The right to relate: On the importance of "orientation" in comparative sexual orientation law

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The Right to Relate

On the Importance of "Orientation"

in Comparative Sexual Orientation Law

by Kees Waaldijk *

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I would like to thank everyone inside and outside Leiden University who made this new chair possible. And everyone who taught me in such a way that I placed comparative law and sexual orientation at the heart of my work. Many thanks also to my two research assistants for their help in preparing this text, and to everyone who has been helping me – over the years and across the globe – with ideas and information about sexual orientation law. Special thanks to Michele Grigolo, for first using the phrase 'right to relate' in a conversation we had in 2002 (see also Grigolo 2003), and to Eric Gitari, for recognizing and encouraging my thoughts on the right to relate (see also Gitari 2012).

Abstract

The right to establish and develop relationships with other human beings was first articulated – as an aspect of the right to respect for private life – by the European Commission of Human Rights (in 1976). Since then such a right has been recognized in similar words by national and international courts, including the U.S. Supreme Court (*Roberts v. U.S. Jaycees*), the European Court of Human Rights (*Niemietz v. Germany*), the Constitutional Court of South Africa (*National Coalition for Gay and Lesbian Equality*), and the Inter-American Court of Human Rights (*Ortega v. Mexico*). This lecture traces the origins of this right, linking it to the meaning of the word 'orientation' and to the basic psychological need for love, affection and belongingness (Maslow 1943). It proposes to speak of *'the right to relate'*, and argues that this right can be seen as the common theme in all issues of sexual orientation law (ranging from decriminalization and anti-discrimination, to the recognition of refugees and of same-sex parenting). This right can be used as the common denominator in the comparative study of all those laws in the world that are anti-homosexual, or that are same-sex-friendly. The right to establish (same-sex) relationships implies both a right to come out, and a right to come together. The right to develop (same-sex) relationships is being made operational through legal respect, legal protection, legal recognition, legal formalization, and legal recognition of foreign formalization.

Keywords**:** comparative law, coming out, discrimination, family life, homosexuality, human rights, lesbian & gay relationships, privacy, same-sex partnership, sexual orientation

Category: Comparative Law

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1. 'Orientation'

In older days, before there were students and professors in Leiden, this building was a church. It was built some 500 years ago as part of a convent of Dominican nuns.[1] The poor nuns had to make do with this plot of land, which was not suitable to build a church with its main altar towards the east.[2] Eastward looking churches had been the custom for many centuries.[3] And that custom had continued the pre-Christian traditions to direct the axis of important buildings towards the orient, towards the rising sun.[4] So, perhaps grudgingly, the nuns had to accept that their convent's church would have an unusual orientation, with the altar either at the south end, from where I am speaking now, or perhaps for some time near the building's north face, where now the entrance is.[5] Thereby the nuns did not follow the strong convention in architecture that has given us the word *orientation*.

One of my roles as professor is to establish and develop relations with colleagues and students. Establishing relations is a key part of education. Among other things, education must be student-oriented. A good teacher not only offers students good insights, knowledge, skills and inspiration, but also listens to the students and is open to learn from them.

Some people will be disappointed now, disappointed in the expectation that a professor of Comparative Sexual Orientation Law would speak about sex. Indeed, as topic for today, I have chosen to focus on one of the other words in the title of my chair: the word *orientation*.

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[1] Lunsingh Scheurleer et al. (1992, p. 786) have concluded that the church was built around 1507 and possibly inaugurated in 1516. In 1581 the six years old Leiden University moved into the building, dividing the church space into three lecture halls and a senate room (Otterspeer 2000, p. 115).

[2] Lunsingh Scheurleer et al. 1992, p. 786.

[3] Hassett 1913: 'From the eighth century the propriety of the eastern apse was universally admitted, though of course strict adherence to this architectural canon, owing to the direction of city streets, was not always possible.'

[4] Idem.

[5] See Lunsingh Scheurleer et al. (1992, p. 787); they write that they are not convinced by an earlier suggestion that the altar had first been located at the north end of the church.

