property relations between partners. Yet the bill never made it to the parliamentary discussion.

In 2001 the new Secretary General of the same Ministry Alenka Kovsca appointed a new expert group to prepare a new bill on registered same-sex partners. Kovsca found the 1998 bill unsatisfactory. This time the Ministry worked very close with the LGBT organizations. They agreed with Kovsca's proposal to equate heterosexual and homosexual partnerships in all rights and duties with the exception of adoption and foster rights. Although there existed some seldom interpretations that the bill should include these rights as well, if it is not to be discriminatory, majority of representatives of LGBT organizations agreed that adoption is a special issue and should be discussed separately. They believed that a bill which would include adoption and foster rights for gays and lesbians has no real chances of being adopted in the Parliament. Additionally it was considered to be a part of political tactic of how to shift public attention from "notorious and unacceptable" gay and lesbian adoption rights to allegedly unproblematic issues of social, inheritance, pension and similar rights. In this fashion, as Mencin claims, the Ministry of Labor, Family and Social Affairs as well as LGBT organizations themselves self-censored its politics and political agenda and agreed on a "compromise before anyone officially demanded it" [6].

The aim of avoiding public discussion on adoption rights was however unsuccessful. Although media constantly reported on the bill and widely opened their space for debate on homosexuality, mostly in a neutral or a positive way, gay and lesbian activists were frustrated by continuously being pressed into discussion on adoption rights. The more they tried to explain that the bill does not include adoption and foster rights for gays and lesbians, the more the general public and opposing

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[6] M. Mencin, "Magicni krog diskriminacije (The vicious circle of discrimination)", *Druzboslovne razprave*, Ljubljana, 2005, in print.

political factions seemed to be interested in this particular issue, often limiting the public discussion to adoption and its alleged malign consequences only.

After years of attempts from LGBT organizations to put forward a bill on registered same-sex partnership, Kovsca's bill was finally submitted to the governmental procedures at the end of 2003. However, when the bill was due to be brought before the Parliament, the procedure was blocked by the Slovene People's party, which was part of the governing coalition at this moment. In their writings to other three (left-wing) parties in the coalition, they claimed that "formation of a same-sex partnership is not a human right. Human rights are protecting values for which we must strive for. Same-sex partnerships are not among them". They believed that this particular law would not be "a sign of tolerance, it would rather stimulate behavior, which is hazardous". Therefore by equating same-sex partnership with conjugal unions "behavior, which is risky for the society, would be positively valued and raised to the position of something that is desired". At the same time they employed the nationalistically based discourse on demography and alleged dying out of the Slovenian nation. This contributed not only to the (moral) panic, but also constitued the (non-reproductive) *other* as the scapegoat: "The bill is encouraging same-sex partnerships and by doing that worsening the generational depiction of the Slovenian nation". Accordingly, the argument goes, society can tolerate same-sex partnerships, but it cannot stimulate them by any means. "That would be a suicidal politics" [7].

In the development of political events, People's party ceased to be a member of the governing coalition (not due to its opinion on same-sex partnership) and the ruling coalition reached agreement on the proposed law at the beginning of March 2004. However it has been withheld from parliamentary procedures until the very last sitting of the parliament before the new elections in October 2004. It passed the first reading, but two additional readings needed doing before the bill is adopted. The fact that the bill was withheld in those months before the elections, when the political constellation in the parliament was in favor of left-wing parties, showed that the left-wing government had no real intentions of adopting the law despite their declarative support for it. It seemed too risky to support gay and lesbian rights few months before the elections. Although the consequent analysis of the elections showed that it was nationalistically imbedded intolerance towards minority groups which paid off during the elections, ignoring the bill on same-sex registered partnership did not help the left wing parties.

5. The everyday life of the Slovenian politics of exclusion

The right wing Social Democrat Party won the elections in October 2004. It shifted the attempts to push forward the bill on registered same-sex partnership dramatically. The newly inaugurated right-wing governing coalition soon decided to withdraw Kovsca's bill, claiming that it was too similar to the Marriage and

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[7] All quotes taken from the People's party annotations to the bill on registered same-sex partners, sent to LDS, ZLSD, DeSUS and the Ministry of Labor, Family and Social Affairs on January 20, 2004.

Family Affairs Act. This resemblance is not acceptable, the argument goes, because heterosexual and homosexual partnerships are different by nature and therefore should be treated differently.

When Janez Drobnic, the new Minister of Labour, Family and Social Affairs was appointed to the office, he claimed that his Ministry would not deal with the question of homosexuality at all. During the hearing he asserted that homosexuality is an issue, which the Ministry of Health should be dealing with. Although he later claimed that he was misunderstood, his pronouncement and allusion that homosexuality is in fact an illness came as no surprise. In few of his previous statements on homosexuality he openly showed his homophobic points of view and expressed intolerant views about Roma, Muslims and single mothers in several other occasions. For example, in an interview for *Mladina* in 2003 he asserted that same-sex

> "[O]rientation is not transmitted genetically, but through socialization. From a societal point of view it is a kind of pathology in human relations. Why do not we also legally introduce equal rights for polygamy and polyandry, why not? All these are stupidities. It is not a question of equal rights, but it could be a pure civilization's decadence. Watch out: all civilizations that introduced it, died out. Do inform yourself about it!"

As the European Union resolutions on anti-discriminatory measures and especially Article 13 of the Amsterdam Treaty have been a reference point for the Slovenian gay and lesbian movement during the accession process, Drobnic's discriminatory pronouncements at the time when Slovenia was already a full member of EU proved to be the first "testing" cause of the efficiency of the said instruments. Lesbian organization LL compiled a "dossier" of Drobnic's discriminatory statements (and of two other Slovenian politicians, Cukjati and Pece) and informed the European Parliament about it. European Parliament member Emine Bozkurt then initiated a complaint, addressed to the European Commission, saying that "one would think that Europe nowadays would have lost the historical idea that homosexuality is a moral or physical disease" [8]. She asked Commission to take the necessary steps to condemn these kinds of pronouncements and not let them be left unpunished. Later the European Parliament's Intergroup on Gay and Lesbian Rights wrote a letter to the president of the European Commission Jose Manuel Barroso, bringing to his attention Drobnic's discriminatory statements and urging him to react. The Intergroup reminded him of his own promise at the Plenary Session of the European Parliament on 26 October 2004 in Strasbourg, where he stated that he would "personally assume full control of our action in the fight against discrimination and the promotion of fundamental rights" [9]. Barroso has not (yet) responded to this request, but his office asked Drobnic to explain his views.

It is somehow ironic that Drobnic was appointed to the office at about the same time when Rocco Buttiglione was rejected a position of a European commissioner

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[8] Skuc LL – Izjava za javnost, 3 February 2005, accessible at http://www.ljudmila.org/lesbo/arhiv_novice.htm.

[9] *Ibid.*

due to his discriminatory views on women and homosexuals. At the time European Parliament expressed a very clear message about its non-discriminatory values. However, it is perhaps even more ironic that at the same time Franc Cukjati and Saso Pece, whose past statements and views are in full accordance with that of Buttiglione, were elected president and vice president of the Slovenian parliament. Cukjati expressed the following heterosexist understanding of single women during the heated debate on the right to artificial insemination in Slovenian parliament in 2001, which ended up in a referendum and consequent prohibition of artificial insemination for single women: “If a single, fertile woman, who wants to have a child, has such a strong psychological resistance towards men and consequently a natural fertilization is not possible, then that kind of a female patient needs a psychological and psychotherapeutic help” [10]. Similarly Pece claimed that guaranteeing artificial insemination to single women is a form of “appeasing single women’s psychological problems who cannot conceive due to their complexes. This kind of solution is only a step away from homosexual marriages, which would be noxious for our country” [11]. However, his most notorious statement is that he would never have a coffee with a homosexual or a black person, expressed in an interview for pop magazine *Mars* in 2001.

Although the European Parliament Member Sophie in’t Veld upon her visit to Slovenia expressed her anxiousness regarding human rights protection and claimed that “if one European Union State has a Minister like that, it is not a particular local problem of that State, but rather a problem of the whole European Union” [12], it seems that the problem remains local. Drobnic might have been admonished, but his Ministry continued the politics of exclusion by keeping gays and lesbians steadily in the second class position. The politics of exclusion from full citizenship is often legitimized as being supported by the majority of Slovenians. For example, one representative of the Ministry of Labour, Family and Social Affairs claimed in her interview for *Radio Slovenija* that according to their survey Slovenian society does not support homosexual marriages, but it does agree with some degree of legal protection of same-sex partners. “Therefore”, she concluded, “our politics [of not equating homosexual partnership with heterosexual] is correct”. In this way one discriminatory praxis (no legal equating) is legitimized by another discriminatory stance (public opinion on homosexual partnerships).

6. Value-based homophobia

Regardless of some positive legal shifting, gays and lesbians remain a marginal minority. European Union resolutions regarding same-sex partnerships – as, for

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[10] Slovenian parliament, April 2001, quoted in J. Trampus, “Nagrajena nestrpnost (Rewarded intolerance)”, *Mladina*, 44, 1 November 2004, http://www.mladina.si/tednik/200444/clanek/slo-tema--jure_trampus/.

[11] Quoted in U. Matos, ““Berufs verbot” odpravljen (“Berufs verbot” dismissed)”, *Mladina*, 28, 10 July 2000, http://www.mladina.si/tednik/200028/clanek/oploditev/.

[12] Quoted in A. Jud, “(Ne)evropski trend netolerance s populizmom ((Non)European trend of intolerance with populism)”, *Vecer (Sobotna priloga)*, 19 February 2005.

example, A5-0281/2003 by which the European Parliament calls on Member States to guarantee same-sex partners the right to marry and adopt children –, are by all means helpful and important. However European Union resolutions regarding family and matrimony affairs are not mandatory for the Member States, therefore protection of gays and lesbians in Slovenia is often displaced on the grounds of protection of traditional, heterosexual family. It is understood that zero-sum logic is at work: the more gays and lesbians are protected and the more rights they are assured, the more nuclear heterosexual family is devalued and endangered. The sociological fact of the existence of new forms of families is simply overlooked or these families, including same-sex families, are devalued as less desired and as an unsafe place for child raising. In accordance with "family protection" the debate on same-sex partnership in often framed within panic, built around demographic situation. The idea of "dying out of the Slovenian nation" firstly emerged in the beginning of the nineties, when Slovenians – in the process of defining the outer enemy – searched for a new non-Balkan identity. As public opinion polls showed there was a high social distance towards immigrants, especially people from former Yugoslavia [13]. Later in the nineties the social distance towards immigrants and ethnic minorities slowly decreased, while distance towards social minorities, especially homosexuals, remained steadily high.

The new right-wing government re-launched the debate on Slovenian nation dying out (and the consequent panic). Since the debate is framed within the context of family protection and stimulation of "bigger families" with three and more children, it seems that this time "the enemy" is within the nation. The argument is as follows: since homosexual relationships are "not open to new lives" (i.e. they do not reproduce), they should not enjoy the same rights as heterosexual partners (who can reproduce). The argument is weak; firstly, heterosexuals are not required to have children in order to enjoy the matrimony rights. Secondly, if the frightening demographic situation is the real reason for discrimination, artificial insemination of single women and gay adoptions should be allowed, since it would contribute to the nation's increment. This shows that the demographical situation and family protection is not really at stake when equation of homosexual and heterosexual partnership is in question. However the argument is populistically effective: the panic around the nation's decline incites and excuses the revenge ethics towards "outsiders", homosexuals among them.

At first it seemed that the problem with the same-sex registered partnership lays in its symbolic meaning. It was often explained that this particular law would constitute homosexuality as a wished-for value. That would, the argument goes, simultaneously devalue the traditional family, which is – in the light of the demographic situation – absolutely unacceptable. In this sense homosexual marriage is constructed as a threatening problem, which can only be solved by keeping gays and lesbians in the position of second-class citizens. As Warner points out: "Often they [heterosexuals] are willing to grant all (or nearly all) the benefits of marriage to gay people, as long

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[13] See N. Tos and others, *Vrednote v prehodu II (Slovensko javno mnenje 1990-1998) (Values in transition II (Slovenian public opinion, 1990-1998))*, Ljubljana, Fakulteta za druzbene vede, 1999.

as they do not have to give up the word “marriage”. They need some token, however magical, of superiority” [14].

It seems that homophobia is turning a new point: comparable with the notion of cultural racism (as opposed to traditional biologically, neurologically and/or psychologically founded racism [15]) homophobia nowadays is no longer based on biological/psychological and/or neurological traits of homosexuals (homosexuals as biologically or psychologically derailed persons), but rather on the societal value of this particular orientation. As media are more and more often portraying homosexuals as normal, as “one of us”, and as the (political) consciousness that one should not be discriminated on the basis of his or her sexual orientation raises, the new ground of discrimination is based on the cultural values of society. Homosexuality might be accepted, but not desired. Homosexuals might be legally protected, but their acts (homosexuality) are still stigmatized and unwanted. Therefore gays and lesbians should remain within the limits of tolerance that society at large poses upon them. I call it the *heterosexual normalization of homosexuality*; it is homosexuality which is in accordance with the heterosexual standards, homosexuality, which is allowed and recognized, but accepted only as long as it does not endanger the heterosexual supremacy [16]. This is particularly explicit in the debate on gay and lesbian adoptions. One of the often employed arguments against adoption is an apprehension that a child might become homosexual if he or she was raised by a homosexual couple. Putting aside the fact that researches do not confirm this assumption [17], the argument is an expression of how homosexuality as a value is unacceptable and problematic; while homosexuals should not be discriminated, the society should take any measures to prevent children from “becoming homosexual”. This is the “hidden agenda” where value-based homophobia springs out. It is also exactly what happened in the latest, third version of the bill on same-sex registered partnership in Slovenia. The right-wing government after withdrawing the Kovsca’s bill drafted a new one. Unlike the previous bill, which envisioned a solemn procedure of registering one’s same-sex partnership, this time the registration procedure is reduced to a bureaucratic and administrative signing of papers on the counter. Homosexual couple is devalued by being removed from the wedding ceremony hall (but at the same time guaranteed some rights), while heterosexual couple gains in its symbolic value, since it can

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[14] M. Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life*, Harvard, Harvard University Press, 1999, p. 82.

[15] See K. Malik, *The Meaning of Race*, London, Macmillian, 1996, and T. Kuzmanic, “Post-socialism, Racism and the Reinvention of Politics”, in M. Pajnik (ed.), *Xenophobia and Post-socialism*, Ljubljana, Mirovni institut, 2002, p. 17-35.

[16] About this in connection to media reporting on homosexuality see R. Kuhar, *Media representations of homosexuality*, Ljubljana, Mediwatch, 2003, p. 87-92. Available also at: http://mediawatch.mirovni-institut.si/eng/mw13.htm.

[17] See S. Golombok, *Parenting: What really counts?,* London, New York, Routledge, 2000.

display itself (as a "value we strive for") in the public space of the same wedding ceremony hall which homosexual couple may not step into.

In order to satisfy the expected cooperation between government and civil society, the right-wing government asked LGBT organizations to submit their annotations and suggestions regarding the newly drafted bill. None of the annotations from LGBT side was later introduced into the bill. The new bill is now similar to the one from 1998, introducing only a limited amount of rights regarding the regulation of property relations and inheritance issues. It guarantees the right to visit your partner in hospital, but gays and lesbians still cannot decide on the medical issues regarding his or her partner, since one does not acquire a status of a "close relative" by same-sex registration. The "close relative" status is needed not only in this particular situation in the hospital, but also in other cases, such as obtaining a joint housing loan and similar. It does not assure any social pension or similar rights to same-sex partners. Despite the fact that LGBT organizations do not support it, the bill has already passed the first reading in Parliament and is expected to be adopted before the summer of 2005. At the moment of writing this paper, gays and lesbians in Slovenia are second class citizens due to lack of legislation. After the proposed bill on registered same-sex partnership is adopted, they will remain second class citizens, but this time their second class position will be *de facto* written in the law.

7. The research: everyday life of gays and lesbians in Slovenia

As the feminist analysis of the concept of citizenship has shown, citizenship is often gendered. While equal citizenship rights might be guaranteed to both, men and women, the praxis of citizenship proved that equal rights for men and women did not necessarily bring social equality to women. The cultural, social and political conditions for active citizenship (the praxis of citizenship as a *gendered* person) are often still in favor of men. Similarly one can argue that citizenship is not only gendered, but also *sexualized*. Putting aside the fact that equal rights for gays and lesbians are not exercised in the majority of the European Union Member States, it is obvious that once the equal rights are guaranteed, the active participation of gays and lesbians in public (and private) spheres as *sexual* citizens will still be limited. I explore the problem of active citizenship and illustrate the limitations of equal rights in the context of the research on everyday life of gays and lesbians in Slovenia. Focusing especially on the question of coming out, I explore the social milieus in which gays and lesbians cannot organize their lives beyond the closet and also point at a certain passivity and resignation in regard to their second class citizenship position.

"Social and family contexts of everyday life of gays and lesbians in Slovenia" was a two-year research project (2002-2004) [18]. Based on the Slovenian public opinion

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[18] The research was conducted by Dr. Alenka Svab, the project manager, and myself. It was financed by the Slovenian Ministry of Labor, Family and Social Affairs and the Ministry of Science. Additional founds were acquired from the Open Society Institute in New York. See: www.mirovni-institut.si/glbt.

poll results of social distance towards homosexuals [19] and on the basis of few previous researches on gays and lesbians in Slovenia [20] our starting point was the idea that gays and lesbians are a socially stigmatized group in Slovenia, facing social exclusion. The aim of the project was to outline the current situation, to research family and social contexts, in which gays and lesbians in Slovenia live, and above all to identify the problems they face because of their sexual orientation. For these reasons, the project was divided into two empirical parts – quantitative and qualitative.

The quantitative part was conducted in the period from April to July 2003 on a sample of 443 respondents, which is a reasonably big (but not necessarily representative) sample, considering the fact that the population of Slovenia is two million. Sampling was carried out by the link-tracing methodology [21], which is relevant for researching small social groups, where a high level of personal trust is required. The starting sample of forty-five respondents was created through personal acquaintances and ads in Slovenian LGBT magazine and at web sites.

The philosophy behind the link-tracing methodology is that there exist some links between the starting sample and other gays and lesbians in the population. Link-tracing methodology helped to identify social networks. Some researchers tried to identify the number of homosexuals in a population by asking their respondents whether they have had any sexual experience with a person of the same sex in the last year/last three years/in their life etc. We found that approach rather problematic, since it reduces homosexuality to sexual experiences only [22]. In our research the problem of who qualifies as homosexual person was surpassed by self-identification; only those who identified themselves to be part of the target population participated in the research regardless of their sexual or other (non)experiences. In our case only those who identified themselves as gays and lesbians were included in the sample.

The quantitative part consisted of forty to seventy minutes' face to face interviews. Twenty-five interviewers carried out the surveying, which consisted of eighty-eight questions, covering seven different topics: homosexual identity and coming out, homosexual partnership, violence and discrimination, school and education, work

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[19] The results of the social distance towards homosexuals, framed as a question "Who would you not want for your neighbour?" in the annual Slovenian public opinion polls are as follows: in 1992 there were 42,5% of those who would not want a homosexual to be their neighbour, followed by 61,6% in 1993, 56,2% in 1994, 61,2% in 1995, 60,3% in 1998, 44,3% in 1999, 55,1% in 2000 and 50,7% in 2002. See N. Tos and others, *Vrednote v prehodu II (Slovensko javno mnenje 1990-1998)*, *op. cit.* and Id., *Vrednote v prehodu III (Slovensko javno mnenje 1999-2002) (Values in transition III (Slovenian public opinion, 1999-2002))*, Ljubljana, Fakulteta za druzbene vede, 2002.

[20] N. Velikonja and T. Greif, "Report: Sexual orientation discrimination in Slovenia", *Lesbo*, 11/12, 2001, p. 64-72, and Id., "Anketa o registriranem partnerstvu (Same-sex registered partnership Survey)", *Lesbo*, 19/20, 2003, p. 57-63.

[21] M. Spreen, "Rare populations, hidden populations and link-tracing designs: what and why?", *Bulletin méthodologie sociologique*, 36, p. 34-58.

[22] See more on this in M. Hubert and others (ed.), *Sexual Behaviour and HIV/AIDS in Europe (Comparison of National Surveys)*, London, UCL Press, 1998.

place, LGBT subculture, media, children and family relations. Each respondent was asked at the end of the survey whether he or she knows of any other gays and lesbians who he or she could ask to participate in the survey. The respondents had to make the initial contact themselves and ask the person if he or she was willing to participate in the survey. Only after they agreed we contacted them or they contacted us. This strategy proved to be efficient; the initial first contact between gays and lesbians themselves helped the potential respondents to obtain information on the research from people they knew and have already went through the surveying process. In this way those who have already participated in the survey, could share their hopefully positive experiences with the survey, while we managed to attract broader audience of respondents who normally would not respond to ads in media. Trust is the key element when researching hidden minorities.

The problem with the link-tracing methodology is that it tends to overemphasize social networks. Those who are isolated or part of a very small and closed social networks are usually left out. Additional problem occurs if only one (big) and easily accessible social network is identified and activated. In our particular case the most accessible social network would be individuals who are connected to the gay and lesbian scene in Ljubljana. This particular population has been surveyed in previous researches. We tried to initiate more parallel chains of social networks and there are some signs upon which we can conclude that we succeeded in doing that. For example, 12% of gays and lesbians from the sample never attend LGBT places in Slovenia, 13% are not familiar with the work of LGBT activists, 11% do not know any of the Slovenian LGBT media or Internet sites and 48% do not live in the capital, Ljubljana, or its suburbs. All these are characteristics not typical of the individuals from the Ljubljana's gay and lesbian scene. Additionally the geographical distribution of the sample shows that we managed to include gays and lesbians from all over Slovenia. We traced the residence of the respondents by the first number of the postal code. This enabled us to keep the information on the exact residence of the respondent as anonymous as possible, yet we still identify the region of the respondent's residence [23].