The word *orientation* is used in different contexts.[6] It is a stronger word than 'direction', 'position', 'inclination' or 'preference'. Orientation implies being directed – or directing oneself – towards something or someone that you want to interact with in a meaningful way. In the oldest, pre-Christian example this will have been the worshipping and welcoming of the rising sun in anticipation of its light and warmth. Being oriented towards something or someone is about *relating* to that thing or person. This relational dimension is present in the orientation of a religious building, in the orientation of a good teaching method, and also in the concept of *sexual orientation*.

Sexual orientation is about how you relate to men or women. Many of us at a certain moment find out that we do relate differently to women than to men. Even before we start relationships we already relate to others.

In international and European law the words 'sexual orientation' are used as the main generic term to cover homosexuality, heterosexuality and bisexuality.[7] In international and European case law the term 'sexual orientation' is mostly used to refer to (homosexual) *behavior*[8] and to (same-sex) *relationships*.[9] Less frequently the term is used to refer to homo-, hetero- or

[6] For 'orientation' the *Oxford English Dictionary* (online) gives as meaning 3: '*fig.* A person's basic attitude, beliefs, or feelings; a person's emotional or intellectual position in respect of a particular topic, circumstance, etc.; (now) *spec.* sexual preference.'

[7] See for example Waaldijk & Bonini-Baraldi 2006, p. 96 and 205.

[8] Homosexual behavior is the issue in roughly 50% of the circa 60 sexual orientation cases that have been decided by the European Court of Human Rights (and in one of the five sexual orientation cases decided by the UN Human Rights Committee). That the European Court considers homosexual behavior as covered by the term sexual orientation is clear since its judgments of 9 January 2003 in *L. & V. v. Austria*, appl. 39392/98 and 39829/98, and *S.L. v. Austria*, appl. 45330/99.

[9] Same-sex relationships are the issue in roughly 20% of the sexual orientation cases decided by the European Court of Human Rights (and also in three of the five cases decided by the UN Human Rights Committee, and in all four cases decided by the Court of Justice of the European Union). That the European Court considers same-sex relationships to be covered by the term sexual orientation is clear since its judgment of 24 July 2003 in *Karner v. Austria*, appl. 40016/98. For the UN Human Rights Committee this is clear since its views of 29 July 2003 in *Young v. Australia*, comm. 941/2000, and for the Court of Justice of the EC already since its judgment of 17 February 1998 in Case C-249/96, *Grant v. South West Trains Ltd.* (par. 47), and more explicitly since its judgment of 1 April 2008 in Case C-267/06, *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen*. The Inter-American Court of Human Rights is very clear on this point, emphasizing 'that the scope of the right to non-discrimination due to sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the

bisexual *persons*, or to their *feelings* or *identities*.[10] This is simply so because in law, the problems tend to focus on homosexual behavior and on homosexual relationships. So in law the words 'sexual orientation' are mostly not used to indicate a characteristic of persons,[11] but to indicate a characteristic of behavior or relationships.[12]

Among the various non-discrimination grounds, religion is probably the most similar to sexual orientation, because both are mainly about behavior (and so are the corresponding fundamental rights: the freedom of religion and belief, and the right to establish and develop relationships with other human beings). Other categories in international non-discrimination law, such as sex and race, are mainly seen as something people are born with. This distinction is only relative, of course. Sex and race also have behavioral aspects: think of pregnancy, or of inter-ethnic marriages. And many people experience their religious orientation or their 'gay gene' as something they are born with,[13] something they cannot change. But it seems true that religion and sexual orientation are both much more about behavior than sex and race are. Of the hundreds of cases involving sexual orientation that I have come across, a large majority

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ensuing consequences in a person's life project' (judgment of 24 February 2012, *Atala Riffo and daughters v. Chile*, par. 133).

[10] Cases involving gay or lesbian identity (including those on military employment, on asylum and most parenting cases) make up 20% of the cases on sexual orientation decided by the European Court of Human Rights. Another 10% of cases deal with pride marches and other expressions about homosexual orientation in general (which is also true for one of the five cases decided by the UN Human Rights Committee).

[11] For 'sexual orientation' the *Oxford English Dictionary* (online) gives as meaning: 'Originally: (the process of) orientation with respect to a sexual goal, potential mate, partner, etc. Later chiefly: a person's sexual identity in relation to the gender to whom he or she is usually attracted; (broadly) the fact of being heterosexual, bisexual, or homosexual. In early use prob. not a fixed collocation.' It seems that the more active original meaning of the term is present in the legal use of 'sexual orientation' to refer to (same-sex) behavior and relationships. As I understand, 'sexual orientation' is rendered in Chinese as 'Xing QingXiang', with the old word 'QingXiang' meaning something like 'looking forward to'.

[12] Strangely, the preamble of *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (of 2007) inadvertently contains a definition that only seems to be directly applicable to persons; it understands 'sexual orientation' to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender' (see www.yogyakartaprinciples.org). See also Waaldijk & Bonini-Baraldi 2006, p. 213-214; and for a social science perspective on defining and measuring sexual orientation, see Gonsiorek et al. 1995.

[13] See Clarke et al. 2010, p. 26 and 33.

involve sexual behavior, same-sex kissing, same-sex relationships, or information about homosexuality.[14] And a similar claim can probably be made about a majority of court cases about religion. The behavioral aspects are included in the prohibition of discrimination. This is probably so, because the behavior that is at the core of religion/belief or at the core of sexual orientation is not just any behavior, but behavior that corresponds to a deep need that often seems inescapable for the individual concerned. A need to relate to specific other beings – human beings (and/or, as the case may be, divine beings).[15]

My chair is in comparative sexual orientation law. In practice I will focus my research and teaching on the legal aspects of homosexual orientation, often in comparison with the legal aspects of heterosexual orientation. My main comparisons will be between laws of different countries and between laws of different international organizations.

What I would like to offer, is an understanding of *why* homosexual orientation is increasingly being recognized and protected in international and European law – and in the law of more and more countries in the world. And in doing so I will propose a common denominator that can be used in the comparative study of sexual orientation law across the continents.

2. A discipline

I am also standing here today to further establish and develop my discipline, *sexual orientation law*. It is a new field, which has been rapidly growing over the last few decades. A field consisting of a wide range of legal phenomena. Let me mention the most important phenomena in this field:

- criminalization – or decriminalization – of homosexual behavior; [16]

[14] See notes 8 to 10, above.

[15] For a more comprehensive analysis of the analogy between religion and sexual orientation, see Richards 1999.

[16] See for example Graupner 1997, Whitaker 2006, Rydström & Mustola 2007, Kirby 2008, Gupta 2008, Sanders 2009.

- legislation against discrimination on grounds of sexual orientation; [17]
- human rights challenges to anti-homosexual laws and practices; [18]
- specific criminalization of anti-homosexual violence; [19]
- regulation of information about homosexual orientation; [20]
- asylum being given – or refused – to individuals fleeing from anti-homosexual persecution; [21]
- recognition – or non-recognition – of same-sex couples; [22]
- recognition – or non-recognition – of same-sex parenting.[23]

The question arises whether there is some system in this diverse field, or at least some common denominator of the different phenomena that make up the field of sexual orientation

[17] See for example Bell 2002 & 2012, Waaldijk & Bonini-Baraldi 2006, Rayside 2008, Chopin & Uyen Do 2011, and chapter 2 of the report HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY – COMPARATIVE LEGAL ANALYSIS (European Union Agency for Fundamental Rights, Vienna 2010), *available at* http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/2010_en.htm.

[18] See for example Helfer 1990, Wintemute 1995, Maguire 2004, Bamforth 2011, Jernow 2011.

[19] See for example chapter 5 of the report DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE – BACKGROUND DOCUMENT (Council of Europe Commissioner for Human Rights, 2011), *available at* www.coe.int/t/commissioner/activities/themes/lgbt/default_en.asp.

[20] See for example Rayside 2008, and par. 62-65 of the report DISCRIMINATORY LAWS AND PRACTICES AND ACTS OF VIOLENCE AGAINST INDIVIDUALS BASED ON THEIR SEXUAL ORIENTATION AND GENDER IDENTITY (United Nations High Commissioner for Human Rights, 2011, A/HRC/19/41), *available at* www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session19/Pages/ListReports.aspx.