[23] 66% of the persons surveyed were male, 34% female. The youngest respondent was born in 1986 (17 years old at the time of survey), the oldest one in 1943 (60 years old). 85% of the respondents were aged between 20 and 40, therefore the results of the research mostly correspond to the experiences of this particular age group. 62% of the respondents currently live in urban centers (Ljubljana or Maribor). The majority, 95% had never been married. The education level of the sample is higher than the average educational level of the Slovenian population. 55% of them have finished secondary school, 20% hold a BA degree and 4% a MA or a PhD. 30% of the respondents declare themselves as religious (51% of them are Roman Catholics). 47% are not religious, while 21% do not want to answer the question. 90% of the sample are of Slovene nationality, 2% of the respondents are Croats, another 2% Serbs. There are other nationalities represented in the sample, but with low percentages. Among them there are Bosnians, Macedonians, Albanians, Montenegrins, Hungarians, Germans, Austrians, Americans and various combinations of these nationalities.

The qualitative part of the research was carried out in May and June of 2004 in the form of focus groups. In seven focus groups thirty-six gays and lesbians were interviewed. Most of them participated in the first part of the research as well. We discussed three topics only: homosexual identity, homosexual partnership and violence. The qualitative part of the research was needed in order to get a better insight and the background information as an addition to statistical data, obtained in the first part of the research [24].

8. Coming out

Coming out of the closet is one of the crucial moments in the process of forming homosexual identity. As Eve Kosofsky Sedgwick points out closet is still "the fundamental feature of social life" [25] of gays and lesbians and presents "the defining structure for gay oppression" [26]. I understand this particular structure as a place, surrounded by high walls, which are built up of two different kinds of bricks: heteronormativity and homophobia. These are the walls which Sedgwick had in mind when she claimed that "people find new walls springing up around them even as they drowse" [27].

Both heteronormativity and homophobia are internalized during socialization and are continuously being strengthened by living in a heteronormative society. 76% of gays and lesbians surveyed claimed that their parents never discussed homosexuality with them when they were young or they provided only a very limited amount of information. Information about homosexuality is usually not obtained in schools either. 45% of the persons surveyed do not remember ever discussing homosexuality in primary or secondary school. Another 45% claimed that they discussed homosexuality in school, but only very briefly. The absence of relevant information keeps the walls high and, as theories on the formation of homosexual identity show, produces identity crises [28]. Matjaz, a gay who participated in the focus groups, believes that he inflicted violence upon himself exactly because relevant information was not available.

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[24] 53% of people interview were male and 47% female. They were aged between 19 and 40. 53% of them were undergraduate and postgraduate students, 31% employed, 8% attended secondary school or were unemployed. 67% of the respondents were in a same-sex relationship at the time of the interview.

[25] E. K. SEDGWICK, "Epistemology of the Closet", in H. ABELOVE and others (ed.), *The Lesbiand and Gay Studies Reader*, New York, London, Routledge, 1993, p. 46.

[26] *Ibid.*, p. 48.

[27] *Ibid.*, p. 46.

[28] See V. CASS, "Homosexual Identity Formation: A Theoretical Model", *Journal of Homosexuality*, 4, 1979, p. 219-235; K. PLUMMER, "Symbolic Interactionism and the Forms of Homosexuality", in S. SEIDMAN (ed.), *Queer Theory/Sociology*, Oxford, Blackwell, 1996, p. 64-82; R. TROIDEN, "A Model of Homosexual Identity Formation", in P. M. NARDI and B. E. SCHEIDER (ed.), *Social Perspectives in Lesbian and Gay Studies*, London, Routledge, 1988, p. 261-278 and others.

> "In the beginning when you are alone, you become very violent towards yourself because of all the wrong information and the lack of information from society, school, and family. Even if I was physically bitten, I do not believe it would be such a dreadful form of violence as I have been inflicting upon myself for years" (Matjaz, 25) [29].

The identity crisis is most often resolved by the process of coming out, although, as our research shows, one has to deal with residues of internalized homophobia in many social settings long after the initial coming out. According to the research, gays and lesbians in Slovenia first come out at the end of their adolescence, on average at nineteen and a half. It is not surprising that gays and lesbians as a rule first came out to their close friends, whose reaction to their coming out was mostly (in 74% of cases) positive. The social milieu of close friends proved to be the safest place to come out. However the high level of positive reactions to one's coming out is not necessarily a sign of a tolerant society, but rather an effect of precise examination on the side of gays and lesbians whom to come out to. On the contrary, coming out to parents seems to be more destructive. The majority of gays and lesbians surveyed came out to their parents a year or two after their initial coming out.

Family life is based on binary gender matrix and consequent expectations about one's sexual identity. Coming out to parents therefore endangers the conventional expectations about children and destroys the heteronormative supposition of family life. As a child comes out of the closet in the family, parents are pushed into the same closet: now they have to deal not only with their own internalized homophobia but also with the heteronormative expectations of the society. According to our research, parents quite often remain in the closet due to fear and shame. More than half of our respondents claimed that their parents have not discussed their homosexuality with other relatives or close friends. As Tara, a lesbian who participated in the research, said:

> "My mother is ashamed of me. She feels awkward because of me. Her head starts to spin as soon as she thinks of the possibility that other people might know about me being with women. (…) When I broke up with my girlfriend, she felt relieved. She enjoyed her happiness and that really gets on my nerves. (…) I think that shamefulness is of key importance. Burdened with the fear of what one might say! And I tell her often: listen mother, society that is you and me" (Tara, 30).

Similarly Ksenja realized that her mother never came out either.

> "After all these years I realized that my mother never came out to anyone. She did not tell a single friend about me. I noticed that she even has a problem saying that word" (Ksenja, 30).

When discussing coming out to parents we have to make a clear distinction between mothers and fathers. While 67% of gays and lesbians surveyed came out to their mother, only 46% came out to their father, too.

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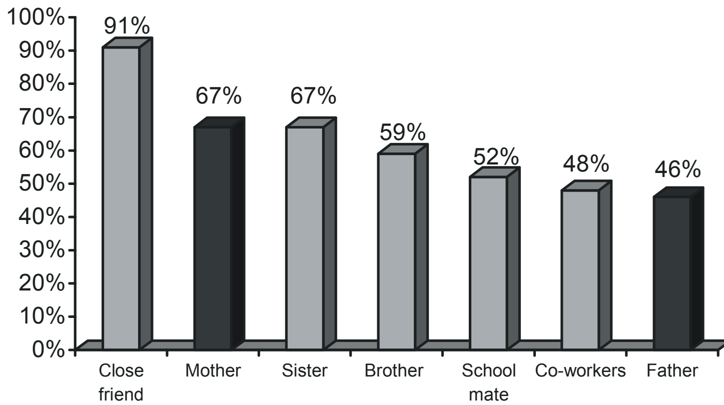
[29] All names of gays and lesbians, who participated in focus groups, are changed. The number in bracket represents the respondent's age.

Whom have you come out to?



As the figure above shows fathers seem to know much less about their children's intimate life and their *real* sexual orientation than mothers. In fact, statistically it is more likely that a person will come out to his or her mother, brothers and sisters, close schoolmates and close workmates before coming out to his or her father. Based on the interviews we identified two major reasons for this: the phenomenon of distant fathers and the patriarchal family constellations.

Most of the respondents when asked why they have not come out to their father explained that no real or very superficial communication exists between them and their fathers. They felt much closer to their mothers and believed that she would better understand them, while father might have serious problems with it. It shows that "emotional work" within families is still unbalanced and remains women's work. Sebastjan, for example, explained why he came out to his mother first:

> "I was much closer to my mother than to my father. It means that it was easier for me to talk to her. I spent incomparably more time with my mother. (…) But it does not mean that my father does not love me or anything like that" (Sebastjan, 31).

Although limited communication between a child and a father could be explained as a sign of patriarchal family constellations, it seems that the relation between parents is also of crucial importance when discussing coming out in the patriarchal families. It turned out that mothers quite often prevented their child from coming out to his or her father. By doing this they either tried to protect their child, because they expect the father to react violently to the fact that his child is homosexual; or, mothers tried to protect themselves. If the family situation is very patriarchal, then the mother is stereotypically responsible for the upbringing of her children. If her child is homosexual, homosexuality is quite often explained and understood as a mistake in upbringing. As such it is a sign of mother's failure in upbringing her child. By trying to prevent the spreading of information on child's homosexuality, which she understands as shameful, she is actually trying to protect not only her child but also herself.

Tara, for example, had this kind of an experience.

> "My mother's first reaction to my coming out was: "Just do not tell your father!" As if she wanted to say: do not do that to me. (…) He is a very violent person, verbally violent, and my mother would definitely have to deal with all the consequences. The fact is that it would be really horrible, if I came out to my father" (Tara, 30).

However, first reactions to one's coming out do not differ between mothers and fathers. 40% of gays and lesbians who came out to both of their parents, reported experiencing negative reactions. As coming out to parents is understood to be a private matter, verbal or even physical violence, perpetrated by parents, is often silenced and remains invisible and not recognized in the society. After they came out, gays and lesbians were exposed to emotional blackmailing, mockery or no communication in the family. 26% of them understood their parents' reaction to their coming out and what followed it as acts of mostly verbal violence. This is how Barbara described the time after coming out to her mother:

> "Her reaction was hysterical. She was crying and screaming. Not to mention what she was saying. (...) She did not threaten to throw me out of the apartment. (...) What I really resent her is that she was dealing with what the neighbors will say. I thought why you care what neighbors will say. Rather deal with your relationship with me. (...) Then she would cry every time there were baby commercials on television. "You will not have children", she would say. (...) She knew exactly which buttons to push and I did not like it. It was not easy for me when she was crying. (...) Then she realized that crying does not help, so she changed her tactic. She started to scream at me" (Barbara, 26).

After Gabrijel came out, his boyfriend's parents tried to break up the relationship he had with his boyfriend:

> "They tried for a while to break us apart. They wanted to send him to the boarding school. But the more they tried to break us apart, the closer we became. This coming out was very painful for me, because it was literally followed by three years of war. (...) I do not remember anymore what we said to each other, but I know that it was such a strong pressure for me that even nowadays I feel a kind of pain in my chest. Well, maybe not pain, but weight. However, we managed to sort things out and today they like my boyfriend" (Gabrijel, 40).

The relations between parents and their homosexual child are power relations. Since gays and lesbians on average come out to their parents when they are twenty or twenty-one years old, they are in most cases still economically dependent on their parents. The State, which can interfere into private sphere, remains silent and uninterested. It seems as if parents have the ultimate right to try to change a child's sexual orientation by various means of verbal violence. Parents often understand homosexual orientation as a phase, which they try to end as soon as possible. The binary distinction between privacy and public sphere is here employed as a control over sexuality.

The first reactions of parents eventually transform into consolidation, but homosexuality often remains a taboo, which family members do not talk about. It becomes a "family secret". Gays and lesbians, who are out to their parents, are therefore often expected not to talk about their homosexuality or their same-sex partners; one is not expected to bring his or her same-sex partner to family reunions

and similar. Therefore, they again end up in the closet, but this time in a – what I call – *transparent closet*. The child's homosexuality may be known, but homosexuality remains a shame. Gays and lesbians are therefore often faced with parents who are willing to accept their child's coming out, but are not willing to accept their child as a *homosexual* person with a *homosexual* lifestyle (whatever that means). As the child is put into a transparent closet, he or she is robbed of his or her sexuality and is expected to act as an asexual person within the family contexts.

Igor, for example, tried to talk about homosexuality with his parents after his coming out, but his parents were simply not ready to discuss it.

> "My mother said I can bring over my friend. But when my boyfriend came with me, she did not know how to act. She could not even breathe. That is why I prefer not to do it, because I am still living with my parents. They know I am gay, but they do not want to know anything more than that. We never talk about it. It is better if I do not mention it. I tried a few times, but then emotions burst out, there was crying and arguing…" (Igor, 27).

All gays and lesbians surveyed did not share the same experiences. Some of them managed to organize their life in the family context beyond the closet. This usually, as Matjaz was explaining, requires a lot of energy.

> "Two years ago I deliberately started to initiate collective lunches and trips. Because his mother, she was ignoring me as much as possible. But I wanted to tell her I am here to stay and that she will not get rid of me easily. (...) I would come to his house and say, come on, let us go on a trip. She would say: "Ah, I am ironing right now…", but I would not care. I insisted on going on a trip together. And we did. I faced her with the fact. Nowadays, my mother and his mother call each other; they meet for coffee and sweets. But they both needed some kind of a push. I worked on it extensively for a year, every weekend, and even before" (Matjaz, 25).

Gay and lesbian relationships are importantly defined by the heteronormative framework of the broader society in which they live. This requires additional investment in relationship building, especially in regard to networks of close relatives. According to our research, there is an egalitarian division of housekeeping labor in gay and lesbian partnerships as compared to heterosexual partnerships, where the gender division of work remains in place. However there is one important exception: kin work. Each partner takes care of his or her own relatives. They, as a homosexual couple, are not interlaced within the networks of each other's close relatives, often because of the transparent closet. It means that they often do not exist as same-sex partners if it comes to family matters. In this sense family context presents a major obstacle, preventing the organization of one's everyday life beyond the closet.

There are however other social milieus where life beyond the closet does not occur. According to our research these are work place and public space. As mentioned before, almost every second employed gay or lesbian in Slovenia hides his or her sexual orientation at work or is out to only few of his or her work colleagues. Although direct and indirect discrimination at the workplace on the basis of one's sexual orientation is prohibited by law and the Slovenian labor legislation penalizes employers who would deny equal promotion to employees on the basis of their sexual orientation, the work place still seems to be an unsafe place to come out. Employed

gays and lesbians prefer to stay in the closet in order to avoid mockery, insults or even losing a job. Similarly, the public space preserves its heteronormative supposition. With every single physical or verbal assault upon gays and lesbians on the streets the heterosexualization of the street is once again reestablished [30]. As Amalija was commenting on holding hands in public: "You can get one false or strange gaze and you will change your mind!" (Amalija, 26)

53% of people surveyed had already experienced violence due to their sexual orientation. 91% of them were exposed to verbal assaults, 24% to physical violence and 6% to sexual violence. Most of the violent acts happened in public space where coming out of the closet by, for example, holding hand of a same-sex partner might result in angry reactions by strangers. According to the research strangers are the most frequent perpetrators of violence against homosexuals (61% of cases), followed by parents and relatives (26%) and friends or acquaintances (23%). This – together with the internalized homophobia – results in a high self-control in public space and makes intimate gestures such as holding hands, kissing and similar, less spontaneous or not spontaneous at all. In the language of citizenship: active participation in public space as a *homosexual* citizen is very limited or impossible. As Gasper was commenting on holding hands in public:

> "You are seized with a cramp on Copova Street [the shopping street in Ljubljana]. There is a controller in your head, which constantly tells you: "Watch out, you are being watched!" Then you do not want to do it anymore, because it ceases to be intimacy. It remains a strange gesture and you do not really know whether it still makes sense. If you are calm, your partner is not. When he calms down, you are not calm anymore. When you are both calm, your schoolmate passes by and then that is not really a good time to do it. (...) All these are disclosures which are somewhat repulsive. I always check. If I think I could handle the situation, if there was an incident, then I do it, if not, I prefer not to do it" (Gasper, 27).

9. Conclusion: active citizenship beyond the closet?

Steven Seidman suggested in his latest study of the closet in America that young generations of gays and lesbians organize their lives beyond the closet [31]. According to our research I can only partly confirm Seidman's ideas to be relevant for gays and lesbians in Slovenia. Here gays and lesbians do not organize their lives beyond the closet on all levels of social reality. The closet might be losing its destructiveness within social milieus of close friends and in some cases within family contexts, if gays and lesbians are not pushed (or let be pushed) into the transparent closet. In some other contexts, however, the closet remains a social structure of oppression. According to the research on everyday life of gays and lesbians in Slovenia public

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[30] G. Valentine, "(Re)negotiating the "heterosexual street" : Lesbian production of space", in N. Duncan (ed.), *Body space: Destabilizing geographies of gender and sexuality*, London, Routledge, p. 146-55.

[31] S. Seidman, *Beyond the closet : The transformation of gay and lesbian life*, New York and London, Routledge, 2002.

space and work space are two of those social contexts where the closet preserves its oppressive power. Additionally the research found an increasing passivity, resignation and conformity on the side of gays and lesbians themselves. Partly the conformity is due to the threatening violence in public space, but also because gays and lesbians accommodate their lives so that they fit into heteronormative suppositions of the public and private spheres. They believe that daily negotiations on heteronormativity would be too energy consuming. As Ksenja explained: "You simply do not want to fight every day on the street or wipe away spittle from your face" (Ksenja, 30).

Nevertheless, it seems that gays and lesbians are often not aware of the right "to have rights" and to participate in public life as a *sexual* person. Rather they are frequently willing (and also find appropriate excuses) to bound their homosexuality within the narrow limits of tolerance. In accordance with this 66% of the persons surveyed never participated in Ljubljana's Pride parade, because they either do not recognize the political importance of the event or they simply fear public reaction to it.

Summing up these results and taking into consideration the current legal and social situation of gays and lesbians in Slovenia, I would conclude that there is

– a low level of activity with regard to citizenship rights for gays and lesbians;
– a high level of homophobia in Slovenian society, and especially discouraging level of internalized homophobia on the side of gays and lesbians themselves;
– a low public awareness of the right to participate in society as an active (homo)sexual citizen, and finally
– although there are several legal measures employed to protect gays and lesbians, the promotion of such protection and rights is not satisfactory.

There seems to be a problematic discrepancy between the status of intimate citizen and his/her praxis of intimate/sexual citizenship [32]; one's intimate/sexual rights can be garanteed, but one's active participation in public (and private) life is still restricted and made impossible due to his/her intimate choices. As the results of the research have shown gays and lesbians in Slovenia cannot actively participate in public and private life as *homosexual* citizens despite the fact that their rights – with an important exception, namely the right to marry and adopt children – are protected in the Criminal Code, the Labour legislation, the Constitution and elsewhere. Formal civil and legal equality, as Rahman argues, does not necessarily bring social equality:

> "The State might allow us, as two abstract individuals, to get married but once we walk out of the registry office we are on the street, and then holding hands marks us out, not as individuals whose rights are assured in law, but as part of the group of queers, against whom it is socially legitimate to discriminate" [33].

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[32] See more on intimate/sexual citizenship in D. Evans, *Sexual Citizenship: The Material Construction of Sexuality*, London, Routledge, 1993; J. Weeks, "The sexual citizen", *Theory, Culture and Society*, 3-4, 1998, p. 35-52; K. Plummer, *Intimate citizenship: Private Decisions and Public Dialogues*, London, University of Washington Press, 2003, and D. Richardson, *Rethinking Sexuality*, London, Sage, 2000.

[33] M. Rahman, *Sexuality and Democracy : Identities and Strategies in Lesbians and Gay Politics*, Edinburgh, Edinburgh University Press, 2000, p. 46.

The implementation of the intimate/sexual citizenship concept might be a useful tool for the promotion of active citizenship rights for gays and lesbians and all the others, whose intimate/sexual choices are limited or made impossible by heteronormativity. Heteronormativity is namely not only a problem of homosexuals, but can also be a problem of heterosexuals and those who do not fit into either of these classifications.

By intimate/sexual citizenship I understand the fundamental right to *actively* participate in public (and private) life. An intimate/sexual citizen is therefore not only a citizen with a bundle of three sets of rights, as they are defined by Marshall [34], but should also be understood as a citizen whose fundamental right is to actively participate in public and private life as a *sexual* person, regardless of his or her intimate choices. Through promotion of intimate/sexual citizenship rights the social relations between heterosexuality and homosexuality as two opposing binaries – where the first one in the pair employs the second one to construct itself as the appropriate, healthy and valuable sexual orientation – could be challenged. As gays and lesbians become more and more legally protected (the *status* of citizenship), the shift of political work should be turned towards the active everyday life (the *praxis* of citizenship). I believe that the question of active citizenship should become one of the top priorities of the gay and lesbian movement in Europe and the United States of America before the repeating legal victories might misleadingly persuade us that the fight is over and that the goal is reached.

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[34] T. H. Marshall, *Citizenship and social class*, Cambridge, Cambridge University Press, 1950.

Recognizing sexual orientation in Polish law
From combating discrimination to claiming new rights

Patrycja POGODZINSKA

1. Introduction

The question of the legal status of sexual minorities gives rise to another question. Where does discrimination end? Is it enough to remove homosexuality from our penal codes and not worry about people's private lives? Or should we publicly recognise sexual minorities as certain social group and equip them with material and procedural rights to protect their civil liberties? The standards of the European Court of Human Rights and the European Union have gradually moved the scale towards addressing the latter question. Despite this movement however, and especially in countries where legal changes concerning LGBT persons are ahead of social changes, the above questions recur whenever new legislation concerning sexual minorities is introduced. This is the situation in Poland, but the answer differs depending on personal, political and religious beliefs. For some, new laws are necessary to combat discrimination, for others they constitute unjustified and immoral claims.

Sexual orientation is a very new expression both in Polish law and in culture. Homosexuality was generally a taboo, while transsexuals have usually been confused with drag queens.

According to a survey done by OBOP (the official body in charge of public opinion polls) in July 2000, 57% of Polish citizens view lesbians and gays unfavourably and only 27% favourably. Still, a positive change in social attitudes can be noted, as seven years earlier only 7% of the respondents indicated a positive attitude towards homosexuals [1].

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[1] *Report on discrimination on grounds of sexual orientation in Poland*, Warsaw, Lambda Warszawa Association, June 2001.

The survey “Attitudes towards homosexual marriages” carried out by the Centre of Public Opinion Research (CBOS) in 2001 showed only 5% of those surveyed claimed that homosexuality is a normal thing. As many as 88% of those surveyed claimed that homosexuality is a deviation from the norm. Of these, 47 % maintained that such deviation should be tolerated, whereas 41 %, claimed that it is an unacceptable deviation [2].

While the situation in law has significantly changed in the past year, the social one is more complex.

2. Labour Code antidiscrimination provisions

In the light of these statistics, in Poland there is no significant discrimination of sexual minorities at the workplace. One should remember, however, that many of those surveyed conceal their sexual orientation from employers and co-workers out of fear of discrimination. The results of the above survey, carried out by Lambda in 2001, showed that experiences concerning discrimination varied between 1-3%.