[21] See for example Jansen & Spijkerboer 2011, and the relevant chapters of the European and United Nations reports mentioned in the previous four notes.

[22] See for example Verschraegen 1994, Forder 2000, Borrillo 2001, Wintemute 2001, Merin 2002, Coester 2002, Boele-Woelki & Fuchs 2003 & 2012, Eskeridge, Spedale & Ytterberg 2004, Curry-Sumner 2005, Waaldijk 2005 & 2008, Kollman 2007, Wilets 2007-2008, Badgett 2009, Banens 2010, Lee 2010, Paternotte 2011, Rydstrom 2011.

[23] See for example Polikoff 2000, Maxwell & Forder 2004, Waaldijk 2005 & 2008, Boele-Woelki & Fuchs 2012.

law. A single concept with which to understand sexual orientation law and its development. In other words, I am looking for an *orientation* for sexual orientation law.

My thesis is, that *the right to establish and develop relationships* can be seen as this common denominator, common to all main phenomena in the field of sexual orientation law.[24] This is so because sexual orientation is all about relating to others. Sexual orientation is about intimate behavior between people, about amorous relationships of people, and/or about attraction to people: people of the same gender, people of different gender, people of any gender. The right to establish and develop relationships has been recognized as one aspect of the human right to respect for one's private life. Both the European and Inter-American Courts of Human Rights, and the highest courts of several countries,[25] now recognize this right, that today I propose to call *the right to relate*.

This right to relate can help to clarify some issues in sexual orientation law, and it can help to explain the general direction that sexual orientation law is taking.

3. Comparative

The need to find a common denominator is even more relevant when you want to do *comparative* legal studies on sexual orientation. And that is of course the plan with my chair in '*comparative* sexual orientation law'.

Traditional comparative legal studies make comparisons either between *similar laws* in different systems, or between different legal solutions to *similar problems* in different systems.[26] In the second type of comparative legal research, the central notion is that of 'functional equivalence'. In this approach 'comparative lawyers seek for institutions performing

[24] Gitari (2012, p. 28) calls the right to establish and develop relationships a 'golden thread' that lies behind 'almost every concern in all sexual orientations'.

[25] See the series of judgments discussed in paragraph 5, below.

[26] For an overview of comparative law thinking with respect to the notion of comparability, see Örücü 2004, p. 19-32.

the same role or solving the same problem.'[27] The question when laws, or indeed, problems are 'similar' enough to make them comparable, has caused a lot of academic writing, but one convincing answer is that 'any thing can be compared with any other thing'.[28]

Comparability does not pose a problem in the global field of sexual orientation law. Throughout the world this field of law shows a great number of very *similar laws*, and also a range of very *different laws* that seem to address *one and the same problem*.

To start with the very *similar* laws, I will give a few examples of eminently comparable laws: A large majority of countries in the world have, or used to have, specific rules criminalizing certain forms of homosexual sex. These rules can be compared in legislative detail, in their geographical spread, in their political history, or in the way they are being enforced. Similarly, all countries in the world have, or used to have, implicit or explicit rules that exclude same-sex couples from marriage. And then there is the growing number of countries that have enacted legislation to prohibit forms of anti-homosexual discrimination.

A similarly growing number of countries have statutes or judgments that open up to same-sex couples some or almost all legal aspects of marriage. Such laws, too, can be compared in their legislative detail, in their geographic spread, in their political history, or in the way they operate in practice. Comparisons between the very *different* laws in the field of sexual orientation are also eminently possible – and even more interesting. This is so because all laws on homosexual offences, on marriage and parenting, on discrimination, on violence, on asylum, on information about homosexuality – all these laws in the field of sexual orientation can be seen as addressing *one basic problem*.

In virtually all countries of the world, this problem arises from two conflicting facts of life. First, there is the fact – *in any country that I know of* – that a smaller or larger part of the population has more or less strong objections to intimate behavior and/or amorous relationships between

[27] Örücü 2006, p. 33.