However, the question concerning harassment at the workplace yielded a less positive result:

> “Such harassment was experienced by 18% of those surveyed; it was not experienced by 82%. In the group of respondents who came out at the workplace such harassment occurred less frequently than in the case of people who did not come out, only 7,6% of respondents who had come out at the workplace experienced harassment. In the group of respondents who stayed in the closet the percentage harassed was slightly higher than in the general group, at 20%.
>
> The result obtained (concerning harassment after coming out) should be subject to more detailed analysis. On the one hand, it may mean that revealing one’s sexuality at the workplace diminishes the risk of harassment. On the other hand, it may mean that homosexuals come out in a friendly environment and coming out has no effect on the degree of harassment” [3].

The most important changes in law to date are the labour law amendments. Chapter IIa of the Polish Labour Code [4] entitled “Equal treatment of women and men” (introduced on 1 January 2002) has since been amended effective on 1 January 2004. The chapter, now entitled “Equal treatment in employment”, forbids discrimination based on sex, age, disability, race, religion, political opinion, trade union membership, ethnic origin, belief or *sexual orientation*.

Of course, the new regulations comply with the European Union accession agreement, requiring adjustment to Polish law under the EU *acquis communautaire*. There is little doubt that Polish lawmakers would be so eager to introduce those amendments without such incentive. Therefore Chapter IIa of the Polish Labour Code repeats with little difference the provisions of the Council

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[2] *Report on discrimination and intolerance due to sexual orientation in Poland in 2001*, Lambda Warszawa Association and Campaign Against Homophobia, July 2002.

[3] *Ibid*.

[4] Kodeks Pracy, 1974 r. (Dz. U. z 1998, no. 21, poz. 94, amended).

Directive 2000/78/EC [5]. It should be noted that under the new amendments, employers are obliged to make available to employees the text of provisions on equal treatment in employment in the form of a written document distributed at the workplace (Article 94^1).

The Labour Code (Article 18^{3a}, para. 3 and 4), in accordance with the directive, defines and prohibits *direct discrimination*, which occurs whenever someone is treated less favourably than someone else would be treated in a comparable situation, on certain specific grounds. *Indirect discrimination* occurs when an apparently neutral provision, criterion, or practice results in unfavourable treatment of some people compared to others. This is also outlawed unless it can be objectively justified. It is the employer, however, who has to demonstrate that there was an objective and justifiable reason for a discriminatory decision [6].

As the prohibition applies to employment, training, promotion, pay and dismissal, it is mostly the employer's responsibility to avoid discriminatory behaviour in such situations. In addition, the Code bans the act of encouraging someone to act in a discriminatory way or to engage in *harassment* (para. 5), where someone behaves with the purpose or effect of humiliating or violating the dignity of another person. As compared to the Labour Code definition of harassment, which bans not only effect but also intention of humiliating or violating the dignity of a person, Directive 2000/78 (Article 2, para. 3) adds to the scope of harassing conduct "creating an intimidating, hostile, degrading, humiliating or offensive environment".

This prohibition also applies to other co-employees. This kind of harassment (as opposed to sexual harassment) is also a new term in Polish labour law and should be read in relation with other Articles of the Code, mainly Article 100, para. 2, point 6, which reads as follows: "an employee has an obligation, in particular, (…) to abide by the principles of community life at the work place".

Even before enacting the amendment, there was agreement among legal experts that offensive conduct towards co-employees may constitute an infringement of this obligation, as well as violence or sexual harassment (as defined in Article 18^{3e}, para. 6).

At first glance, Chapter IIa provides only for employer's responsibilities for preventing discrimination. However, if one reads it in conjunction with other regulations relating to obligations of employees, it is clear that all sanctions provided by the Labour Code will be applicable in the event of workplace harassment. Depending on the significance of a violation, disciplinary action can range from an official reproach to termination of employment without notice, in the case of serious infringements of employee's primary obligations (according to Article 52 of the Code).

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[5] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation of 27 November 2000, *OJ*, no. L 303, 2 December 2000, p. 16-22.

[6] Article 18^{3b}, para. 1.

The issue of employees' responsibility relates closely to the employer's obligations. Article 94 of the Code, in the new paragraph 2b) and in the unchanged paragraph 10, states:

> "An employer is obliged, in particular, to:
> 2b) counteract discrimination in employment, in particular on the grounds of sex, age, disability, race, religion, nationality, political opinion, union membership, ethnic origin, belief, sexual orientation (…)
> 10) stimulate the development of principles of community life at the workplace".

This somehow vague obligation to stimulate the development of principles of community life at the workplace has been interpreted as applicable not just to an employer-employee relationship but also to relations between employees. "In this scope an employer should make sure that employees properly comply with their obligation to abide by the principles of community life at the workplace (according to Article 100, para. 2, point 6)" [7]. Still, an obligation to counteract discrimination in employment, expressly added to the list of obligations, emphasises the particular responsibility of an employer to control and discipline.

Thus, ignoring instances or complaints of discrimination constitutes an infringement of Labour code by an employer, and gives rise to a compensation claim for a victim of such discrimination.

In the case of a third party, for example clients, the question is: can the prohibition of harassment at the workplace be interpreted in such a way as to include them? It seems plausible that a client can also create "an intimidating, hostile, degrading, humiliating or offensive environment". Can an employer stay indifferent in such a situation, if he is obliged to "counteract discrimination in employment" (according to the amended Article 94 of the Code)? On the other hand, an employer cannot discipline a third party under the Labour Code provisions, as they are not bound by an employment contract, therefore the Labour Code does not apply to them. It is tempting to create an obligation of a different type, for example to have the client handled by another employee or department; then again, as the scope of the Directive and the Labour Code covers only employment and working conditions etc, as provided by Article 3 of the Directive, such an interpretation is not supported under the current Labour Code.

An offended employee could, of course, try to make use of relevant Civil Code regulations to protect his/her "personal rights" [8], but so far, they prove to be ineffective concerning LGBT persons. Therefore, as there is no specific law prohibiting discrimination in areas of life outside the workplace, the protection of an individual is deficient.

The following Articles of the Labour Code specify the actions that can result in an infringement of the equal treatment principle, and the consequences of such

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[7] K. Jaśkowski, E. Maniewska, *Kodeks pracy. Komentarz*, Zakamycze, 2002, 2nd ed.

[8] For example, Articles 23 and 448 of the Civil Code protects "personal rights of a human being", in particular health, freedom, honour, freedom of conscience, name, look, correspondence, place of living, artistic and scientific creativity.

infringement. At the same time, they introduce exceptions to the principle of equal treatment. Therefore, the scope of the principle includes every act of an employer that leads to discrimination of employees and results, in particular, in: refusal of employment or termination of employment, inequitable working conditions – including unfair salary –, exclusion from promotion or other work-related benefits, exclusion from participation in vocational training. It is the employer who has to prove that there has been no breach of the principle of equal treatment, that the difference of treatment was justified by objective reasons (Article 18^{3b}, para. 1).

The reversal of the burden of proof to the employer is essential for the equal treatment principle to be applied effectively – as it is supposed to help persons being subject to discrimination to claim their rights. It also underlines the significance of the rule, as one of the most important rules of the labour law.

The EC Directive gives governments the option of excluding specific cases where differences in treatment can be justified in special circumstances. The Polish Labour Code also provides for such exceptions in Article 18^{3b}. For example, it allows to establish the requirement of age or professional experience, for the access to employment and vocational training, or with relation to dismissal, remuneration and promotion conditions. It is also possible to set special conditions of employment for older or disable workers and persons with caring responsibilities in order to ensure their protection.

However, one exemption might be misused with regard to sexual orientation. The Directive (Article 4) formulates this exception in these words:

> "(…) Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, *such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate*".

In other words, the characteristic being a ground for discrimination is at the same time an essential characteristic to be able to do the job. The Article in the Polish Labour Code is phrased slightly different – *refusal of employment* based on one of the grounds for discrimination shall not constitute discrimination if it is justified by the nature or conditions of employment, as well as occupational requirements. Moreover, it does not emphasise that the reason for treating people differently should be "legitimate" and the requirement "proportionate".

It seems that the directive underlines that an employer may need an employee with some particular characteristic, while the Labour Code rather allows *not employing* someone because of a specific feature. I wonder whether this difference implies, or at least allows for a different interpretation. It is uncertain whether such a structure of this Article was intentional. Furthermore, the section of the Labour Code allowing churches or similar organisations to employ people who share their religion or beliefs in cases where this is "a genuine, legitimate and justified occupational requirement" is phrased almost identically as in the Directive.

It is probable that some people would like to invoke this regulation to discriminate LGBT persons, mainly in cases of occupations requiring exceptional "moral predisposition".

Polish law presents plenty of similar occupational requirements, impossible to define, relating to certain occupations or functions. For example the requirement of an "immaculate character" (e.g. laws relating to occupational requirements of judges, advocates, solicitors, public service, etc.), "moral qualities" (e.g. the act on the Commissioner for Human Rights Protection – Ombudsman), "immaculate moral reputation" (e.g. the Act on Internal Security Agency and Intelligence Agency) or as in the Teacher's Charter "the obligation to uphold moral principles".

The question that should be asked is how employers or courts would be supposed to interpret or estimate one's morality. Making use of conventional beliefs or religion tradition of a society does not seem a proper way to do that. Consequently, LGBT persons that wish to live openly and in integrity with their identity could be prevented from taking up certain jobs or occupations.

Intentions to use this possibility have often been expressed, mainly by right-wing politicians, even during the debate in the Senate (the upper house of the Polish Parliament), when the amendments to the Labour Code were discussed. One of the senators suggested, and the representative of the government agreed, that "a person with homosexual proclivity" or "a person who has been penalised for various behaviour of this kind" (*sic*) applying for a job at schools or orphanages could be rejected due to requirement of upholding "the fundamental moral principles". Similar statements suggest that in the perception of many people homosexuality is confused with paedophilia – an intolerable ignorance that representatives of the State should not promote. Sadly, these views seem to be shared by and influence the opinion of common citizens. Moreover, the court recently dismissed the first case concerning infamy of homosexuals with regard to such statements in the press [9].

Such interpretation, preventing people from taking up certain jobs or occupations, or forcing them to conceal their sexual orientation, is undoubtedly against the regulations of the Directive. Moreover it clashes against certain constitutional rights, such as: the right to legal protection of private life, of honour and good reputation, to make decisions about one's personal life (Article 47 of the Constitution of the Republic of Poland), the freedom to choose and to pursue occupation and to choose one's place of work (Article 65). It also seems contrary to the Polish Labour Code, taking into consideration the substance and purpose of those acts, elimination of stereotypes and their consequences, such as discrimination.

It is worth mentioning, that the January 2004 amendment to the Labour Code introduced a new Article 22^1, which has finally specified what kind of data an employer may demand from a person applying for a job. The Article does not allow questions about sexual orientation [10].

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[9] See below.

[10] The list includes forename, last name, parents' names, date of birth, education, professional experience, place of residence.

The Labour Code also guarantees compliance with the principle of non-discrimination. Persons who consider themselves wronged by an act of the employer, are entitled to pursue an action with the labour court and claim compensation. The compensation should not be less than a minimal salary. It is to be noted that the amended regulation does not lay down an upper limit for compensation, this is a change in comparison with the past when compensation for violation of the principle of equal treatment of men and women could not exceed an equivalence of six times minimum earnings.

Moreover, apart from the compensation claim, an employee may demand from an employer the benefit or performance that he had been refused.

The victim of discrimination may also demand to institute settlement proceedings before a settlement committee, or to file a complaint with the State Labour Inspection. In that case, the Inspection should carry out investigation to establish whether there are grounds for the complaint. The complaint to the Inspection has certain advantages: the person complaining remains anonymous and does not have to support his/her arguments in court. On the other hand, the measures available for the Labour Inspection are limited. For example, an inspector may instruct an employer to remove contraventions. However, it is only the court that can officially establish a breach of anti-discrimination regulations, so that legal consequences could be drawn. Therefore, the responsibilities of labour inspectors are mainly of monitoring and advisory character.

The complaint to the Labour Inspection can be lodged either instead of, or adjacent to a civil action. In the latter case, the results of the investigation conducted by the Inspection can be used in the court proceedings to support the plaintiffs' claims.

Trade unions and organisations active in protecting human rights may also institute legal proceedings on behalf of victims of discrimination.

Another Code's rule that is essential for the effectiveness of the anti-discrimination regulations is the protection against victimisation. As Article 11 of the Directive reads:

> "Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment".

This clause corresponds to Article 18^{3e} of the Polish Labour Code:

> "Availing an employee of the rights he was entitled to due to an infringement of the principle of equal treatment in employment shall not constitute a reason for termination of an employment contract with or without notice".

The Article of the Directive seems to be broader, as it requires protection of employees not only against dismissal, but also against any adverse treatment as a consequence of an employee's complaint.

The establishment of a Plenipotentiary for Equal Status of Women and Men in November 2001 should be mentioned here as an important instrument supporting both legal and social antidiscrimination actions. By a Government Ordinance of June 2002, the mandate of the Plenipotentiary was expanded to cover issues of non-

discrimination, including discrimination of sexual minorities. The measures initiated within the extended mandate were mostly required by the EU Racial and Gender Equality Directives, 2000/43 and 2002/73. These Directives serve the purpose of educating the public on issues related to discrimination; reviewing the contents and effects of existing and planned national legislation in the light of relevant international standards; advising public authorities at all levels on issues related to discrimination. The Plenipotentiary holds many conferences, including those relating to LGBT issues (e.g. a conference entitled "Equality and Tolerance in School Curricula and Textbooks" on 8 October 2002 or a conference relating to the draft of the same-sex partnerships act in November 2003) and supported events and conferences organised by LGBT NGOs.

However, the Directive 2002/73 on the implementation of the principle of equal treatment for women and men requires the creation of a similar body for the prevention of gender discrimination (the implementation deadline being set for 19 July 2005). A draft law on the equal status of women and men is still before Parliament, and the progress in respect of the establishment of effective anti-discrimination institutions has slowed down noticeably. It is worth quoting the opinion of the Commissioner for Human Rights of the Council of Europe Mr Alvaro Gil-Robles, on the creation of a national body for counteracting discrimination in Poland [11]:

> "12. Whilst the EU Directives require that bodies created to combat discrimination are mandated to conduct independent studies and surveys and provide independent legal assistance, and permit the integration of the anti-discrimination into existing national human rights structures, they do not explicitly require, though they do not preclude, the creation of institutions whose independence is established by law. It might be noted, however, that the important qualifications concerning the independence of all three of the activities required by the Directives entails, at the very least, structures and guarantees for ensuring such independence. ECRI's General Policy Recommendations no. 2 and 7, in contrast, explicitly encourages the creation, by statute, of independent specialised bodies to combat racism and racial discrimination at the national level.
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> 13. From his discussions with the Polish authorities the Commissioner understood that there is still some reluctance to create an institution both structurally and statutorily independent from Government. Recently suggested alternatives include the possibility of establishing a single, separate body incorporated into the administrative and decision making apparatus of the Government, under the authority of an individual nominated by the Prime Minister, with the rank of Secretary of State and the authority to sit in the Council of Ministers. The creation within an existing Ministry of a separate section responsible for fulfilling the functions listed above has also been proposed.
>
> 14. Whilst the latter proposal would evidently fail to satisfy the high expectations for the anticipated body, it is indeed difficult to see how *any* body incorporated into the structure of government, and consequently lacking the necessary independence, could effectively carry out the important functions expected of an anti-discrimination

[11] CommDH (2004) 7.

institution. Indeed the experience of a number of countries [which] have adopted this model tends rather to this conclusion.

(…)

16. One of the most important functions of anti-discrimination institutions is to act as a public watchdog. The lack of formal independence of a governmental body will, however, inevitably result in questions being raised as to the independence of its reporting on government policy and administrative practises, even where such reviews are commissioned from outside sources. This problem is evidently acute where the individual responsible for running the body is nominated by the Prime Minister and is a member of the Government. The willingness and ability of the organ to address the policies and practises of fellow ministries would likely be compromised. Also, the effect of the head of the institution's tenure being conditional on both the internal politics of Government and on the swings in parliamentary elections risks undermining the continuity necessary for the satisfactory fulfilment of the post's functions".

3. Effectiveness of antidiscrimination clauses

Why is the amendment of the Labour Code so important? Since the first Polish Penal Code of 1939 decriminalised homosexuality, the Labour Code is one of the first Polish legal acts that contain an explicit reference to sexual orientation. The first one was the amendment to the Act on Employment and Counteracting Unemployment (amendment in force since 6 February 2003), replaced in June 2004 by the new Act on Promotion of Employment and on Institutions of the Labour Market [12], which introduced the ban to formulate job offers in a discriminatory way.

However, the Labour Code provides the genuine and practical protection of an individual against discrimination (the possibility to find redress before a court). Even before the amendment of 2004, the general prohibition of discrimination in employment constituted one of the fundamental principles of Labour Law, expressed in Articles 11^2 and 11^3 of the Labour Code. Nevertheless, the catalogue of possible grounds of discrimination did not include sexual orientation. Moreover, Article 32 of the Constitution [13] provides for prohibition of discrimination in political, social or economic life for any reason whatsoever, as well as for the principle of equality before the law and equal treatment by public authorities. In theory, these clauses should embrace discrimination on ground of sexual orientation. It is not irrelevant, though, that at the time of drafting the Constitution, the proposition to add sexual orientation as one of the grounds for discrimination was rejected. On the other hand, there are Articles in the Constitution emphasising equality of men and women (Article 33) and providing for particular protection of certain groups, e.g. war veterans (Article 19), religious establishments (Article 25), national and ethnic minorities (Articles 27 and 35), children (Article 72) or even consumers (Article 76). This shows the reluctance of the legislature to interpret the principle of equality as encompassing homosexuals and transsexuals.

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[12] *Ustawa o promocji zatrudnienia i instytucjach rynku pracy* (Dz. U. z 2004, no. 99, poz. 1001).

[13] The Constitution of the Republic of Poland of 2 April 1997.

Thus, even a broad antidiscrimination clause seems insufficient to protect anyone effectively against discrimination. The Commissioner for Human Rights of the Council of Europe, Alvaro Gil-Robles, when visiting Poland in November 2002 [14], also indicated, that "despite the wide anti-discrimination clause in the Constitution, Poland has very little specific anti-discrimination legislation". Moreover, "Poland has not yet signed Protocol 12 to the European Convention on Human Rights introducing the general prohibition of discrimination, though it is being considered".

Therefore, the amendment of the Labour Code can be perceived as a success and a milestone on the way to improving the situation of LGBT persons in law and in public life, even though it is too soon to see the tangible effects of this legislation.

We might wait a long time, however, for such effects. Although the implementation of the Directive seems quite accurate, it does not guarantee a proper execution of the law. The Polish Labour Code provides for a very complex protection of employees' rights, yet in practice those rights have been frequently infringed. Because of the difficult situation in employment, people are willing to tolerate violation of their rights to maintain their jobs, and they seldom refer a case of discrimination to the court. Furthermore, those who decide to file a suit (usually only after the termination of employment), are often discouraged by long trials (even a few years), by the cost of professional advice and sometimes by the unpredictable results. The situation is even worse in cases concerning discrimination of women, which exists in many aspects of employment; it should be noted, that since the amendment of 2002 (that introduced new provisions relating to equal treatment of men and women in employment) almost no trial has been started by women on the base of these new regulations. I suppose this situation is the result of fear of stigmatisation, of being labelled as "a difficult worker", especially when discrimination of women in employment is deemed illusory. I presume this tendency will not dramatically change by massive suits filed by homosexuals or transsexuals, whereas this would additionally involve "coming out" and public condemnation.

Nonetheless, those legal changes did not bring about public debates on homosexuality – in fact, most academic articles on labour law commenting the amendment seemed to ignore the words "sexual orientation" and everything behind it. May be, due to above-mentioned reasons, most authors perceive these changes as cosmetic, not leading to a real change of the legal situation of a significant social group.

4. The new proposal on same-sex partnerships

The "storm" began in November 2003, when professor Maria Szyszkowska (Senator of the governing party – Democratic Left Alliance) introduced a proposal of a bill on same-sex registered partnerships [15] (according to Polish law, if the bill

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[14] Report of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on his visit to Poland, 18-22 November 2002, for the Committee of Ministers and the Parliamentary Assembly.

[15] In fact, Professor Szyszkowska prepared the project and sent it to her parliamentary club for internal opinion procedures in July 2003. It should be noted, that there was a similar

passes the Senate, it is subsequently sent to the Sejm *(Lower House)* as a legislative initiative). The proposal (supported by thirty-six senators) provided that a registered partnership, available only for same-sex couples, would create rights and obligations similar to civil marriage with respect to economic matters – right of inheritance after partner's death, right to use partner's health insurance, right to joint taxation of income. The adoption of children would be impossible, however one of the provisions gave the partners right to raise and care together for a biological child of one of the partners.

The proposal was not perfect from the legal point of view, its main weakness being, I think, too many references to the Family and Care Code instead of being a coherent and self-contained act. Another problem was the provision relating to the care for partner's children – accused (by, *inter alia*, legal experts giving opinion on the proposal) of disguising an adoption while imposing rights and obligation connected only with parental rights. Although the proposal itself did not intend to equate registered partnership with marriage, these points supported the main argument of the proposal's antagonists – marriage is an institution between a man and a woman (the constitutional definition of marriage), with the purpose of procreation, so gays and lesbians do not have the right to be considered as a "family".

The proposal has not received an enthusiastic backing from its author's party [16] – most of her colleagues considered the proposal a waste of time, with no chance to get through the Polish Parliament. Generally, most political parties in Poland do not declare their official stance on LGBT rights. The League of Polish Families and Law and Justice are the most obvious antagonists. The parties that openly support LGBT rights and the proposal of the bill, beside the Labour Union (whose present leader, Izabella Jaruga-Nowacka was formerly the first Plenipotentiary for Equal Status of Men and Women) are the Greens 2004. However, they have little chance for a mandate in the next Parliament – they are young, they lack funds and access to media, so their influence on voters is limited so far.