[28] Örücü 2004, p. 20.

persons of the same sex.[29] Secondly, there is the fact that a part of every population is – in their attractions, in their behavior, or in their relationships – oriented towards persons of the same sex (or of both sexes).[30] Certain criminal laws, certain family laws, some anti-discrimination laws, occasional laws regulating information,[31] etc., all try to address the problem caused by these two conflicting facts. The function of any of these laws is either to *restrict* or to *increase* the possibilities for individuals to relate to someone of the same sex.[32] In the terminology of comparative law, all criminal, labor, family and other laws that restrict these possibilities are *functionally equivalent*. And so are the various laws that increase these possibilities. Also for that reason it is possible to see the ´right to relate´ as the common denominator of comparative legal studies on sexual orientation.[33]

The notion of functional equivalence also highlights something else. The function of restricting the possibilities for relating to persons of the same sex, can of course also be performed by non-legal phenomena. Think of bullying, queer bashing, corrective rape, rejection for a job vacancy, eviction from housing, biased education, or any other form of unofficial homophobia. Think of the many subtle and less subtle ways in which heterosexuality is socially and culturally

[29] The assumption in this functionalist approach to comparative law, is that there are shared problems and needs in all societies (Örücü 2006, p. 33). With respect to objections against homosexuality, data from surveys like the World Values Survey seem to confirm this assumption (www.worldvaluessurvey.org; see the data resulting from question V38, on the dislike of 'homosexuals' as neighbours, and question V202, on the justifiability of 'homosexuality').

[30] See Cameron (2001, p. 649).

[31] Think of laws prohibiting 'propaganda' for homosexuality (such as those recently adopted in some Russian cities) and of laws guaranteeing a minimum availability of non-biased information in schools. On the latter topic, see European Committee on Social Rights 30 March 2009, *INTERIGHTS v. Croatia*, compl. 45/2007.

[32] The intention behind some such laws (as opposed to their function) may be a desire to find a balance between laws restricting and increasing same-sex possibilities. This is connected to what I have phrased as the '*law of small change'*: 'Any legislative change advancing the recognition and acceptance of homosexuality will only be enacted, if that change is either perceived as small, or if that change is sufficiently reduced in impact by some accompanying legislative 'small change' that reinforces the condemnation of homosexuality' (Waaldijk 2001, p. 440).

[33] Some comparatists would call it a possible 'tertium comparationis'. On that term, see Örücü 2006, p. 36.

promoted or in fact made obligatory.[34] The effects of all these non-legal phenomena are often the same as the effects of anti-homosexual laws. For example, in a country where the criminal law only prohibits homosexual sex between men, the scope for relations between women may be even more restricted by social mechanisms that make heterosexuality compulsory. Anti-homosexual laws and anti-homosexual practices appear to be functionally equivalent. Both can have a very negative impact, not only on the direct victims, but also on lesbians, gays and bisexuals in general, and also intersex and transgender people. Both legal homophobia and unofficial forms of homophobia can cause fear in many people. This can terrorize others than the direct victims,[35] terrorize them into secrecy, abstinence, solitude. And this can lead to serious forms of suffering, self-hate, even suicide.[36] Various studies have found that lesbians, gays and bisexuals may be twice as likely as heterosexuals to attempt suicide.[37] And it seems probable that anti-homosexual laws and practices are at least in part to blame for this higher suicidality.[38]

Similarly and conversely, there appears to be functional equivalence between decriminalization laws, anti-discrimination laws, legal partnership recognition etc. on the one hand, and for example the use of unbiased information in education or LGB-friendly statements of opinion leaders in the media on the other hand.[39] All such legal and non-legal phenomena can make it easier for people to feel safe and confident enough to establish and develop a relationship with someone of the same sex.

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[34] A notion first explored by Adrienne Rich in the article *Compulsory heterosexuality and lesbian existence* (1980); see Clarke et al. 2010, p. 121.

[35] In that sense anti-homosexual violence (and other forms of homophobia) share a key characteristic with terrorism. Much quoted is what Hoffmann (2003) has said about terrorism as being 'meant to produce psychological effects that reach far beyond the immediate victims of the attack'.

[36] Clarke et al. 2010, p. 135.

[37] King et al. 2008; Clarke et al. 2010, p. 137; see also Kooiman 2012, p. 74.