The draft has left the Senate. Following the first reading, it was passed to the Senate Committees – the Legislation and the Rule of Law Committee and the Social Policy and Health Committee, which worked on it until August 2004 (common sittings on 10 February and 29 July) and adopted a few amendments. After a plenary debate during the second reading in the Senate, on 29/30 September and 14 October, the draft was deprived of many rights. For example: joint taxation would be possible only after concluding a notarised contract (because some people might abuse the bill, pretend to be homosexual and register only to gain material benefits – an opinion of a Senator of Samoobrona); references to feelings and mutual care were deleted (because the only motive for registered partnership is sexual deviation – a Senator of the League

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proposal in February 2002, when a Deputy of Democratic Left Alliance, Joanna Sosnowska, proposed an act on legally recognised domestic partnership (*konkubinat*), for hetero- and homosexual couples. The project has never been accepted as a legal initiative.

[16] The personal consequences of the proposal for its author have been shocking – many newspapers ceased cooperation with her and people returned her books; she received threat letters and for a few months was under a special police protection.

of Polish Families); partners would not be able to share the same surname; and the act of registration would not be ceremonial (because homosexuals should not endanger the status of family). It should be mentioned, that over 300 workers of registry offices wrote protest letters against the bill on same-sex partnerships to the Parliament; however, the Polish Association of the Registry Office Workers considered this an abuse of the post – the registry officials should not involve in political disputes.

Nonetheless, the proposal returned to the Senate Committees, which (during a sitting of 18 November 2004), restored many provisions, and adopted new, more precise regulation. Nevertheless, the Committees did not approve the Article relating to the custody of a partner's child.

After the third and last reading in the Senate on 3 December, the proposal has been approved and passed to the *Sejm*.

The current version of the proposal gives a partner a status of a "close person/relative", relevant also in the light of procedural laws (civil or criminal). After registration in a registry office (without, however, ceremonial character, taking the vow or possibility of sharing the surname [17]), the partners may visit each other in hospital and decide on treatment in emergency, pick up correspondence; they have the right to inherit from each other and demand alimony in case of poverty. The joint property will be available after concluding a notarised contract, but without the possibility of joint taxation. The final version of the draft has been deprived of the obligation to mutual care and support, as well as of any reference to common household or relations between partners – this shows the reluctance to provide registered partnerships with any notions of family life, even very discrete. Adoption is not allowed, a partner without parental rights cannot represent a child, although the draft does not forbid raising a partner's child together. A person living in registered partnership will not be able to marry.

Although the proposal may disappoint some LGBT circles, I think, that in such a hostile and unhealthy atmosphere the fact that it was not rejected in the first reading and was passed to the *Sejm* can be considered as an important achievement. It can be perceived as an important step towards a better existence for sexual minorities, a step that may improve the tolerance of the society. Nevertheless, the draft is now in the hands of the Deputies in *Sejm*. The outcome is difficult to predict. However, if it has any chances to be adopted, it should be done before the end of this tenure, as according to the political prognosis the new Parliament may be very conservative.

It is worth citing the public opinion surveys on the matter.

In 2000, 60% of Polish citizens were against homosexual marriages, 24% accepted this possibility. However, the attitudes towards the economic aspect of same-sex partnerships were optimistic: 58% agreed that same-sex couples might have a common property, 31% disagreed, 45% of the surveyed claimed that homosexual people living together should have the right to tax reduction in the case of joined calculation of due taxes, 44% were against this right.

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[17] The possibility of sharing the same surname had been restored before by the Senate Committees.

In February 2002 Pentor carried out a survey on the legalisation of concubinage. 49 % appoved the idea, 41 % did not. However, the question "Should the concubinage of homosexual couples be legalised?" brought only 18 % of positive answers, while 75 % were against. The survey was carried out among a representative random group of 800 adult Polish citizens [18].

5. LGBT persons in the sphere of public rights – discriminated or invisible?

The issue of same-sex partnership is still very controversial in Poland. It raises again the question of whether this step is necessary to combat discrimination. However, the situation of sexual minorities in Poland is more sorrowful, when it comes to protection of standard, fundamental democratic rights, granted to every citizen by the Constitution and law, not to mention international documents – right to respect for private life, freedom of thought and conscience, freedom of expression, right of peaceful assembly, right to protection against aggression.

The proposal on same-sex partnership law activated both sides of the dispute – LGBT NGOs organised information campaigns, right-wing politicians organised humiliating crusades and did not avoid violence.

The most "noticeable" for the public is, I think, the Campaign Against Homophobia (CAH), founded in 2001. CAH is a non-government organisation operating throughout Poland. Their main objective is to publicise the discussion on the subject, to increase social representation for all sexual minorities, to shape tolerant attitudes, to promote awareness of sexual and gender identification, to create and introduce anti-homophobic discourse in the public sphere. In cooperation with ILGCN Polska (International Gay and Lesbian Association for Culture in Poland, created four years ago), they have organised several actions, including political lobbying, education in schools, petitions, publishing materials. Importantly many of their actions are designed for the media. Each year there are more local divisions of CAH being created in larger cities of Poland. In this way, their activities can embrace almost the whole country.

The LAMBDA Warsaw Association is the oldest Polish LGBT organization, created over ten years ago; its activities are mostly based in the Warsaw area – they run an Information and Support Centre, provide information and support to homosexual individuals and their relatives, run support groups which help participants to accept their sexuality; they provide legal, medical and psychological counselling. The association also monitors discrimination, prepares survey research among homosexuals with regard to discrimination based on sexual orientation. They are doing a great job, but for someone not familiar with the LGBT movement they are rather invisible.

In May 2004, LGBT NGOs, supported by the Plenipotentiary for Equal Status of Women and Men, organised in Krakow the "Days of Culture for Tolerance". The event included interdisciplinary seminars at the university, meetings, discussions and films,

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[18] *Report on discrimination and intolerance due to sexual orientation in Poland in 2001, op. cit.*

open to everybody. The most important was the March for Tolerance, the peaceful demonstration with the participation of LGBT persons, their friends and supporters, but also disabled and everyone who wanted to express their disagreement about all kinds of discrimination. Antagonist – several conservative and religious organisations – sounded the alarm that a parade of naked deviants would profane the royal town. Yet the citizens did not see naked deviants, just ordinary people, young and old, men and women, homo- and heterosexual, even parents with children. Nonetheless, despite the police protection, eggs, bottles and stones flew over, and the march ended up with a regular fight of hooligans, led by local right-wing politicians, with the police; when the police could not control them any longer, they chased anyone in view.

Still, this incident brought about a public debate on tolerance, homosexuality, same-sex families and aggression. Suddenly gays and lesbians can be seen on TV, popular magazines write about homosexuality – which was unthinkable a few years ago. Although the debates often lack objectivity and substantial arguments, I suppose it is some progress. Even though the aggression of many people and the outcome of peaceful educational events were disheartening, still many people sympathised with the idea. Many of them for the first time had a chance to know something more about homosexuality than awkward stereotypes.

After riots in Krakow, a few vandals were arrested but they were soon released; CAH accused some of the leaders of the riots of hampering legal demonstration and encouraging hate crimes. However, the prosecution always refuses to take up such cases, due to absence of witnesses or evidence (although the events were witnessed by hundreds of people and media) or lack of elements of crime. The situation reoccurred in Poznan in November 2004.

Although the Penal Code protects the life, health, physical integrity and dignity of persons belonging to social minorities (in Articles 118, 119, 256 and 257), the list of protected groups is closed – the Code only mentions crimes against ethnic, racial, political, religious or national minorities. Other minorities, such as people with disabilities or sexual minorities are not listed. It seems that for prosecutors this implies – not protected. According to surveys [19], 77% of victims of violent assault did not report their case to the police. Where the assaults were reported, police reactions were usually unsupportive.

Private persons should be protected against damage to their honour and against bodily assault (Articles 212 and 216 of the Penal Code), therefore lesbians and gays could go to court on the basis of these provisions. CAH tried that in 2003, accusing a woman (leader of a local association "Polish Family") of a crime against reputation – infamy, as she wrote in a newspaper that homosexuals constitute a threat to family, and "someone suffering of this disease should be forbidden by law from becoming a teacher and raising children". According to the relevant sections of Article 212 of the Penal Code, someone who harms the reputation of a person, a group of persons, an institution, a legal entity... in a way that may humiliate them in public opinion or

[19] *Report on discrimination on grounds of sexual orientation in Poland*, *op. cit*.

jeopardise their public trust necessary for a given post, occupation or activity, shall be punished by a fine, restriction of freedom or imprisonment up to one year. If the same offence is committed through the media, the imprisonment can be up to two years.

The trial began in December 2003; the prosecution refused to take up proceedings, because there was no social interest at risk, and the private charge was dismissed by court in Warsaw in November 2004; CAH's appeal has not been examined yet.

Although Article 58 of the Constitution recognises freedom of assembly, in June 2004 the President of Warsaw (Lech Kaczyński) banned the "Parade of Equality" – official reasons being avoiding riots and care for public morality. It should be noted that this kind of reasoning is not quite compatible with the interpretation of the right of peaceful assembly by the European Court of Human Rights. For example, in *Plattform Ärzte für das Leben v. Austria* (1988) the Court examined the State's affirmative obligation to provide protection to groups exercising the right of peaceful assembly:

> "A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community.
>
> In a democracy, the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective-freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be".

Kaczynski however, claimed that such an assembly would have constituted a public demonstration of sexual issues and would have offended religious feelings of other people. Therefore he upheld his decision against the opinions of all human rights organisations and two repealing decisions of the governor (*wojewoda*).

CAH's campaign "Let them see us" in April and May 2003 is another example of discrimination in a sphere of public rights, or shutting off the public space, which by definition belongs to every citizen and where sexual orientation should not be of any relevance. The campaign involved displaying billboard photographs in public spaces – photographs portraying thirty couples of the same sex holding hands. No provocative poses – just smiling girls and boys, people like those met in the streets every day – except that a boy held a boy's hand. As the author of the photos said, they were intentionally similar, monotonous, so the viewer would get bored with them and consider that homosexuality is nothing strange or unusual.

However, Warsaw, Krakow, and Gdansk city councils pulled down the billboards, after a brief public display – persuaded by conservative groups and politicians. The arguments were as usual – promoting the normality of a sexual relationship between people of the same sex is unacceptable. Quite often pressure was exerted on the private advertising agencies responsible for the billboards and art galleries willing to exhibit the photographs (the galleries that did show them lost their premises due to

sudden termination of lease contracts). The comments in media were divided, but no real dispute took place. No one really challenged this practice.

It seems that the legal system – the police, prosecution, courts – does not perceive sexual minorities as a social group, whose interests and reputation could be harmed. Is it because "sexual orientation" is still missing in many important legal acts, or because the judges and prosecutors just lack good will in interpretation of existing laws? There are opinions according to which legal acts cannot force the society to be more tolerant. May be this is true, but it is equally true that legal acts can help minorities to extend their public space, life space, safer space – provided that they shall execute the rights imposed by law. As much as they need support and solidarity of other discriminated groups, the success of sexual minorities, as of the most stigmatised group, would be a general success of tolerance and democracy, from which others would benefit.

The influence of European Institutions on the Hungarian legislation regarding LGBT rights

Judit Takács

This paper gives an overview of the history of sexual orientation and gender identity related anti-discrimination legislation in Hungary, not only emphasising the role of European institutions but also that of national and international NGOs in promoting this issue in the Hungarian context. Examples of practical application of equal treatment claims are also presented in order to highlight the opportunities provided by equal treatment legislation for LGBT people to fight against discrimination in their everyday life. The paper is based on research carried out within the OSI International Policy Fellowship project "How to put equality into practice? Anti-discrimination and equal treatment policy-making and LGBT people".

1. Looking back

In Hungary, the legislation concerning same-sex relations was clearly discriminatory before 2002. Certain regulations of Hungarian criminal law functioned as the basis of institutionalised discrimination of homosexuals: "illegitimate" relationships between same-sex partners were defined differently and suffered more serious consequences than those of different-sex partners. For example, the age of consent was eighteen for same-sex partners whereas it was fourteen for different-sex partners. The obsolete terminology used in legislation for same-sex relationships (for example, the use of the terms "*természet elleni fajtalanság*": "perversion against nature" that remained effective in some sections of the Criminal Code even after 2002) also suggested social rejection and discrimination.

The Hungarian history of legal persecution of homosexuals (Table 1) shows that the social rejection reflected in the Penal Code was rooted in a kind of moral judgement, inherited from Christian doctrines. It is true that certain European authors had already raised their voices against legal discrimination of homosexuals

in the second half of the XIXth century, and some of these early anti-discriminatory arguments – especially those of Károly Kertbeny, who coined the word "homosexual" in 1868-69 – emphasised in a very modern manner that the State should not intervene into the private lives of individuals. However, European legislation – and Hungarian law as well – soon became dominated by a "medicalised" model of homosexuality [1].

Table 1. Overview of the legal treatment of same-sex sexual relationships in Hungary

Before 1878	There was no punishment defined for "perversion against nature" (p.a.n.) and women could not be prosecuted for p.a.n. according to Hungarian law. Explanation for the lack of penalisation can be found in Bodo's *Jurisprudentia Criminalis* of 1751 stating that "the Hungarian people have attained virtue and chastity to such a degree that there was no need for a special law like this; so imposing no punishment meant that even the reference to the possibility that this kind of crime was at all committable had to be avoided". Penalty for p.a.n. thus depended on the "wisdom of the judge". Death penalty for sodomy was forbidden by the enlightened Austrian Emperor and Hungarian King, Josef II. in 1787. (According to the 1767 decree by his mother, Marie Therese, sodomy was punished by being burnt to death.)
1878-1961	For committing p.a.n. men as well as women could be prosecuted; three forms of p.a.n. were distinguished: conducted with an animal; with a same-sex partner; with a different-sex partner in an unnatural way. Consensual same-sex relationships were considered to be milder crimes and punishable with a maximum of one years' imprisonment; the coerced forms with up to five years' imprisonment [2].
1961-1978	Different ages of consent: fourteen for heterosexual relationships, twenty for homosexual ones. Special clause on "perversion against nature conducted in a scandalous manner", causing a public scandal. "Coerced perversion against nature" – only applicable outside the institution of marriage (special clause providing that if the perpetrator and the victim get married before the first judgement, the punishment can be mitigated to any extent) [3]. General criminalisation of p.a.n. ceased (citing medical arguments saying that homosexuality is a biological phenomenon therefore it cannot be handled legally as a crime); maximum penalty for conducting p.a.n. with a partner under the age of twenty or causing a public scandal was three years' imprisonment.
1978-2002	Different ages of consent: fourteen for heterosexual relationships, eighteen for homosexual ones; maximum penalty for conducting p.a.n. with a same-sex partner under the age of eighteen is three years' imprisonment (Articles 199 and 200 of the Hungarian Penal Code) [4].

In the second half of the XXth century Hungarian law makers defined homosexuality as an "abnormal" biological phenomenon, which at the same time – surprisingly – could be learnt; and this learning process can have dangerous consequences. By the end of the 1990s the internal contradictions of Hungarian legislation on homosexuality

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[1] J. Takács, *Homoszexualitás és társadalom* [Homosexuality and Society], Budapest, Új Mandátum, 2004, p. 81-92.

[2] Act V of 1878 (Hungarian Penal Code).

[3] Act V of 1961 (Hungarian Penal Code).

[4] Act IV of 1978 (Hungarian Penal Code).

became apparent: in certain cases judges stayed the proceedings by referring to the regulations discriminating against same-sex relationships as being unconstitutional. The expectations of the international legal environment – especially at the European Union level – revealed the need for a reexamination of discriminatory legal treatment of same-sex relationships [5].

By examining the evolution of homosexuality as reflected in Hungarian legislation, especially during the XIXth and XXth centuries, we can find different versions of the social categorisation of homosexuality which was defined as a sin until the end of the XIXth century, then considered as an illness until the second half of the XXth century, when it became a form of fairly dangerous social deviance. Therefore the view of homosexuality as a freely chosen lifestyle did not appear – and still does not seem to appear – to be a part of the choices reflected by Hungarian legislation.

2. Fighting against the legal discrimination of LGBT people

In a broad sense, the development of sexual orientation and gender identity related anti-discrimination and equal treatment legislation can be traced back to 1989 when the clause on prohibition of discrimination became part of the Hungarian Constitution. Before the introduction of the law on equal treatment and the promotion of equal opportunities [6] in 2003, Hungary already had national laws prohibiting discrimination, such as the Constitution, the Labour Code, the Act on Public Education and the Act on Public Health [7]. However, only the latter explicitly prohibited discrimination based on sexual orientation [8]. In all the other cases, the question whether sexual orientation should be included under the heading "other situations", usually ending the list of discriminatory forms based on "race, colour, sex, language, religion, political or other opinion, national or social origin, circumstances of wealth and birth" [9] was a matter for interpretation.

During the 1990s the issue of discrimination based on sexual orientation and equal treatment policymaking did not figure in the political agenda. However, the practical application of the general anti-discrimination clause of the Constitution in relation to sexual orientation as a basis for discrimination could be observed on two occasions in the decision-making processes of the Hungarian Constitutional Court. Therefore we can agree with the statement whereby "because of the weakness of Hungarian anti-discrimination legislation, the Constitutional Court, generally known in Central and Eastern Europe for its pro-active attitudes, seems to have taken the lead in shaping lesbian and gay rights with a more or less progressive attitude" [10].

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[5] *Ibid.*, p. 92-94.

[6] Act CXXV of 2003.

[7] 1997/CLIV.

[8] See L. Farkas, "Nice on Paper: The Aborted Liberalisation of Gay Rights in Hungary", in R. Wintemute, M. Andenaes (dir.), *Legal Recognition of Same-Sex Partnerships. A Study of National, European and International Law*, Oxford, Hart Publishing, 2001.

[9] Hungarian Constitution, 70/A para.

[10] L. Farkas, *op. cit.*, p. 564.

In the 1990s the Hungarian Constitutional Court reached two decisions involving discrimination based on sexual orientation: one in 1995 and one in 1999.

In 1995 [11] in the constitutional examination of marriage between persons of the same sex and the recognition of partnerships, the Hungarian Constitutional Court ruled out that the determination of marriage as a communion of a man and a woman was not a case of discrimination infringing the Constitution. According to the Court's arguments "in our culture and in law the institution of marriage is traditionally the union of a man and a woman", therefore the State "can offer different legal options for traditional and currently exceptional communities" because "the right of the concerned person is not that the same institutions be available to everybody" [12].

At the same time the Hungarian Constitutional Court stated that a lasting communion of two persons could constitute such a value that they were entitled to legal recognition of their communion based on a fair recognition of the personal dignity of the involved persons irrespective of their sex. According to the Court's argumentation, the question whether the partners are of different sex or of the same sex, is related to disadvantageous differentiation:

> "The cohabitation of persons of the same sex, which in all respects is very similar to the cohabitation of partners in a [different-sex] domestic partnership – involving a common household, as well as an emotional, economic and sexual relationship (…) – gives rise today, albeit to a lesser extent, to the same necessity for legal recognition as it did in the 1950s for those in a [different-sex] domestic partnership. (…) The sex of partners (…) may be significant when the regulation concerns a common child or (…) a marriage with another person. However, if these exceptional considerations do not apply, the exclusion from regulations covering (…) [different-sex] domestic partnership (…) is arbitrary and violates human dignity; therefore it is discrimination contrary to Article 70/A (…) The benefits (social and social security) that can be given only on the basis of a domestic partnership cannot depend only on the sex of the two people living together" [13].

Thus in 1995 the Court legalised lesbian and gay partnership by declaring that the previous law limiting partnerships to "those formed between adult men and women" was unconstitutional. The Parliament was ordered to make the changes necessary to recognise same-sex partnerships by 1 March 1996. The partnership law in Hungary in its present form – after changing Articles 578/G and 685/A of Act 4 of the Hungarian Civil Code – includes any couple, of either sex, living permanently together in a state of "financial and emotional communion". It is a factual legal relationship, which exists without official registration; thus there are underlying problems of proof. Law reform is, therefore, needed to "institutionalise" – at least to a certain degree – same-sex relationships and to prevent family and other policy practices from discriminating against same-sex couples.

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[11] Decision 14/1995 (III.13).

[12] L. Farkas, *op. cit.*, p. 567-568.

[13] *Ibid.*, p. 568.

In 1999 the Court ruled that the differentiation based on sexual orientation in paragraph 203 of the Penal Code (punishing incest of siblings) was unconstitutional [14]. In the case of the various deeds considered incest in the Criminal Code paragraph 203 the Court had to answer the question of whether paragraph 70/A of the Hungarian Constitution, forbidding discrimination, was infringed by the fact that the law punished sexual relations only between siblings of the same sex. Incest between siblings of opposite sexes was not liable to any criminal sanction.

The Hungarian Constitutional Court established in its 20/1999 (VI. 25) decision, that this differentiation on the grounds of sexual orientation was covered by the item "other cases" in the introduction of paragraph 70/A of the Hungarian Constitution. The judgment examined whether there were substantial reasons for this differentiation. The Hungarian Constitutional Court found no such reason in the examined case, and therefore no grounds for different criminal measures in cases of incest between siblings of different sexes or incest between siblings of the same sex. Nor could it be shown that the dangers incurred by society due to these actions were different.

At the beginning of the XXIst century, Hungary was among the very few European countries – besides Austria for example – where the national Penal Code openly discriminated between same-sex and different-sex partners concerning the age of consent in a sexual relationship.

In June 2002, the European Parliamentary Committee on foreign affairs issued a recommendation that "reiterate[d] its call upon the Hungarian government to eliminate provisions in the Penal Code which discriminated against homosexual men and lesbian women, notably Article 199" [15]. Soon after this recommendation, in September 2002, the Hungarian Constitutional Court ruled that paragraphs 199 and 200 of the Hungarian Penal Code were unconstitutional and eliminated them [16]. This ruling was perhaps issued on the consideration that the criminal code of a country which was at that time on the threshold of European Union membership, could no longer contain a legal provision of that kind. Indeed, in 1984 the European Parliament endorsed, for the first time, a resolution, in which it called on Member States to stop prosecuting adults for consensual homosexual relations on the one hand, and to determine equal ages of consent for heterosexual and homosexual relations on the other. Following this, in the yearly Human Rights Assessment Reports, as well as in the special resolutions of 1994 and 1998, the European Parliament took a stand on the issue of equal rights for homosexuals and lesbians urging Member States to repeal criminal law measures based on sexual orientation, including different thresholds for age of consent. The special resolution passed in 1998 confirmed that the European Parliament would not approve the admission of such a Member State, whose law or political practice infringed on the human rights of homosexual persons.

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[14] 20/1999 (VI. 25.)

[15] Recommendation 72 of the EP Committee on foreign affairs; from the Information officer of ILGA-Europe, http://www3.europarl.eu.int/omk/omnsapir.so/

[16] 37/2002 (IX.4).

It is worth mentioning some of the main elements the Hungarian Constitutional Court referred to in its 2002 ruling [17].

In considering the case, the Hungarian Constitutional Court paid special attention to the relevant documents of the European institutions devoted to the protection of human rights: the European Court of Human Rights (henceforth: ECHR), the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe (henceforth: LAHRC) as well as the Parliamentary Assembly of the Council of Europe (henceforth: PA).

The main elements of the ECHR decisions concerning criminal regulation of homosexual behaviour can be summarized as follows [18]. Criminal measures against voluntary, consensual homosexual activity constitute interference into the private lives of individuals on the part of the State or, more precisely, an infringement of the right to maintain respect for the chosen sexual practice (European Convention on Human Rights, Rome, 4 November 1950, Article 8, henceforth: Convention). State interference in the most intimate aspect of private life encroaches on the most personal manifestation of an individual, therefore the State is only entitled to do so on grounds of extraordinarily serious reasons.

The ECHR entrusts States with the greatest possible degree of consideration, allowing them to decide on the necessary measures to protect morality, or individuals' rights and freedoms in society. This is true, in particular, in determining the age up to which taking penal measures is justified in order to protect the young from sexual behaviour that may lead to social exclusion or that they may regret at a later stage of their life. According to the ECHR's position, penal measures may be necessary in a democratic society to protect those who are particularly vulnerable due to their tender age from corruption and sexual exploitation.

The ECHR did not take a position on whether the differences in criminal penalties applicable to gays and those applicable in the cases of heterosexual or lesbian relations were discriminatory. According to the view of the ECHR no further examination was necessary once violation of Article 8 of the Convention – e.g. State interference into the private lives of individuals – was established.

The Hungarian Constitutional Court stated that the consideration of Articles 8 and 14 combined of the Convention as in the *Sutherland case* [19] was relevant and could therefore be applied in its decision. The LAHRC did not find objective and reasonable grounds for holding that the age of consent for homosexual relations between men should be higher than that for lesbian and heterosexual relations in examining the complaint against the legislation at that time in force in Great Britain and Northern Ireland. The appropriate instruments of criminal law and their application were

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[17] *Ibid*.

[18] ECHR, judgment of 22 October 1981, *Dudgeon v. United Kingdom*, Series A, no. 45; ECHR, judgment of 26 October 1988, *Norris v. Ireland*, Series A, no. 142; ECHR, judgment of 22 April 1993, *Modinos v. Cyprus*, Series A, no. 259; ECHR, judgment of 31 July 2000, *A.D.T. v. United Kingdom*.

[19] No. 25186/94, 1 July 1997.

discriminatory, infringing the Convention in its provisions for the right to maintain respect for private life. The ECHR did not take a position in the case, since the offending legal regulations had changed in the meantime [20].

The LAHRC considered the case to be an appropriate opportunity to review the preceding law in the light of the changes that had occurred in the previous twenty years. Contrary to its former standpoint, it found that there were no reasonable and objective grounds to maintain differing ages for the beginning of legal homosexual and heterosexual practices, that the determination of such differing ages was not a commensurate means to achieving the intended goals. The LAHRC did not recognise the submission that society supports the heterosexual lifestyle and condemns the homosexual one as an acceptable justification for differing criminal laws.

The LAHRC drew attention to the fact that Article 14 of the Convention protects against discrimination without adequate cause of persons who are in largely similar situations. The differing treatment is especially hurtful if it does not serve any lawful purpose, or if the applied instruments are not commensurate with the intended goals. Nevertheless, the Committee recognised that States have a certain degree of freedom to determine how to justify and which degrees of difference justify separate treatment of similar circumstances.

At the time of the first decision of the Court in the matter of criminal prosecution of homosexual behaviour in 1981, the Assembly made a statement in defence of the rights of homosexual persons. The Assembly called on the World Health Organisation to delete homosexuality from the international list of diseases (actually this happened in 1991) and accepted a motion against various forms of discrimination against homosexuals, including, among others, the termination of different ages of consent. Almost twenty years later, on 26 September 2000, the Assembly accepted a motion to review the situation of homosexuals again. The Assembly called on the Council of Ministers to demand that Member States determine equal ages of consent for homosexual and heterosexual activities in their criminal laws.

This jurisprudence clearly shows that rulings of the ECHR and even statements by the various committees of the Council of Europe played a crucial part in completing an anti-discrimination legislation project in Member States, particularly in the case of Hungary.

There are several decisions of the European Court of Human Rights that are potentially influential on national LGBT anti-discrimination legislation. These decisions are collected in Table 2.

[20] ECHR, judgment of 27 March 2001, *Sutherland v. United Kingdom*.

Table 2. European Court of Human Rights: potentially influential decisions on national LGBT anti-discrimination legislation [21]

1981	In the case of *Dudgeon v. UK* (judgment of 22 October 1981), the ECHR declared for the first time that legislation criminalising consensual sexual acts between adult men in Northern Ireland was in breach of Article 8 of the Convention, which provides a right to a private life. The Court also confirmed that such legislation contradicted the right to a private life in the case of *Norris v. Ireland* (26 October 1988), *Modinos v. Cyprus* (22 April 1993), and *A.D.T. v. UK* (31 July 2000).
1999	In the case of *Salgueiro Da Silva Mouta v. Portugal* (21 December 1999), the Court declared that refusing child custody to a gay man simply because of his homosexuality was a breach of Article 8 of the Convention, i.e. the right to a private life. It was declared to be discriminatory on the grounds of sexual orientation, thus violating Article 14 of the Convention which prohibits discrimination. In this case, after divorcing his wife, Mr Mouta was granted access to his child. However, his former wife did not comply with the agreement and did not allow Mr Mouta to visit their child. During the court battles in Portugal, Mr Mouta lost his case and child custody was granted to his former wife. The reason given to justify refusing him child custody was his homosexuality and cohabitation with another man.
2001	In the case of *Sutherland v. UK* (27 March 2001) the Court found that the higher *age of consent* for gay men was discriminatory and violated the right to a private life. This case was supported by Stonewall, a British LGBT NGO and resulted in an equal age of consent in the UK (from January 2001). The European Court of Human Rights confirmed that the higher age of consent for gay men was discriminatory and in breach of the European Convention on Human Rights in two more recent judgements, *L. and V. v. Austria* (9 September 2003) and *S.L. v. Austria* (9 September 2003**)**.
2001	The *Goodwin v. UK* (11 July 2001) case is related to the legal status of transsexuals in the UK (treatment in relation to employment, social security, pensions and inability to marry). The Court found a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender for a post-operative transsexual, and found no justification for barring the transsexual from enjoying the right to marry under any circumstances. In July 2004 the Gender Recognition Act was introduced in the UK.
2003	*Karner v. Austria* (24 July 2003) was the first ever case relating to the rights of same-sex partners that the Court had agreed to consider. It involved a complaint from Siegmund Karner, an Austrian gay man who had lived in his male partner's flat since 1989 and shared the expenses of the flat. Mr Karner's partner died in 1994 and designated Mr Karner as his heir. However, the landlord of the property started the process of terminating the tenancy with Mr Karner. District and Vienna Regional Courts interpreted the term "life companion" of the Rent Act as including same-sex partners who had lived together for a long time. However, the Supreme Court disagreed with this interpretation. For the first time in its history, the European Court of Human Rights ruled that this was discrimination based on sexual orientation and that the Convention had been breached.

However, it is important to note that decisions of national courts can also influence the judgments of the ECHR. For example, in 2003, in the *Karner v. Austria* case, Robert Wintemute, Professor of Human Rights Law at King's College, London prepared a third party intervention on behalf of ILGA Europe and two other British

[21] Source: http://cmiskp.echr.coe.int/ and www.stonewall.org.uk/stonewall/information_bank/

NGOs. In this intervention the Hungarian Constitutional Court's decision of 1995 [22] – legalising lesbian and gay partnership by declaring that the previous law limiting partnerships to "those formed between adult men and women" was unconstitutional – was also cited.

According to Robert Wintemute, the main issue of the *Karner* case – which is the most recent decision of the ECHR relating to LGBT rights – was to decide who has the right to take over a flat when the tenant dies:

> "Is it only a spouse? For the moment that's up to each country to decide. What happened was that Austria's legislation in the 1970s said a "*lebensgefährte*", life companion, or life partner could take over the flat, and it was actually completely gender neutral. So in theory it could have covered a same-sex partner but the case went to the Austrian Supreme Court, and they said: no, back in the 1970s the legislature was only thinking about unmarried different-sex partners so those are the only partners covered by this legislation, and so then Mr Karner went to the European Court of Human Rights, except that he died before the case was decided. But he won and they said same-sex partners had to be treated in the same way if they were unmarried. What made that case stronger was that it did not involve marriage; that made it less controversial. Also there was a strong trend in Western Europe especially, – but actually here Hungary was cited to the court – the trend of giving at least the same rights to same-sex partners as are given to unmarried different-sex partners. I prepared what is known as a third party intervention in that case. Non-governmental organisations are allowed to ask the court to intervene and present additional arguments and information. In this case, because the lawyers in Austria were not specialists on the European convention, they did not have access to comparative law, to what was going on in other countries, so I prepared the intervention on behalf of ILGA Europe and two other NGOs in Britain. One thing that is helpful for judges is if you just tell them what legislatures have been doing. That is useful information, but what gives them even more courage is if you can quote a court from another country that has reached the same conclusion. Fortunately there were a lot of good decisions from Canada, the US, South Africa; even the UK provided a positive case and also Hungary: it was the famous Constitutional Court decision of 1995. Fortunately I found an English translation and quoted it to the court. That led them to decide that this was now a minimum standard of equal treatment" [23].

This example indicates that human rights related law at European level is not just a one-way street, but it can have several directions and intersections. As I have already pointed out, European Institutions, especially the rulings of the ECHR, greatly influenced the Hungarian Constitutional Court's judgment of 2002, eliminating the different age of consent for heterosexual and homosexual relationships. On the other hand, a previous decision of the Hungarian Constitutional Court was used – together with various court rulings from other countries – in pleading for a positive judgement of the ECHR in an LGBT rights related case.

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[22] 14/1995 (III. 13).

[23] Interview with Robert Wintemute, Professor of Human Rights Law, King's College, London, conducted by Judit Takács on 31 October 2004. Used by permission.

Hence, we see the importance of appropriate national and European level law as well as the coordinated work of national and European level NGOs in advancing LGBT rights.

3. Development and application of equal treatment legislation for LGBT people

After completing an anti-discrimination legislation project – e.g. a legal reform primarily aimed at eliminating discriminatory parts of the national penal code –, the next step is to develop LGBT people's rights by equal treatment policymaking. Again European institutions can significantly drive these legal reforms. This seems to be true especially in the case of countries preparing for accession to the European Union.

A. Development of Hungarian law on equal treatment and promotion of equal opportunities

The first initiatives for the development of an anti-discrimination and equal treatment legislation can be traced back to 2000-2001 in Hungary. Developing the law on equal treatment and the promotion of equal opportunities in Hungary took several years. (The main stages of this development are listed in Table 3.) After two attempts to propose special anti-discrimination bills (focusing respectively on racial and gender equality), the first general anti-discrimination draft bill was submitted by Magda Kósáné Kovács and Katalin Szili (MPs, Hungarian Socialist Party) in April 2001. This draft bill included the prohibition of discrimination based on sexual orientation, and clear references to the 2000/43 Racial Equality Directive as well as to the 2000/78 Employment Equality Council Directive. The latter is the first directive explicitly referring to sexual orientation as a protected category.

In the first public version of the concept of the proposed equal treatment act – published on the homepage of the Ministry of Justice in November 2002 – all fourteen protected categories listed in the Employment Directive could be found: race, skin colour, ethnicity, language, disability, state of health, religion, political or other views, sex, sexual orientation, age, social origin, circumstances of wealth and birth, and other situations.

By the time the draft bill on "equal treatment and the promotion of equal opportunities" reached the stage of parliamentary discussion at the end of 2003, additional categories such as family status, motherhood (pregnancy) or fatherhood, gender identity, part-time or limited period employment status, membership in interest representing bodies, were inserted into the list of protected categories. The bill passed in December 2003 and came into force on 27 January 2004.

According to experts who worked on the preparation of the conceptual framework of the Hungarian Equal Treatment Act, the concept of the new law closely followed the practice of the Hungarian Constitutional Court, the provisions of relevant Hungarian legislation, and the European Union's requirements. These experts emphasised that according to the European Commission the main goal of the European anti-discrimination legislation is to provide for effective protection

from discrimination and one of the means to achieve this goal, perhaps the most desirable one, is to introduce a separate anti-discrimination act with general effect [24]. In the "old" European Union Member States examples of general anti-discrimination acts (as in the Netherlands) as well as different acts promoting equal treatment of variously disadvantaged social groups (as in the United Kingdom and Ireland) can be found. Hungary chose the first, "more desirable" option. In other – present and future – accession countries we can observe the same development. New general anti-discrimination acts were introduced in Romania in 2000 and in Slovakia in 2004, while in Bulgaria such introduction is underway.

Table 3. Development of Hungarian law on equal treatment and promotion of equal opportunities

May 2000	Proposal for an anti-discrimination bill (focusing on fighting against racism and xenophobia) drafted by Jenő Kaltenbach, Parliamentary Commissioner for Minorities.
February 2001	Anti-discrimination draft Bill (focusing on promoting equal opportunities for women and men) submitted by Péter Hack and Mária Kórodi (MPs, Alliance of Free Democrats) [25].
April 2001	Anti-discrimination draft Bill (general – including the prohibition of discrimination based on *sexual orientation*) submitted by Magda Kósáné Kovács and Katalin Szili (MPs, Hungarian Socialist Party) [26]. Here there are references to the 2000/43 Racial Equality Directive and the 2000/78 Employment Equality Council Directive already mentioning *sexual orientation* as a protected category.
November 2002	In a Ministry of Justice document published in November 2002, outlining the concept of a new anti-discrimination and equal treatment law, there were fourteen categories specified as possible causes for discrimination, including *sexual orientation*. (The other protected categories were race, skin colour, ethnicity, language, disability, state of health, religion, political or other views, sex, age, social origin, circumstances of wealth and birth, and other situations.)
2003	Following inter-ministerial negotiations and public consultations in which NGOs were able to express their views, the final text of the law listed additional protected categories including *gender identity*. (Other inserted categories were family status, motherhood, pregnancy and fatherhood, part-time or limited period employment status, membership in interest representing bodies.)
December 2003	During the parliamentary debate of the draft bill, there was a certain level of rejection and a lack of comprehension expressed against the inclusion of sexual orientation and gender identity into the protected categories by representatives of the opposition parties. Nevertheless, the bill passed.
27 January 2004	The new law came into operation with the proviso that a new administrative body, an Equal Treatment Authority was to be established by 1 January 2005.
22 December 2004	A government decree was issued establishing the new Equal Treatment Authority in January 2005.
January 2005	Equal Treatment Authority set up.

[24] B. Bitskey, T. Gyulvari, "Az antidiszkriminációs szabályozás reformja" [Reforming anti-discrimination legislation], *Acta H Emberi jogi közlemények,* 15/4, 2004, p. 19.

[25] T/3804.

[26] T/4244.

The idea to introduce a general equal treatment act was not received with equal enthusiasm either in the Hungarian political arena, or in civil society. Counter arguments were cited by politicians as well as NGOs stating that from the perspective of providing really effective, "tailor-made" social protection for certain social groups – especially for women and Roma people – it would be more suitable to introduce separate acts dealing specifically with their problems [27].

During the parliamentary debate on the draft bill there was a certain level of rejection and a lack of comprehension expressed against the inclusion of sexual orientation and gender identity into the protected categories by representatives of the opposition parties.

It is instructive to cite some of the views and worries expressed in the debate.

Flórián Farkas (MP, Fidesz – Hungarian Civic Union) stated that treating various groups in different situations uniformly was not correct. He pointed out that

> "being a gipsy is not an illness, nor a birth defect, nor the result of an accident; it cannot be compared with problems of sexual orientation or gender identity. Perhaps it is not a coincidence that the draft proposed by the Minority Parliamentary Commissioner in 2000 was limited to national and ethnic minorities. I propose that this law be redrafted. I am first in line to support the idea of draft bills concerning other groups needing to be protected likewise… This would be better for everyone" [28].

Erika Szabó (MP, Fidesz – Hungarian Civic Union) argued that "other situations" could replace all the protected categories. Sexual orientation and gender identity as protected categories did not seem to make sense to her. She posed the following ambiguously poetic question: "According to the draft does it mean sexual orientation appropriate to general social norms and expectations, or does it refer to the opposite [e.g. sexual orientation opposing general social norms]?" [29]. Szabó also agreed with Farkas that the ethnic group of gipsies should not be categorised together with other "otherness": "as an ethnic category, the gipsies struggle with many problems and obviously they feel that they should not be listed together with sexual identity or otherness" [30].

László Nógrádi (MP, Fidesz – Hungarian Civic Union) emphasised the need to protect certain values:

> "Protecting our values is not the same as discriminating against others. When, for example, a religious school pays attention to hiring a teacher, who practises Christian values (or, at least, identifies with them) and considers that it is a requirement, then if they do not hire a homosexual person, or a person representing other values or having another gender identity, it does not mean turning against them; in these cases they are protecting their own values, and representing the interests of parents whose children are enrolled in such school because they want their children to be brought up in accordance with their own values. A school has the right to uphold such a value

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[27] B. Bitskey, T. Gyulvari, *op. cit.*, p. 22.
[28] Comment in the parliamentary debate on 25 November 2003. http://www.parlament.hu
[29] Comment in the parliamentary debate on 27 October 2003. http://www.parlament.hu
[30] Comment in the parliamentary debate on 26 November 2003. http://www.parlament.hu

system. The other problem with this draft is that it mixes together concepts belonging to different dimensions and different categories. Skin colour or ethnic background is not the same as gender identity or state of wealth. These should not be treated on the same level and mixed (…) I am afraid that if we are not careful, Orwell's vision that all people are equal but some are more equal than others may come true" [31].

Sándor Lezsák (MP, Hungarian Democratic Forum) expressed his surprise that sexual orientation and gender identity were included in protected categories:

"I would like to emphasize my surprise that the law would prohibit discrimination based on vaguely defined "gender identity", instead of discrimination between the sexes, e.g. between men and women. (...) I do not understand why the draft prioritises the less tangible gender identity over the objectively existing sex categorisation. According to the draft, sexual orientation cannot be a motive for disadvantageous discrimination either. (...) According to this law it would be completely normal to have necrophiliac pathologists or paedophile teachers, and their discrimination would be prohibited. (...) For example, does it qualify as disadvantageous treatment if parents or teachers want to change the sexual orientation of young people with medical treatment (...)? (...) According to medical opinion on this issue, male homosexuality can be cured with a good chance until the end of puberty, while lawyers – who are not physicians! – find posing this question about the necessity of treatment in itself humiliating and discriminative. Unfortunately this draft is so terse concerning the field of prohibiting discrimination on the basis of sexual orientation that it could even include all aberrations seen in horror movies as permissible and legally protected forms of sexual orientation" [32].

From the arguments I have just presented as well as those of some other Hungarian politicians and NGOs a certain hierarchical preference can be observed in the different grounds for equal treatment policymaking. Providing ethnic groups and women with special protection claims a higher priority than the "special privileges" demanded by categories like those based on sexual orientation and gender identity.

On the other hand a different, positive approach towards the inclusion of sexual orientation and gender identity as protected categories could be observed. The Hungarian Equal Treatment Act was conceived with this approach, focusing on protecting the rights of precisely those categories of people who appeared to have the highest vulnerability to discrimination based on previous court cases. In the view of governmental officials directing the introduction of the new act, the two most important targeted groups were Roma people and gays. A government official – who did not wish to be named – explained lawmakers' dilemmas concerning the issues of target groups, state responsibility as well as civil consultation as follows:

"We wanted an act protecting rights by focusing on redressing grievances; as opposed to "actionist" legislation pushing societal reform through "positive" State measures. The aim was that the law should provide legally aggrieved people with proper satisfaction in appropriate procedures. (...) Last year the Ministry of Justice presented the bill for an Act on Legislation (*jogalkotási törvény*) to Parliament,

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[31] Comment in the parliamentary debate on 25 November 2003. http://www.parlament.hu

[32] Comment in the parliamentary debate on 25 November 2003. http://www.parlament.hu

> making civil consultation [i.e. consultation with concerned NGOs] the general rule: putting bills on the internet where anyone can read and comment on them. (…) The idea to make them public on the internet was also widely criticised (…) but in my view, it is still a better solution than for the ministry to decide whom they should choose as their partners. That is a greater danger. (...) Naturally, there are always proposals [from NGOs] that cannot be carried out, but there are many things that can be done not only with very important acts like this one, but also with the various enacting clauses of acts. Still, it must be noted that the responsibility associated with preparing the law cannot be taken over by NGOs (…) because consultation does not mean that composing the main goals would be yielded to NGOs who represent only a part of the views [their own among many]. (...) We were not interested in the number of their members but in how useful their comments could be in the codification process. (…) If they bring up professionally good points and they are able to argue for them, like for example, in this case, when they raised the issue of transsexuals, then we replied that "of course, the act should apply to them, too". When it [the insertion of gender identity into the list of protected categories] was discovered later during the parliamentary debate, representatives asked what it referred to, and we told them what it meant. There was some pulling of faces – but that was all. (…) It is true that during the preparation work, it was a kind of subsidiary proposition that – exactly because we wanted a rights-protection kind of act, instead of a positive state-action act – we would focus on the groups that experienced the harshest discrimination. For example, an anti-discrimination act cannot do too much with cases like women who cannot do overtime work because they have to go home to take care of their children. These problems cannot be tackled by a rights-protection act. Therefore we concentrated on two target groups: Roma people and people in a minority position on sexual orientation grounds. (…) It does not mean that the law does not apply to others, too – but as legally they are the major target of discrimination, an external observer could have the impression that this law was especially "tailor-made" for them. (...)
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> (...) We wanted to emphasize that equal treatment is a right that can be enforced by a court, if this right is infringed. So unambiguous specific prohibitions can be composed and forbidding their infringement is a requirement. On the other hand, equal opportunity is not a right. There are State programmes, State measures to decrease social injustice. (...) These are political decisions made by the government which will also take the political responsibility for these decisions. But it is impossible to say that it is a State obligation that every year a certain amount of money must be spent on, for example, building houses for Roma people. On the other hand, we can say that it is a State obligation to protect the rights of Roma people when they are at risk of being forced out of their houses" [33].

From the foregoing, it is clear that the intention of the Hungarian government officials preparing the new law was to focus on practical legal problems from a specific rights protection perspective. In this context the role of NGOs was to provide practical knowledge accumulated – in this field mainly – from legal practice gained from court jurisdiction, while the government policymakers' role, especially through the work of ministerial as well as external experts, was to elaborate a theoretical framework

[33] Interview with a Hungarian government official who did not wish to be named, by Judit Takács on 1 September 2004. Used by permission.

that could effectively be applied to practical cases. The main scope of the Hungarian Equal Treatment Act is the protection of rights: this is the "hard core" to which the "softer" field of promoting equal opportunities was added as an indicator of direction. Hungarian law makers seemed to be aware of how difficult – if at all possible – it is to regulate social problems associated with the promotion of equal opportunities by legal means, and they chose to concentrate on more tangible assets.

Focusing the Hungarian Equal Treatment Act primarily on people in a minority position on the grounds of sexual orientation – as well as on the ethnic minority group of Roma people – might sound surprising at first. However it follows logically from a rights protection perspective since previous court cases – or legal defence – showed that effective redressment was needed for the legal grievance of certain categories of people.

As far as the inclusion in the scope of the act of the "real surprise" category of gender identity is concerned, that can also be explained as a logical extension of the application of a rights-protection approach. Even though a great deal of experience has not been accumulated in this field in Hungary, gender identity was a possible ground for discrimination that could be – and was – taken into consideration.

Finally, it should be emphasised that inclusion of sexual orientation seemed to be in perfect harmony with EU trends reflected by the 2000/78 Employment Equality Council Directive. This fact obviously helped to retain sexual orientation as a protected category despite opinions to the contrary. It should also be mentioned that the inclusion of sexual orientation in the list of protected categories was more than just a cosmetic exercise: interestingly, in 2002 the Ministry of Defence eliminated certain parts of two decrees (one of 1996 and one of 2000) according to which homosexuality was regarded as a "personality disorder" and as unsuitable for compulsory or professional service in the army [34]. This example shows how earnest the government was in implementing its anti-discrimination policy.

The appearance of gender identity among the protected categories, on the other hand, cannot be explained by EU trends but was achieved mainly because of the efficient interest representation strategies applied by Hungarian NGOs, namely the Háttér Support Society for LGBT People together with the Hungarian Helsinki Committee in the course of public consultations, initiated by the Ministry of Justice that provided real opportunities for stakeholders in Hungarian civil society to voice their views. To be fair, it must also be mentioned that – as can be seen from the minutes of the parliamentary debates – many Hungarian MPs were still quite unfamiliar with the concept of "gender identity" and at least one of them interpreted its inclusion as a scandalous surprise.

It can therefore be said that the determination of the two above mentioned NGOs as well as of government officials involved in preparing the act in compliance with

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[34] 9/2002 (II.28) HM-EüM joint decree 28/2002. (X.17.) BM-IM-MeHVM joint decree.

rights protection principles provided a new law including progressive elements, even when judged in a modern European context.

B. Practical application of equal treatment claims

1. *Actio popularis*

In addition to the inclusion of gender identity, another important novelty of the new law is the possibility of initiating *actio popularis* e.g. NGOs (societal bodies and special interest groups) can start legal action if the mistreatment is based on a category which is an essential feature of the individual's personality, also applies to persons belonging to a larger group which may not be exactly determined [35].

The first such *actio popularis* was initiated by the Háttér Support Society for LGBT People in February 2004. The case was based on the fact that the Károli Gáspár University of the Hungarian Reformed Church – a university established and maintained by the Hungarian Reformed Church but which received State support and issued diplomas accepted by the Hungarian State – published on its webpage that persons propagating and living homosexual lifestyles are *persona non grata* in their pastoral and theology teacher training programs. To prove the discriminatory practice the NGO referred to the fact that in the previous year a student had been expelled from this university because of his homosexuality. The Metropolitan Court (Fővárosi Bíróság) rejected the case in the first degree, stating that the declaration on the homepage was only an expression of opinion and not discrimination. However, it acknowledged the right of a NGO to start a case on an abstract basis, and it implicitly accepted that equal treatment legislation also should apply to universities maintained by a Church and financially supported by the State.

The NGO appealed against the ruling, saying that an act cannot be regarded only as an expression of viewpoint if a person covered by the protected category suffers disadvantages as a consequence. In December 2004, the higher court confirmed the rulings delivered in the first degree proceeding. The NGO is now seeking permission to appeal to the High Court for the case to be reconsidered, and if that is unsuccessful, it will examine the possibility of turning to the European Court of Human Rights.

2. *"Let's start a family!"*

Since same-sex marriage is not possible in Hungary, same-sex partners can emulate some of the conditions of married life only with the help of private legal contracts. The "Let's start a family!" programme of the Legal Aid Office of Háttér Support Society for LGBT People offers different means to arrange a legal framework to start same-sex family life. These means encompass a civil union contract arranging property, financial and personal relationships, including: providing right to obtain medical information about the partner's health, right of disposal over the partner's assets when that partner is in a helpless state, preparation of a will, and the appointment of guardians (if there are children). The existence of this program shows that same-sex

[35] 2003/CXXV. Law 20, para. (1).

couples need to make an extra effort if they want to establish a level of family security similar to that inherently enjoyed by married couples.

Establishing a legal framework for same-sex family life can be even more complicated when one of the partners is a foreign citizen. The following example indicates how difficult it can be if a person wants to live with a partner who has foreign citizenship, especially in the case of same-sex partners.

A same-sex male couple had been living together in Hungary for three years. One of them is a Hungarian, the other is a Romanian citizen. They participated in the "Let's start a family" programme of Háttér Support Society and made a private life partnership contract with each other. After three years of uninterrupted official stay in Hungary, the man with Romanian citizenship applied for a residence permit: he had a work permit, he had a job and he had a regular income exceeding the Hungarian minimal wage. The Hungarian partner declared in a notarised document that he would provide his partner with free accommodation and any necessary financial – or other type of – support. In order to prove that he was capable of providing such support, the Hungarian partner presented a portfolio worth ten million HUF to the court. However, the Romanian partner's application for a Hungarian residence permit was rejected by the Hungarian Immigration Office. The main problem with the application was that the Hungarian Immigration Act does not acknowledge cohabiting partner to be a family member as opposed to one's spouse. According to the law, when applying for a residence permit, an official declaration provided by a family member proving that the applicant has subsistence and accommodation is "especially" appropriate.

If the Immigration Act had legally acknowledged a same-sex partner to be a family member, she/he would then have been able to receive the necessary permission without any difficulty – as in fact everything else was in order. But as this was not the case in Hungary, the Immigration Office could not accept the declaration of the Hungarian same-sex partner as he was not considered to be a "proper family member". In the second degree procedure, the Immigration Office accepted the fact that one partner could provide the other with free accommodation – as at this time their private life partnership contract was attached as an official document. However, there were still some problems with the necessary subsistence level.

At this point the Legal Aid Service of Háttér Support Society, which represented the same-sex couple had two possibilities. First, it could argue that the disadvantageous discrimination between partners and family members in this context was unconstitutional. However, applying this approach would not grant a practical solution in the short term, while time is very important when people's everyday life becomes impossible. Secondly, it could refer to the principle of free proof – e.g. if the law does not order otherwise, any proof can be used freely – that has to be applied in these procedures according to Hungarian law. The lawyer of the Háttér Support Society chose the second option, while also pointing to the text of the Immigration Act referring to the necessary declaration that is "especially" appropriate if provided by a family member. This wording implies that declarations provided by people who are not family members can also be – if not "especially" then just simply – appropriate.

In the meantime the Equal Treatment Act came into force. On the basis of this Act, this case can be interpreted as an example of indirect discrimination, e.g. a seemingly

neutral condition, provision, or practice that brings a person covered by a protected category into a substantially more disadvantageous situation than a comparable situation of another person not belonging to the protected category. According to the Equal Treatment Act, it is sufficient to prove that a person belonging to a protected category is brought into a disadvantageous situation. Therefore in this case it would be the obligation of the Immigration Office to prove that they did not discriminate.

In the course of an administrative procedure the Metropolitan Court (Fővárosi Bíróság) ruled that the previous decision of the Immigration Office should be repealed and that a new immigration procedure should be started. However, the court's ruling was based on the observation that the situation had not been sufficiently explored, and it did not use the indirect discrimination argument at all.

3. "The pension case"

The following example shows the influence of European institutions on Hungarian jurisprudence. In 2003 a person, who had been living in cohabitation with his same-sex partner since 1991, died. The surviving partner applied for a widower's pension. (As there is no registered partnership for same-sex couples in Hungary, the existence of the partnership had to be proved by a special official certificate.) The National Pensions Authority (*Nyugdíjfolyósító Igazgatóság*) rejected the pension application in the first and second degrees arguing that according to social security law in the case of the death of one partner in a cohabiting childless partnership, the surviving partner is eligible for a widow's or widower's pension only if ten years of uninterrupted cohabitation can be proved. However, the authority argued, as the modification of the Hungarian Civil Code legalising same-sex partnerships (following the decision of the Hungarian Constitutional Court in 1995) became operational only in 1996, the ten-year cohabitation period could only be completed in 2006.

The Háttér Support Society encouraged the surviving partner to allow their lawyer to represent him and to start an action in the Employment Court of Budapest (*Fővárosi Munkaügyi Bíróság*), arguing that the lawmaker's intention in 1996 was to end discrimination in 1996, not in 2006. Therefore any period of cohabitation preceding the legislation should be taken into account. Furthermore, the lawyer of Hátter Support Society showed that a different interpretation of the legislation would lead to consequences in opposition with the Constitution.

This case was not only prosecuted in court but simultaneously, a coordinated lobbying offensive was launched. In October 2003, three NGOs (the Hungarian Civil Liberties Union, the Háttér Support Society and the Hungarian Helsinki Committee) issued a protest declaration. The Minister without Portfolio responsible for equal treatment affairs was approached by the activists, leading her to publicly express an opinion in the case, saying that she considered it discriminatory. The Minister also turned to the Hungarian Prime Minister's Office with the view of obtaining a government order ending the ambiguity of the social security law. At the same time the Háttér Support Society escalated their lobbying to the European level by contacting ILGA-Europe (of which it is a member) and asking them for support in the form of a letter addressed to the Hungarian Prime Minister and government. In this letter ILGA-Europe asked how it was possible that, during the final stages of

negotiations on Hungary's accession to the European Union and in the course of codifying national equal treatment legislation of a high European standard, a public body under the direction of the government – the National Pensions Authority – could openly discriminate against same-sex couples.

The government responded by issuing an executive order effective as of 1 January 2004 acknowledging that any period of cohabitation prior to 1996 was to be taken into account in the assessment of widow's or widower's pensions rights. This order provides an underlying assumption, namely that if at the time of the death of a partner, the partners are registered at the same address, then the burden of proof is reversed and it is to be assumed that at the time of death the cohabiting partnership existed unless facts emerge that show the opposite. This develops the Constitutional Court's factual legal relationship into an implied factual relationship based on registered address: thus a registered address implies certain rights. Although the Háttér Support Society was delighted with this victory, it decided to continue the case in court asking for a retrospective judgement covering the period before the government order came into effect on 1 January 2004, as the case had been before court since February 2003. The court ruled in favour of this request in September 2004.

From the point of view of developing anti-discrimination and equal treatment legislation and policymaking the analysis of this case raises two important points. First, a precedent was created with potentially far-reaching consequences in other fields of law (especially in disputes involving probate law between relatives and surviving partners of the deceased). Secondly, this judgement can be interpreted as a symbolic compensation for same-sex partners as it creates a retrospectively valid legal framework covering a period when suitable legislation for same-sex partnership was nonexistent.

This example clearly illustrates that the existence of internationally operating NGOs acting for and on behalf of their national constituencies can create a new dimension of European-wide activism towards sound policymaking and implementation.

PART III

Towards Europe: gays and lesbians in the candidate countries

Between acceptance and rejection
Decriminalizing homosexuality in Romania

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1. Introduction

The decade following 1989 represents for Romanian sexual minorities a period of liberalization unthinkable before. For decades, all consensual sexual relations between same-sex adults were forbidden and a number of homosexuals were sent to prison. Today same sex relationships are no longer a matter of criminal law and Romania possesses an elaborate legal framework to combate discrimination.

The significant developments in the domain of private life are only one aspect of a radical change at all levels of the Romanian post-communist society. The transition to democracy implies a lot of important transformations, most notably in Romania's legal framework, its structural reforms, economic developments, reorganization of its institutions and the creation of new ones, building a new order out of the wreckage. On the other hand, despite the dynamic of change and the various structures that were quickly reversed in the first years of transition, there are a lot of aspects resistant to change: values and mentalities are much slower to make the transformation.

In this present paper I explore the decriminalization of homosexuality as part of the conditional political clauses of the European Union enlargement towards Central and Eastern Europe, more precisely the influence of the country's adhesion to European Institutions for the dynamics of the "homosexuality issue". The major focus of this approach is on the main actors who contributed to outlaw discriminations.

In order to answer the research question, the paper is organized into three parts: the first section tries to briefly draw some general characteristics of the Romanian society, which go beyond our particular subject, but are relevant to understand the conditions of change and give us an inner light on the process of decriminalizing homosexuality. Secondly, I focus on the chronological steps of the process of change, underlining the principal features of the legal framework. The third section deals with

the concrete actions developed by the actors involved in this process, with a focus on the implementation at national level of the international human rights instruments. The attempt to draw a few general conclusions in the third and final part rounds out this paper.

2. Romanian society today: between past and present

A. The Romanian Orthodox Church, a power-sharing partner

One aspect that we have to keep in mind when we analyze the process of decriminalizing homosexuality in Romania is the place and influence of the Orthodox Church in this society. Even though the Romanian Constitution asserts the Church-State separation, orthodox officials assume an important role in forming and defending the Romanian nation. During the communist years the Romanian Orthodox Church (ROC) was forced to take orders from the political power and it collaborated with the communist regime [1]. After 1989, it constantly tried to acquire a better place in the political arena and its implication in political decisions is a matter of evidence. The Romanian Orthodox Church is a very active presence in all fields, using the large confidence of the population [2] to legitimize its action in political matters or education, but not only. Trying to establish itself as the only stable moral reference in a changing world, "the ROC has become rather a *power-sharing partner* of the political forces at the head of the State" [3]. Claiming to possess the only valuable answers to important social and political questions, the Romanian Orthodox Church, in the name of the majority of the population, tries to influence the public climate and the political body on various issues, homosexuality being one of them.

B. Patriarchal values, communist ideology and sexuality today

Another relevant aspect for our discussion refers to sexuality in general. Several issues have to be considered in connection with this large theme: the patriarchal values as the core of the social structure in this country, the important significance of the family in the Romanian society, the consequences of political control over private and intimate life during the communist years, the situation of sex education. Most likely this list is not exhaustive.

The Romanian social structure is mainly based on a peasant culture, which considers the patriarchal family as the cement that holds together Romanian society, its foundation. Men's and women's roles are strictly defined, young adults are expected to get married, start a family, and the purpose of sexual relations must be

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[1] For further information about the relations between the ROC and the Communist Party before 1989 see O. Gillet, *Religion et nationalisme. L'idéologie de l'Eglise orthodoxe roumaine sous le régime communiste*, Bruxelles, Editions de l'Université de Bruxelles, 1997.

[2] The 1992 census counted 87% of orthodox; in 1994 the numbers published by ROC were 80% of orthodox. For a discussion on these numbers see A. Capelle-Pogacean, "Du "retour de l'orthodoxie" dans la Roumanie post-communiste" , *L'Autre Europe*, 36-37, p. 117-139.

[3] G. Andreescu*, Biserica Ortodoxa romana ca actor al integrarii europene*, The Romanian Orthodox Church and European Integration. A Summary, electronic version, 2002, p. 4.

procreation. Still today, a highly valued measure of success is having a family and children. For couples, having children is not only the necessary aim, but more, they give meaning to life. Children are expected to obey their parents until adulthood and dependence continues often beyond that point with grandparents assuming a very pivotal role in raising children.

The values and moral standards of this culture were enlarged by a series of measures during the communist years that reinforced them: the control of private life reached incredible forms, from the antiabortion law, additional measures such as periodical gynecological exams and criminalization of contraceptive methods, to celibate taxes or criminalizing sex outside marriage [4]. The values of the patriarchal culture, as well as control of sexuality and intimate life constitute a strong conservative force; sexuality as reproduction is often considered the only one "pure" and "sane" motive, and should be protected against the corruptions of modernity.

More, eliminating sex from the public discourse lead to a lack of information on this topic. Reproduction notions were taught during biology classes, with no reference to love, pleasure, and eroticism. The most information on sex matters came from themes mainly associated with fear, sin, and harm. On these grounds, where traditional mentalities tend to relate sexuality to immorality and danger, the explosion of illustrated magazines and messages circulated by the media where pleasure and desire are the main subject, the source of a big issue: relaxation of norms concerning sexuality is equivalent to moral degradation. Homosexuality is seen in this context as a sign of this decadence.

C. Homosexuality, a measure of democratization

Transition from communism towards democracy implies various and quick reforms. Recent years have witnessed a number of important developments at all levels of society, but this process of transition is not without hitches. What becomes clear when we take homosexuality into discussion is that this process of change implies restructuring an entire belief system, a sector where change takes more time. Prejudices do remain, challenging what had previously been accepted as the correct answer by new requests of democracy: human rights, freedom of speech and expression, minorities' participation in political decision. Against the background of communist legacy, adding permanent negotiation between State institutions, democratic standards tend to be associated with external intrusions and new values are seen to be imposed by international organizations. Even though preoccupation with integration into European institutions is very present during the years following 1989, some of the membership requests appear as a violation of national interests and traditions.

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[4] Unmarried couples could not share a hotel room or even a berth in a sleeping car. A woman discovered having illicit sexual activity was given a criminal record for prostitution.

Despite the fact that Romania has continued to implement numerous reforms, there remains considerable scope for improving, and the human rights sector has been one of the key issues. Since other post-communist countries in the region abolished legislation concerning same-sex relationships soon after the regime change, Romania continued to keep in its Penal Code a law criminalizing homosexuality, being one of the last remaining States in Europe to impose criminal sanctions for engaging in private, consensual homosexual conduct. While all over Europe the debates concern equal rights, anti-discrimination laws, the right to marriage and adoption, Romania continued to condemn homosexuals to prison for all consensual same-sex relations [5] and to establish stiff prison terms for members of gay associations.

For more than ten years, all attempts to decriminalize homosexuality failed to accomplish the change and consensual same-sex relations continued to be prosecuted. This is the main objective of the present approach – to examine and understand the revision of the Romanian Penal Code: who were the actors involved in this process? What was the combination of internal and external factors that succeeded in imposing the change?

After having discussed the above overview of the general context of Romanian society, we are going to move on to examine the features of the legal environment.

3. From repression to liberation: a two-step evolution

As we briefly observed above, the communist legacy regarding gays and lesbians in Romania is problematic: considered inexistent by the official reports, homosexuals had to be kept away from the public space. The Romanian Penal Code had a specific article – Article 200 – which criminalized all consensual homosexual acts. Under this article:

> “Sexual relations between same-sex persons will be punished by a prison sentence of one to five years.
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> If the act provided for in para. 1 is committed under duress, or against a minor, or against a person unable to defend himself/herself or to express his/her will, the punishment will be a prison sentence of two to seven years.
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> If the act provided for in para. 2 results in serious injury to physical integrity or to health, the punishment will be three to ten years in prison; if the deed results in the death or suicide of the victim, the punishment will be a prison sentence of seven to fifteen years.
>
> Enticing or luring of a person into the perpetration of the act provided under para. 1 will be punished by prison sentence of one to five years” [6].

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[5] According to information published by the Ministry of Justice in October 1995, fourteen men were imprisoned under Article 200, para. 1, in 1993 and 1994.

[6] Codul Penal cu completarile, modificarile si abrogarile pana la 2 oct 1992, editie coordonata, sistematizata si ingrijita de Iulian Peoanru (edition coordinated, organized and supervised by Iulian Poenaru), Editura neprecizata (Publishing house not mentioned), 1992. All translations of law articles are not official.

Sending them to prison or using their "stigma" as a blackmail instrument for collaboration were ways of dealing with this issue. The following years after 1989 did not seem to bring more freedom to Romanian homosexuals. It was not until 2001 that a real change occurred when Article 200 of the Penal Code was abolished and Romania adopted legislation on combating discrimination.

What happened in the meantime? To ease access to the dynamics of change during this period, we found it necessary to establish two different periods in this process.

The first period starts, in our opinion, in 1993, with several factors coming to light: the beginning of mediation between the political realm and society by the intermediation of the non governmental sector [7]; we have to add the entrance of the country on the international political scene by the adhesion to the Council of Europe. And to draw the complete tableau, we should not leave aside the return of the orthodoxy in the public space and the permanent negotiation between the Church and politics [8]. But, most important, the subject of homosexuality becomes an issue in the parliamentary debates.

The Government's proposal to amend the Penal Code and modify Article 200, after several reformulations and "forwards" and "backwards" between the two chambers [9] of the Parliament, was finally adopted in 1996, being the first Penal Code reform after the communist regime collapsed. Vividly contested (as we are going to see) by the majority of the political parties, this project constitutes the first intervention on the article concerning same-sex relationships: the first paragraph decriminalizes private homosexual conduct. On the contrary, two other conditions are instituted to the first paragraphs and a new paragraph added:

> "Sexual relations between same-sex persons, if performed in public or if they have resulted in public scandal, will be punished by prison from one up to five years.
>
> The act of an adult person having sexual relations with a same-sex under age person is punishable by imprisonment from two to seven years, and interdiction of certain rights.
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> Same-sex relations with an individual who cannot consent or cannot defend himself/herself, or same-sex relations performed by constraint, against the will of the other, are punishable with imprisonment from three to ten years, and interdiction of certain rights.

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[7] Romanian Helsinki Committee (APADOR-CH Asociatia pentru Apararea Drepturilor Omului in Romania – Comitetul Helsinki), established in 1990, launched the program "Ameliorarea drepturilor omului prin intermediul legislatiei" (Improving human rights through legislation); the main idea of this action is the transparency of Parliament's work and one of the accomplishments is the start of an open dialog with the Parliament members on the constitutionality of the bills, the respect for international treaties and European standards concerning human rights.

[8] See on this matter A. Capelle-Pogacean, *op. cit.* ; N. Bárdos-Féltoronyi, *Eglises et Etats au centre de l'Europe. Réflexions géopolitiques*, Paris, L'Harmattan, 2000.

[9] Bills or legislative proposals passed by one Chamber will be sent to the other Parliament Chamber. If the bill or legislative proposal is rejected in the latter, it will be sent back, for a new debate, to the Chamber that had passed it. A second rejection is final. If one of the Chambers has passed a bill or legislative proposal, in a different wording from that approved by the other Chamber, the Presidents of both Chambers will initiate a mediation procedure, by parity Committee.

> If the act provided in para. 2 and 3 results in serious physical injuries or damages of state of health, the punishment is imprisonment from five to fifteen years and interdiction of certain rights; if the act results in victim's murder or suicide, the punishment is imprisonment from fifteen to twenty-five years and interdiction of certain rights.
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> The practice of tempting or urging others in order to practice homosexual relations, as well as the propaganda or association, or any other acts of proselytism performed for this goal, is punishable by imprisonment from one to five years" [10].

Under the label of liberalization, this reform of the Penal Code does not bring in fact any improvement to the legal environment in Romania: homosexuality is still illegal in Romania after the 1996 reform and, more, homosexual people do not have the right to express themselves or to act in a specific association.

The reform opens a second period, characterized by the continuity of the actors involved in the process of change, even as new figures appear and have a word to say on this matter. In this second period there is also a lack of interest from the political side and the adoption of contradictory measures.

Debates on Article 200 are weak and the subject does not mobilize politicians' attention. Two essays in this period aimed at modifying this article resulted in failure. Only four years later, in 2000, did the situation change. In August 2000 the Romanian Government adopted the first anti-discrimination legislation, Ordinance 137/2000 on preventing and punishing all forms of discrimination. The Ordinance forbids any discrimination based on "race, nationality, ethnic origin, language, religion, social status, belief, sex or sexual orientation, denunciation to a disfavored category or any other criterion". Following Ordinance 137/2000, for almost one year the Romanian legislation had two contradictory provisions: one sanctioning same-sex relationships and forbidding gay associations as well as freedom of expression of homosexual persons, and another criminalizing all discriminatory action against homosexuals. Article 200, the legal text criminalizing homosexuality, was abolished only in 2001 by Ordinance 89/2001. Significantly from this point of view, although still part of the Penal Code, Article 200 had not been enforced since 1997. Nevertheless, an advanced and complete anti-discrimination law came out in a country where the fight to decriminalize homosexual acts was one of the hardest.

As we pointed out before, the legal framework concerning same-sex relationships in Romania evolved in two steps: first a change was made in 1996, taking the form of a compromise where decriminalizing homosexual conduct in private came at the cost of limitations on freedom of expression and association. The second step towards equal rights brought a legal provision sanctioning discrimination based on same-sex orientation and, shortly after, the abolition of all punitive laws regarding homosexuals.

After describing the main accomplishments of the last decade in terms of legal changes, this paper proceeds by analyzing the role of and the relations between the principal actors in the debate to improve the legal situation [11] of the sexual minorities in Romania.

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[10] Codul Penal al Romaniei, Editura Lumina Lex, 1997.

[11] This paper takes into account only the legal changes, leaving aside aspects regarding the social situation of this minority.

4. Negotiating for a "more gay Romania"

It is a common place to consider the transformations of legal provisions concerning private life as a response to external conditionality, a change stemming from the effort to align Romanian legislation with that of the European Union, imposed externally. From the multitude of such opinions, we choose two to exemplify this idea: "In 1993, the Council of Europe has obtained from the Romanian Government the promise to abrogate the homophobic legislation as a condition of the adhesion" [12]. Or "Without really assessing the substance of this document [Ordinance 137/2000] and in an attempt to gain more legitimacy before the international community, the Romanian Parliament adopted the Ordinance as law in February 2002" [13].

It is precisely this common judgment that we are examining further. What are the sources of these statements? On what basis can we argue that amending the Penal Code was a "sacrifice for the integration"? Several aspects of this process of change are examined in order to answer this issue – the European institutions' recommendations, the internal response in Romania, e.g., political, social, and the human rights activists.

A. The Council of Europe and the European Union: terms and conditions

Two different levels of this process of change are taken into consideration to demonstrate the active involvement of European institutions and their influence, in direct relation with the chronology drawn above. In the years following the collapse of the communist regime, the priority for Romania had been its relations with the Council of Europe. 1993, when the country joined the Council of Europe [14], marked an important accomplishment. Once Romania received the European Commission's Opinion on its application for EU membership [15] in 1997, and the accession process was formally launched [16], attention turned mainly towards the EU.

As already stated, in 1993, the Romanian Government introduced a program of judicial reform for the Penal Code and Code of Criminal Procedure; this reform included revisions of Article 200. The initiative is connected with the Council of Europe's requirement to Romanian authorities to modify this law in order to meet European standards. Indeed, following the demand to become a member of this institution, Romania received a series of visits from European representatives who reviewed the application for membership and determined progress in implementing the reform. Rapporteurs from the Council of Europe visiting Romania in April 1993 to investigate its human rights record raised the issue of homosexuality. Based on these

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[12] Ph. Masanet, "Balkans", in *Dictionnaire de l'homophobie*, Paris, PUF, 2003, p. 59.

[13] R. E. Iordache, "Behind the Velvet Curtain: On the Anti-Discrimination Law in Romania", electronic version, Columbia Law School, Public Interest Law Initiative.

[14] Romania became member of the Council of Europe on 7 October 1993.

[15] Romania applied for EU membership on 22 June 1995.

[16] On 30 March 1998, by a meeting of the Ministers for Foreign Affairs of the fifteen EU Member States, the ten Central and East European applicant States and Cyprus.

reports [17], between other recommendations, the Parliamentary Assembly affirmed its expectation that “Romania will shortly change its legislation in such a way that (...) Article 200 of the Penal Code will no longer consider a criminal offense homosexual acts in private between consenting adults” [18].

Modifying the law concerning homosexuals as a condition for adhesion to the Council of Europe is considered a key factor in opening the debates on the Penal Code Reform and amending Article 200. After joining the Council of Europe, Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms [19] and also signed Protocol 12 (prohibiting discrimination), which became referential instruments in the debates of the following years.

The next moment that we focus on occurred in 1997, a year of great importance for the history of Romania’s relations with European Institutions. The progress of the country on democratic reform constitutes the subject of Resolution 1123/1997 on the honouring of obligations and commitments by Romania [20], which noted that Romania had made considerable progress towards the fulfillment of its obligations and commitments since joining the Council of Europe, but also stated that “certain provisions of the Penal Code now in force are unacceptable and seriously imperil the exercise of fundamental freedoms, especially Article 200 on homosexual acts (...)” [21]. The Parliamentary Assembly requested that the Romanian authorities “amend without delay the provisions of the Penal Code (...) which are contrary to fundamental freedoms as set forth in the European Convention on Human Rights” and decided to stop monitoring Romania [22], saying that the procedure could be reopened if the conditions stated are fulfilled within a year.

On the other hand, the Romanian application for EU membership is being examined and the European Commission published “Agenda 2000 – Commission Opinion on Romania’s Application for Membership of the European Union”. The document analyzed the Romanian case according to the “political” criteria for accession formulated for the candidate countries in Central and Eastern Europe [23]. Section B of this document refers to political conditions, human rights, and the

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[17] See Doc. 6901, Commission’s report on political matters, rapporteur: Mr Friederich Köning, 19 July 1993 ; Doc. 6918, Commission’s opinion on judicial matters and human rights, rapporteur: Mr Gunnar Jansson, 20 September 1993 ; Doc. 6914, Commission’s opinion on relations with countries non members, rapporteur: Mr Theodoros Pangalos, 16 September 1993.

[18] Avis 176 (1993) 1 concerning Romania’s demand to join the Council of Europe, text adopted by the Parliamentary Assembly of the Council of Europe on 28 September 1993 (46th sitting).

[19] The Convention was ratified and became effective on 6 June 1994.

[20] Text adopted by the Parliamentary Assembly of the Council of Europe on 24 April 1997 (14th sitting).

[21] Para. 9.

[22] Procedure opened under Order no. 508/1995.

[23] Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

protection of minorities; from this point of view, the Commission observes that: "As regards equality before the law, homosexuals are exposed to abuses by the vagueness of the term "public scandal" [24] as applied to homosexual acts by Article 200 of the Penal Code" [25].

The same issue was mentioned in November 1998, when the European Commission presented the first "Regular report from the Commission on Romania's progress towards accession". In this document, the Commission observed that "in July 1998, a comprehensive reform of the Penal Code dealing with issues such as homosexuality, libel, insult and offense to authorities, was rejected by Parliament and sent back to Government" [26].

Significant for our approach are the two Directives [27] banning discrimination adopted in 2000, requiring all Member States of the European Union, existing and future, to review their legislation and make the necessary changes in order to ensure effective implementation of these laws.

Resolution 1123/1997 and Agenda 2000, as well as the continuous feed back from the European authorities were only slightly acknowledged by the Romanian authorities. Even though the main priority of the Government was to integrate the country into the European Institutions, the external political conditionality, at least at the beginning, did not have a great effect on reforming provisions regarding private life.

Gay rights in general and Article 200 in particular became sticking points, a barrier to the goal everybody agreed on. If at the European level Romanian representatives expressed the political willingness to improve the legislation regarding homosexuals, to amend Article 200 of the Penal Code, on the internal scene the opposition to the repeal of this article was almost unanimous. More, the ROC was very active in expressing its condemnation of homosexuality, and the political sector at the time were very permeable to the Church's influence.

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[24] "In public" is defined by Article 152 of the Penal Code: "The deed is considered to be committed "in public" when committed: a) in a place that by its nature or purpose is always accessible to the public, even if no one is present there; b) in any other place accessible to the public, if two or more persons are present; c) in a place inaccessible to the public, with the intention that the deed be seen or heard and if this consequence occurs before two or more persons; d) in a meeting of two or more persons, except for meetings that can be considered family meetings due to the nature of the relationships between the participating persons; e) through any means by which the actor has knowledge that the occurrence may reach the public". The terms "public scandal", however, are not defined anywhere in the Romanian penal legislation.

[25] DOC/97/18, B.1.2, p. 16.

[26] Regular report from the Commission on Romania's progress towards accession, November 1998, p. 11.

[27] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) and Directive 200/78/EC (the Employment Equality Directive). Member States were under an obligation to complete implementation of the first Directive by 19 July 2003 and the second one by 2 December 2003. The new Members had to complete it by May 2004.

B. Politics and religion – together to defend the nation

The attempts to honor the European institutions' expectations remained with no concrete results for a long period of time. The parliamentary debates offered the opportunity to hear a homophobic discourse that mobilized all arguments possible to imagine. All speeches referred to homosexuality as an immoral act, a deviation from the law of nature, a sickness, a crime, a sin, a sexual aberration, an attack to the health of the nation and society… and the list is not exhaustive. The main idea resulting from the politicians' interventions was that decriminalizing homosexual acts is not a valid option: homosexuality is an offense to the moral and religious conscience of the great majority of the population, a modern vice that Romanians do not have to embrace in order to be recognized as Europeans. Cultural and historical patterns must be taken into consideration by the European institutions and the country's values should be respected.

A gap in this picture appeared in 1994, when the Constitutional Court ruled that Article 200 was unconstitutional, violating protection for privacy stated by Article 26 of the Constitution [28]. The Court's decision was an improvement for the rights of gay men and lesbians in Romania, the first important step towards a more permissive legislation. However, it allowed criminal prosecution for homosexual acts "committed in public or producing a public scandal". As we have noticed earlier, these were the conditions included in the new form of Article 200, the result of the first reform of the Penal Code after 1989. More, the three years of parliamentary debates led to a formula that introduced restrictions on the right of association and expression. Even though the EU and the Council of Europe have strongly criticized the new law for maintaining dangerously vague language that permitted arbitrary enforcement, the Romanian authorities considered it as the most appropriate response to the European norms, respecting also the national context.

As we have mentioned before, one figure is very preeminent in this context, meaning the Romanian Orthodox Church. Claiming the allegiance of 87 % of Romanians, the ROC is very active in trying to occupy a better place in Romanian society. The issue of decriminalizing homosexuality constituted for the ROC a handy instrument in exercising its influence on the political scene in Romania. On several occasions, the ROC denounced the danger represented by an eventual legalization of homosexual acts. Patriarch Teoctist himself condemned homosexuals as "abnormal and unnatural", on a regular basis, not only in sermons given at services, but in petitions addressed to the Parliament, especially during the debates concerning the reform of the Penal Code.

The ROC benefited from support by ASCOR (Asociatia Studentilor Crestin-Ortodocsi din Romania), an association of students who mobilized their forces against the abolition of Article 200. Among their activities, let us mention the conference organized in Bucharest in 1995 under the title: "Homosexuality – propaganda of human degenerates", an event that gathered a series of speeches claiming the danger

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[28] Decizia no. 81, Curtea Constitutionala, 15 July 1994

of homosexuality. With the intention to demonstrate the necessity to keep Article 200 unchanged in the Penal Code, several disciplines were brought together to express their point of view: theology, sociology, medicine, law. Signed by the Patriarch, by all bishops and archbishops of the ROC and by representatives of some Christian organizations, the brochure issued after the conference was presented as a petition to the Parliament, opposing the decriminalization of homosexual acts.

The new formula of Article 200 after the Penal Code reform in 1996 expresses how the traditional religious beliefs and Church guidelines exerted their influence on the politics of homosexuality in Romania. Trying to honor the obligations assumed as a member of the Council of Europe and not to introduce unpopular reforms that would contradict the “majority orthodox spirit”, Romanian politicians arrived at a compromise that fully expressed the inability to accept homosexuality as a matter of personal choice, a human right.

The period following the first reform of the Penal Code did not register significant events in the political arena; even though the Romanian government received vehement criticism from the EU and the Council of Europe, and the Article 200 issue was considered a violation of the European Convention on human rights, all initiatives to amend this article failed. After several projects failed to arrive on the table for discussions in the Parliament, one important step towards decriminalizing homosexuality was the Government proposal presented to the Parliament in 1999, under the title: Law project for modifying and completing the Penal Code in order to comply with the requirements of Resolution 1123/1997. The proposal included the total elimination of Article 200 from the Romanian Penal Code, to which, as we have mentioned before, the Resolution specifically referred, with the clearly expressed reason to comply to European standards. This time, the parliamentary debates were far from the vivid mobilization witnessed in Parliament and leading to the reform in 1996. At the time almost all parties in Parliament found resources for the fight and brought up arguments against the change. On this occasion, however, several voices claimed the necessity to accept the change, mainly because of the commitments made at the European level. The project at last succeeded in passing in the Deputies Chamber [29] in June 2000, but the Senate never had the chance to discuss it [30].

The Deputies Chamber’s decision received a strong reaction from the ROC, who, in a public letter addressed to the Parliament, expressed its “sadness about the abolition of Article 200 by the Chamber of Deputies”, calling on the Parliament “not to vote for laws contrary to the Christian moral, to the law of nature, to the

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[29] Law project to modify and to complete the Penal Code in order to comply with the requirements of Resolution 1123/1997 received 180 votes, 14 votes against and 40 abstentions; Point 9 of the project, concerning the abrogation of Article 200 received 122 votes, 63 votes against and 17 abstentions; Session of the Chamber of Deputies on 28 June 2000, published in *OJ*, no. 100/2000.

[30] The project arrived to the Senate on 26 November 2002, when Government Ordinance 89/2001 had already abrogated Article 200.

dignity and the vocation of family" [31]. The press conference [32] following focused the discussions around the subject of homosexuality, considering also the possibility of calling a referendum if the Senate comes to the same decision as the Chamber of Deputies. The same idea appears in a public speech that (at the time newly appointed) Minister of Justice Rodica Stanoiu made for the press: "(…) given the opposition of the [Romanian Orthodox] Church and the discussions that have arisen in this matter, I would be in favour of a referendum" [33].

C. ACCEPT – strategies of mediation

Romania's obligations as a member of the Council of Europe and of the European Union and the recommendations coming from the European institutions were often considered by politicians and the ROC representatives as dismissive of the national values, imposed from above against Romanians. However, certain actors at national level apprehended the conditions of the European integration as a new structure of opportunity to defend their interests. Taking advantage of the switch of the framework for decision making from national to European level, the Romanian Helsinki Committee [34] and Bucharest Acceptance Group developed a series of strategies to intercept the domestic structures reluctant to change. This is the main focus of our analysis in this section of the paper.

The Romanian Helsinki Committee, a non-governmental organization, founded in 1990 with the purpose of promoting and protecting human rights and fundamental freedoms, had developed activities in support of disfavored categories and vulnerable groups: men and women, adults and underage, refugees, migrants, prisoners, minorities, victims of domestic violence, etc. Their main activities concerned researching and monitoring the way State authorities respect the international obligations in human rights and the conventions Romania is part to. Acknowledging gays' and lesbians' rights infringements in Romania, at the beginning of 1994 the Romanian Helsinki Committee established contact with a few foreign citizens in Bucharest who were concerned about the homosexuality issue in the country. As a result, an informal group called Bucharest Acceptance Group [35] was born, with the objective to find solutions for "a more gay Romania". This was not the first attempt to

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[31] Petition addressed by the Holy Synod to the Senators and Deputies on 13 September 2000.

[32] "We need healthy young people in mind and body, like any civilized country and we must try to protect them from contamination by such serious sinners", said a spokesman for Holy Synod bishop Vincentiu Ploiesteanu. Suggesting that the EU's pressure to change legislation regarding homosexuality is completely misguided, he added: "We want to join the European Union, not Sodom and Gomorrah" (*BBC News*, 20 December 2001).

[33] *ProFM radio station*, 21 December 2000, News.

[34] APADOR-CH – Asociatia pentru Apararea Drepturilor Omului in Romania – Comitetul Helsinki, The Association for the Defence of Human Rights in Romania – Helsinki Committee.

[35] Christopher Newlands, David St. Vincent, Guido R. Spaanbroek, Jennifer Tanaka, Bonny Wassing are some of the persons involved in the project.

create a gay organization in Romania; two other informal groups had existed – Total relations and Group 200 –, but only for a short period of time and they did not leave consistent marks of their existence [36]. The meanings to start their activities and try to accomplish their aim were found in 1995: as part of the "Year of Tolerance", Bucharest Acceptance Group, with support from the Romanian Helsinki Committee and UNESCO-CEPES (the European Centre for Higher Education/le Centre européen pour l'enseignement supérieur) organized a conference in Bucharest, "Homosexuality – a Human Right?". Another seminar, financed by the Dutch government took place the same year in Sinaia.

Since allies of the organizer – the Royal Netherlands Embassy in Bucharest, the United Kingdom Embassy, the Embassies of Norway and Denmark, Dacia Foundation Amsterdam, International Gay and Lesbian Human Rights Commission San Francisco, Soros Foundation-Open Society Institute – were of such importance, the Romanian Government allowed the events to go ahead even though the Penal Code clearly outlawed them. Two representatives were present – Deputy Nicu Vintila from the Juridical Commission of the Chamber of Deputies and Counsellor Octavian Cojocaru, representative of the Ministry of Justice. Both underlined the pressure from the Orthodox Church and the fact that the Romanian society is not prepared to accept same-sex relations.

After these two events, Bucharest Acceptance Group remained silent on the internal scene. No other conferences were organized and its visibility in Romanian media was almost insignificant. Efforts aimed at registering Bucharest Acceptance Group as an official organization were especially complicated and the Penal Code reform in 1996 did not ease the way. However, in 1996 Bucharest Acceptance Group did register as a non profit, non governmental, human rights association, under the name ACCEPT. The solution to avoid the restriction formulated in the last paragraph of Article 200 was to set a larger objective, i.e. human rights, and not specifically LGBT rights.

Benefiting from their new status, ACCEPT could start negotiations for partnerships with other associations and obtain sponsorships [37] which allowed its existence and activities for the repeal of the anti-gay legislation. Working with foreign organizations

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[36] Exploring this issue is to be considered. The magazine *Gay 45* had two issues before it disappeared. The only reference to this issue was found in I. Baciu, V. Cimpeanu et M. Nicoara, "Romania", in R. Rosenbloom (ed.), *Unspoken Rules – Sexual Orientation and Women's Human Rights*, International Gay and Lesbian Human Rights Commission, San Francisco, USA, 1995, report prepared for United Nations Fourth World Conference on Women. An interview with Vera Cimpeanu in 2004 could not achieve to more information on the subject.

[37] ACCEPT is sponsored by various international organizations, among them: the Dutch Ministry of Foreign Affairs (through the MATRA program); Cooperating Netherlands Foundations for the Central and Eastern Europe; the Royal Embassy of Holland in Bucharest; the Finnish Embassy in Bucharest; the Canadian Embassy in Bucharest; UNAIDS (The Joint United Nations for HIV/AIDS) and UNDP (United National Development Program); the Open Society Institute; ASTRAEA; and the Kimeta Society of Toronto, Canada, ILGA-Europe, Amnesty International, Human Rights Watch, IGLHRC.

and individuals to increase pressure from abroad on Romanian authorities has been the main focus of the association. Several examples could be called to sustain this statement: among them the collaboration of ACCEPT with ILGHRC for the report "Public Scandals", hosting ILGA conference in 2000 in Bucharest or the collaboration with members of the European Parliament.

In June and July 1997, ACCEPT took active part in the research mission organized and financed by the Human Rights Commission and IGLHRC in Romania to investigate the situation of gays and lesbians under the new Article 200. Members of ACCEPT together with representatives of the two organizations, visited fifteen penitentiaries and interviewed prisoners as well as members of the Parliament, representatives of the ministries and local prosecutors, and police. The final report published in English and translated into Romanian presents systematic abuses of homosexuals in penitentiaries. Titled "Public Scandals: Sexual Orientation and Criminal Law in Romania", on 15 January 1998, the report was the object of a meeting of Scott Long [38] and Jeri Laber [39] with President Emil Constantinescu. Following the discussion based on this report, the President promised to pardon all prisoners convicted under Article 200, para. 1 and 5 and stated that his gesture should send a message to the Romanian public and authorities [40].

Another significant moment demonstrating ACCEPT's implication on the European scene occurred in 2000. The Romanian organization hosted in Bucharest the 22nd European Conference of ILGA, under the title "ACCEPTing diversity"; it was an occasion for ILGA to call on the Romanian Parliament to repeal Article 200 of the Penal Code. ACCEPT considered the annual conference of the European organization a way to demonstrate and underline the constant attention of European institutions on the Romanian authorities and their respect for the international obligations assumed [41].

Last but not least, in response to action alerts for solidarity and support launched by ACCEPT, members of the European Parliament, including: Baroness Emma Nicholson, Lousewies van der Laan, Astrid Thors, Michael Cashman, Joke Swiebel, Jan Marinus Wiersma, Enrique Barón Crespo, Patsy Sörensen [42], signed several

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[38] Advocacy coordinator of the International Gay and Lesbian Human Rights Commission.

[39] Senior adviser to Human Rights Watch.

[40] "Homosexuality is the last remaining human rights problem we have to address in Romania, and we will address it" (President Constantinescu, according to *ILGA Euro-letter*, 57, February 1998).

[41] "The European Conference of ILGA can be seen as an exercise of correct information, which raises the awareness to the situation and rights sexual minorities enjoy in the Member States of the European Union and in accession countries. The fact that this conference takes place in Bucharest has a special significance: it demonstrates the constant concern of this international organisation for the way Romania commits itself to respect the rights of minorities, democratic requirements and the reform of the legal framework" (Florin Buhuceanu, representative of ACCEPT, at the press conference).

[42] Document archived at http://www.raglb.org.uk/archive.htm.

protest letters addressed to the Romanian Government and Romanian diplomatic representatives, underlining the necessity of decriminalizing homosexuality and asking that future penal laws do not place individuals at risk solely because of their sexual orientation.

ACCEPT's strategy included also to seek support from within Romania and to approach directly representatives of the Romanian authorities, particularly the Romanian Ministries of Justice and of European Integration, but mainly over the last period.

5. Conclusions

In the above pages we discussed decriminalization of homosexuality in Romania in the context of the European enlargement towards east. After a short highlight of the place the Romanian Orthodox Church occupies in the Romanian society, we examined briefly the effect of the patriarchal values and the communist ideology of people's view on sexuality: an alternative life style is associated with immorality and degradation, Romanian society rejects any difference. A second section of this paper proceeded with a short historical account on transformations of the legal framework concerning homosexuality and divided the process of change into two successive periods: the compromise period (1993-1996) and the transformations period (1997-2001). The third and main part of this paper analyzed the major actors involved in this process, inquiring on the continuous negotiation between them: the European institutions, the internal political power holders (the Parliament and the Romanian Orthodox Church) and the human rights activists (Romanian and their international partners). Each actor has different strengths and different strategies. However, we consider that the external pressure from the European institutions created the opportunity to launch the debate on decriminalizing homosexuality in Romania. Joining the Council of Europe and signing the European Convention on Human Rights offered the appropriate conditions for this issue to become a matter of political interest. Furthermore, we consider that lack of mobilization in civil society, religious authority and moral conservatism explain why the subject has not arisen spontaneously in Romania. Also, these are the factors causing the delay of the reform concerning private life.

Nevertheless, if the context of the European integration has led to change, this has not happened directly. As Caporaso argues [43] European pressures worked through domestic mediating factors. On the one hand, internal actors facilitated the process; human rights NGOs, by their strategy of involving international intermediaries, contributed to increasing the pressure. ACCEPT, through their collaboration with Amnesty International, Human Rights Watch, ILGHRC, or the European Parliament, played a significant role in keeping the subject on the agenda. According to Weiler's observation [44] the EU has become a presumptive arena in which problems are to be

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[43] J. A. Caporaso, "Third Generation Research and the EU: The Impact of Europeanization", Presentation at Conference on Impact of Europeanization on Politics and Policy in Europe, Toronto, Canada, 7-9 May 2004.

solved, ACCEPT developed a series of strategies at the European level, trying to force the decision making.

On the other hand, domestic response to external pressure had negative consequences on the way reform has been implemented: as we have seen, the first phase of the change process led to the denial of freedom of association and freedom of expression. We would add that the domestic resistance to change (as for instance the Romanian Orthodox Church intervention in the decision making) led to continuously paying attention to the subject in the European arena and contributed to consider the "homosexuality issue" as a sensitive point for the Romanian integration.

After years of struggling with religious and moral conservatism, despite the weakness of the associative sector, Romania finally decriminalized homosexual acts, as required in order to meet human rights standards of the Council of Europe and the European Union. A remarkably rapid change, compared to the decades needed for such changes to occur in Western Europe and North America. Yet, curiously enough, compared to other post-communist countries, decriminalizing homosexuality has been a long controversy going through endless adversity. Symbolic of a difficult and slow transition, homosexuality has been a question of awareness of European conditionality and less a matter of human rights, "which remains very low in Romania as a whole" [45].

Last but not least, we have to keep in mind that this paper is part of a work in progress; most of the issues here approached need further investigation. Therefore our attempt was to formulate a series of general observations, which are confined to this stage of our research; following inquiry will allow to better elaborate the outcome.

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[44] J.H.H. Weiler, "The Transformation of Europe", in Id., *The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration*, Cambridge, Cambridge University Press, 1999.

[45] As R. Weber noticed, "human rights as a concept penetrated Romanian society only in the last twelve years, together with the emergence of democratic politics. However, its evolution since then has been ambiguous at best". R. Weber, "The Romanian Legal Approach to Human Rights", electronic version, Monitoring human rights and the rule of law in Europe, eumap.org.

Homophobia within the Western Balkans:
Otherness and the image of the enemy

Jean-Arnault Derens

In November 2004, public television from Montenegro invited Atila Kovac to participate in a public debate. On this occasion, the manager of the *Decko* newspaper from Novi Sad in Voivodine, the only gay magazine in Serbia-Montenegro faced a double lynching. In front of the channel's headquarters demonstrators mainly instigated by the "*Varvari* " (the Barbarians), the supporters of the Buducnost football club, had tried to stop him from entering the building. Violent brawls broke out between the demonstrators and the police. Six members of the "*Varvari*" were arrested after having attacked the television car that was driving Atila Kovac, and three other persons were hurt. In the studio, Atila Kovac had to respond to students determined to prove that "homosexuality is a disease". The six students on the set had been selected by the "Student Parliament", an organization run by Balsa Dragovic. Mr Dragovic explained that despite his efforts and the channel's explicit requests, he could not find students ready to defend another debating position. The messages received from the audience were all one-sided: "Should the children be allowed to watch such a television show? You should feel ashamed that you let a pederast appear on the national TV channel. Montenegro is an honorable country".

As a consequence, the comments disseminated by the press and within the coffee houses from Podgorica had mainly referred to the brawls with the police and to the "provocation" perpetrated by Atila Kovac; he had "insulted the heroic spirit of the Montenegro inhabitants", by qualifying the inhabitants of Podgorica as "little cats" in an interview solicited by the *Vijesti* [1] daily newspaper.

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[1] See "Monténégro: homophobie, violence et haine de l'autre ", *Le Courrier des Balkans*, http://www.balkans.eu.org/article4851.html

There is no public location explicitly open to gays in Montenegro, as there is no gay organization. The few feminist NGOs or NGOs defending human rights would rather keep away from this topic, blaming at the same time the "conservative" attitude of Montenegro society. However, a homosexual population obviously exists in Montenegro, but it is compelled to live in extreme discretion: gay people from Montenegro, who have the means to usually travel to Serbia or abroad to meet with each other. One's financial situation within a ruined country is now the barrier.

It is worth analysing the invectives launched against Atila Kovac. In no time, the students gathered in the television studio had reached the following conclusion: "You are a Hungarian from Voïvodine, so you should appear on the television channels from your country". Therefore, the gay identity is not compatible with the national Montenegrin identity. Homosexuality is a foreign matter, and sexual and national minorities are all subjected to the same contempt.

Similarly, there is an obvious resemblance between the hate filled slogans launched by the counter-demonstrators during the gay prides that were regularly organized in Zagreb in Croatia and the only gay pride ever organized in Belgrade, on 30 June 2001.

The gays from Croatia have been accused of being "traitors" and even "*tchetnik*", meaning Serbian nationalists, while the gays from Serbia have been accused of being "*oustachi*", meaning Croatian nationalists. The vocabulary of hatred is actually the vocabulary of war. The *tchetniks* and the *oustachis* fought against each other during the Second World War and these terms were brought back to light during the war from 1991-1995.

Thus, homosexuals are not only considered as foreigners, but they are even associated to the troops of the national and historical enemy. Their existence and their claims represent an aggression against the nation.

The gay pride in Belgrade, that has engendered extremely violent conflicts on 30 June 2001, had occurred against the background of a very special political context. On 5 October 2000 the people's revolution put an end to the authoritative regime of Slobodan Milosevic and Serbia started a difficult democratic transition. On 1 April 2001, Prime Minister Zoran Djindjic initiated a radical action resulting in the arrest of Slobodan Milosevic, accused by the International criminal Tribunal for the former Yougoslavia (ICTY). On 28 June, the Serbian government again took a surprising initiative by transferring Slobodan Milosevic to The Hague to appear before his judges.

In order to succeed in such an operation, Zoran Djindjic relied on the international conventions Serbia had signed, that would guarantee the prevalence of the ICTY and he short-circuited the proceedings launched before the Serbian courts. In doing this, he caught unawares the federal President Vojislav Kostunica, a "democrat nationalist", who was also a legalist and displayed a very critical attitude towards international jurisdiction.

The Serbian political scene was about to redefine itself around a position of cooperation with the ICTY. Zoran Djindjic was driving a reformist and explicitly pro-Western trend, while Vojislav Kostunica was promoting the re-sitting nationalist

camp. He mainly benefited from the solid support offered by the Serbian Orthodox Church, which was eager to gain visibility and more social power.

The counter-demonstrators, determined to "attack the pederast" on the streets of Belgrade, were gathered by the supporters of the football club and by some other semi-clandestine movements, such as the Obraz (Honor) network. These networks would mainly recruit their militants from the benches of the Faculty of philosophy from Belgrade and were strongly connected to the Church. Their policy relies on the theological-political tradition of the *svetosavlije*, which is an ideology initiated by some theologians, such as Bishop Nikolaj Velimirovic, who was canonized by the Serbian Church in 2003 and the priest Justin Popovic. This ideology places the Serbian people in a special position within the general economy of redemption, because ever since the vow of Prince Lazar Hrebeljanovic on the eve of the battle from Kosovo Polje, on 28 June 1999, the Serbians were deemed to be "a celestial people", a new chosen people [2].

Therefore, June 28th symbolizes at the same time the political collapse of Serbia and also the spirituality of the Serbian people. Events seem to have conspired around this symbolism, with Slobodan Milosevic transferred to The Hague on 28 June and the gay pride taking place a few days later. The sensitivity of nationalists who were connected to the Church was now at its peak and the violent opposition to the gay pride seemed to gain a major political meaning: as Slobodan Milosevic had been transferred to The Hague, Serbia could finally and decidedly throw away its communist past, but it ought not to get involved into a "westernizing" trend. On the contrary, it had to affirm its specific Christian values as the foundation of its long dreamed identity.

The situations in Serbia and Montenegro are not exceptional, though. There are a few homosexual organizations that have been recently founded in Macedonia and Skopje, its capital, had to witness the emergence of tolerance areas. These rather timid initiatives benefited from international financing. In December 2003, the Center for Human and Civic Rights from Skopje launched a vast poster campaign promoting the rights of sexual minorities, on the topic: "Getting along with other people's differences". This campaign had been sponsored by the Swedish and the American governments.

A few weeks before his tragic death in a plane crash, the President of the Republic, Boris Trajkovski, denounced this campaign in an interview in the *National Review*, referring to the American religious right wing. He explained that "the money of the American tax payers should not be in any circumstance used for promoting alternative life styles in my country and I am convinced that lots of Americans would not adhere to such an initiative. We have lots of other things to settle and this money could be

[2] On the eve of the battle, an angel came to visit the prince who was running the Christian armies against the Turks subordinated to sultan Murad. The angel asked Lazar whether he preferred to win the battle and run over the world or the supremacy over the celestial kingdom. The Christian choice of Lazar would thus engage the entire Serbian people.

better used. This campaign is an insult addressed to the majority of the population from Macedonia which consists of Orthodox Christians and Muslims" [3].

Boris Trajkovski, a member of the nationalist party VMRO-DPMNE had imposed himself as a moderate figure and as a responsible character within the armed conflict from 2001. The survival of the Macedonian State owes him a lot. He spoke about the specificity of emerging from a Methodist community in the southern part of Macedonia, which explains his important connections with the USA and with the religious movements in this country [4].

In Kosovo, the entire gay life style was practically inconceivable and that has changed only recently. The massive international presence ever since the establishment of the United Nations' protectorate in June 1999 has naturally modified the situation. Private parties multiplied and they started attracting Albanian and even Serbian homosexuals. Ever since, parties and trips to Greece and Turkey have been regularly organized. The parties have always had a private character, but they can also draw hundreds of people, coming from Serbia or from Macedonia. Such gay gatherings have thus a multi-ethnical character which is exceptional in Kosovo.

While the physical attacks against homosexuals have been confirmed during the past years, the mediator for human rights in Kosovo, Marek A. Nowicki, explains that no such case has ever been reported to him, which proves that self-censoring and the burden of silence rule over such issues.

Nevertheless, the *Zëri* daily newspaper, which enjoys the reputation of promoting quality and of being intellectually open within the press panorama of Kosovo, published in 2003 a vast article explaining the "against nature character" of homosexuality. The most respected imam in Kosovo, Sabri Bejgora, had a particularly insulting attitude towards the homosexual circles and warned them that the Islamic law thought that homosexuality "was a disease that one should heal and prevent". The article published in the *Zëri* also pointed out that the Council for the defense of human rights and liberties in Pristina, the main organization of this kind in Kosovo, "did not take a position with respect to such issue". The person in charge of the only gay organization of Kosovo, Martin Berisha, also emerged from the small Albanian catholic community and complained about the fact that the newspaper did not try to disseminate other points of view too [5].

The daily newspaper *Epoka e Re*, in favor of the President from Kosovo, Ibrahim Rugova, was even more explicit, by denouncing "the behaviors and the dangerous life styles brought by foreign people". Albanian society still remains patriarchal and

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[3] See "Macédoine: diatribe homophobe du Président Trajkovski", *Le Courrier des Balkans*, http://www.balkans.eu.org/article4025.html

[4] Taken hostage by the *Comitadjis* Macedonians at the beginning of the 20th century, an American missionary had managed to convert those who kept her prisoner. Ever since then, this small Methodist tradition had been preserved in some villages around Gevgelija, representing an exceptional case relying on the implementation of Protestantism within the Balkans.

[5] See "Les gays *kosovars* flirtent avec le danger", *Le Courrier des Balkans*, http://www.balkans.eu.org/article3282.html

the "manly" virtues have been exalted during the conflict with Serbia. This society is nevertheless engaged in a slow but irreversible modernizing process which mainly addresses urban populations. At the same time, the Albanian community displays a more and more critical attitude towards the international presence, assimilated to a new "colonialism" which could prevent the accession of Kosovo to independence. The emergence of a timid homo-socialization was thus denounced as a stigma of the international presence in the country, presence which is perceived with increasing hostility.

Why are the Balkan societies so hostile towards any public manifestation of homosexuality? The question undoubtedly lacks an answer, even if one can invoke the patriarchal character of such societies, which is not at all exceptional, especially as far as the Mediterranean region is concerned. Although homosexual practices were partially de-penalized in a few republics of former Yugoslavia, ever since the beginning of the 1980s, the communist experience also plays an important role. In Albania, the law stipulating imprisonment as punishment for homosexuality was abolished only in 1995.

Confronted with such issues, we should be reminded of the importance of homo-socialization in the history of the region, featuring characters that were well known for their sexual tastes, such as the redoubtable Albanian seigneur Ai Pasha of Tepelenë, at the beginning of the XIXth century. The travelers of the XIXth century, such as the Austrian consul Johann Georg von Hahn (1811-1869), considered the "father of Albanian studies", noticed that there was an *ephebeum* tradition in the mountains from the northern part of Albania, where teenagers aged 12-13 would serve as sexual companions to twenty years older persons before getting married [6].

Precisely because they are patriarchal, Balkan societies imply a strict separation of sexes with respect to all aspects of social life. From such a perspective, the differences are rather minor between Muslim societies and Christian societies – Orthodox and Catholic. This situation naturally favors the development of different homo-erotic and homo-social behaviors which are not necessarily incompatible with marriage, this being a material involvement aimed at engendering a lineage.

The recent war experience has certainly contributed to the domination of the patterns and stereotypes of warrior virility. The most fundamental issue is probably the fact that Balkan societies, involved in a difficult and chaotic economic, political and social transition, are also societies incurring a crisis of identity. Within such a context, the image of the other, of the national foe, has played an essential role which sexual otherness is also a part of. More precisely, the gays claiming the minimum amount of rights and minimum social visibility become the image of the enemy, the metaphor by excellence of the inner foe, who is ready to undermine the national identity.

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[6] See R. Elsie, *A Dictionary of Albanian Religion, Mythology, and Folk Culture*, London, Hurst, 2001.

Annex

COUNCIL DIRECTIVE 2000/78/EC

of 27 November 2000

establishing a general framework for equal treatment in employment and occupation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the Opinion of the European Parliament [2],

Having regard to the Opinion of the Economic and Social Committee [3],

Having regard to the Opinion of the Committee of the Regions [4],

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(2) The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [5].

(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

(7) The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.

(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

(10) On 29 June 2000 the Council adopted Directive 2000/43/EC [6] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social

[1] OJ C 177 E, 27.6.2000, p. 42.
[2] Opinion delivered on 12 October 2000 (not yet published in the Official Journal).
[3] OJ C 204, 18.7.2000, p. 82.
[4] OJ C 226, 8.8.2000, p. 1.
[5] OJ L 39, 14.2.1976, p. 40.
[6] OJ L 180, 19.7.2000, p. 22.

protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

(26) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community [1], the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities [2], affirmed the importance of giving specific attention *inter alia* to recruitment, retention, training and lifelong learning with regard to disabled persons.

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

(32) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.

(33) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.

(34) The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.

(37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

[1] OJ L 225, 12.8.1986, p. 43.
[2] OJ C 186, 2.7.1999, p. 3.

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 4

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 5

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate

aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 9

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 11

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

Article 13

Social dialogue

1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.

2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

Article 14

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

CHAPTER III

PARTICULAR PROVISIONS

Article 15

Northern Ireland

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

CHAPTER IV

FINAL PROVISIONS

Article 16

Compliance

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

Article 17

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 18

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 19

Report

1. Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 November 2000.

For the Council

The President

É. GUIGOU

Abreviations

ACM	Alternative Contract to Marriage
Agalev	Anders gaan leven
AIDS	Acquired Immune Deficiency Syndrome
AJDA	Actualité juridique. Droit administratif
APGL	Association des parents gays et lesbiens
BLGP	Belgian Lesbian and Gay Pride
CAH	Campaign Against Homophobia
CCL	Contrat de cohabitation légale
CVP	Christelijke Volskpartij
D.	Dalloz
DeSUS	Democratic Party of Pensioners of Slovenia
EC	European Community (or Communities)
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECRI	European Commission against Racism and Intolerance
EJIL	European Journal of International Law
EU	European Union
FAGL	Fédération des associations gayes et lesbiennes
FDF	Front des francophones
FWH	Federatie Werkgroepen Homoseksualiteit
GLBT	Gay, Lesbian, Bisexual, Transgender
GLQ	Gay and Lesbian Quarterly
ICTY	International Criminal Tribunal for the former Yougoslavia
IGLHRC	International Gay and Lesbian Human Rights Commission

ILGA	International Lesbian and Gay Association
IR	Informations rapides Dalloz
JCP	La semaine juridique, édition générale
JDJ	Journal du Droit des Jeunes
JT	Journal des tribunaux
LAHRC	Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe
LDS	Liberal Democracy of Slovenia
LGBT	Lesbian, Gay, Bisexual, Transgender
MP	Member of Parliament
NGO	Non governmental organisation
OJ	Official Journal
OSI	Open Society Institute
PA	Parliamentary Assembly of the Council of Europe
RJC	Revue de jurisprudence constitutionnelle : décisions du Conseil constitutionnel
ROC	The Romanian Orthodox Church
RTDC	Revue trimestrielle de droit civil
RTDE	Revue trimestrielle de droit européen
SP	Socialistische Partij
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USA	United States of America
VLD	Vlaamse liberalen en democraten
VMRO-DPMNE	Vnatresna makedonska revolucionerna organizacija – Demokratska partija za makedonsko nacionalno edinstvo
ZLSD	United List of Social Democrats

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