[38] King et al. 2008; Kooiman 2012, p. 75.

[39] A remarkable example is the video message of UN Secretary-General Ban Ki-Moon to the UN Human Rights Council meeting of 7 March 2012 on violence and discrimination based on sexual orientation or gender identity (see www.un.org/sg/statements/index.asp?nid=5900), which is very popular in a remix version at www.youtube.com/watch?v=lUizJUQIbq4 .

So the right to relate can operate as the common denominator in comparative legal studies on sexual orientation law. This is not to underestimate the many differences between different countries and regions of the world. Comparative studies will highlight such differences, and possible trends of convergence and divergence.[40] But a first step in comparative legal research is conceptualization, and conceptualization 'is the recognition of the need for a level of abstraction of concepts'.[41]

4. Sexual?

Another candidate for a common denominator in sexual orientation law, could perhaps have been found in the notion of sex or gender, or in sex in the sense of sexual activity. However, that would have been problematic. Attitudes to sex, gender and sexual activity may indeed be relevant in explaining why there is so much exclusion and prejudice against certain sexual orientations. But sex, gender and sexual activity do not fully explain why homosexual orientation should be protected against such discrimination; they do not fully explain why same-sex intimacy and same-sex partners should be recognized, nor why in many parts of the world they gradually *are* getting some legal recognition.

Furthermore, the meaning of the words sex and gender are very ambiguous, especially in the context of sexual orientation. Ask a homosexual or heterosexual person (many of them is this room now), whether they prefer persons of a particular *gender* or persons of a particular *sex*, and they will be puzzled. Even if some of us can distinguish intellectually between the notions of gender and sex, we are rarely able to distinguish between the sex and the gender of the person we love. In law, as in real life, the words sex and gender are mostly used as synonyms.

[40] See for example Wilets 2011.

[41] Örücü 2006, p. 37.

But sex in that wide sense covers only one meaning of the English word 'sex', the sex to which you *belong*.[42]

The other meaning of the word refers to the sex you *do*: sexuality, i.e. sexual activity. But precisely in the context of sexual orientation, both meanings of the word 'sex' are somehow linked. Many people prefer to have sex with someone of a particular sex, someone of a particular gender. It is not exactly clear how both notions are linked. Different people will experience it in different ways. Is it only sex that we prefer to have with someone of a particular gender? Or are there also other forms of contact that we like to have with someone of a particular gender? And if so, do we want these other forms of contact because we want to have sex, or do we want to have sex because we want to have other forms of contact, too? Or put differently: When we fall in love with someone of a particular gender, is that a cause or an effect of our desire to have sex with that person? Or is it actually the same thing? Perhaps scientists from other disciplines will be able to solve these puzzles.

For most ordinary people who fall in love with someone, it will remain virtually impossible to know to what degree their feelings can be attributed to that person's sex, or to that person's gender, or to the prospect of sexual and/or other activity with that person.

Therefore it seems appropriate that in the concept of 'sexual orientation', one adjective ('sexual') is being used to refer to the sex of the partners, to the gender of the partners, and to the sexual activity that might take place between them.[43] Complex and confusing, indeed.

Too complex and too confusing to consider sex or gender or sexuality as the common theme in a newly established field of law. Furthermore, the whole point of a human rights approach to sexual orientation law, is that sex, gender and sexuality should not matter in law, should not be legally relevant. The law should be indifferent to the sex or gender of the lovers involved. And

[42] In Dutch, the sex-you-are is referred to as '*sekse*', and the sex-you-do as '*seks*'. But in Dutch, as in English, the corresponding adjective is the same for both nouns: *seksueel* (sexual), which is I believe is also the main adjective corresponding to the noun 'gender'.

[43] In the word 'homosexuality' the same multiple function is performed by the part 'sexual'. I might mention that as a student I explored the double function of that part of the word 'homoseksualiteit'; see Waaldijk 1981, p. 10-14.

in general, the law should also be indifferent to the sexual or non-sexual character of their love. Also the legal recognition of heterosexual love (in such institutions as marriage and cohabitation) goes well beyond the sexual aspects of that love (think of joint parental authority, survivor's pensions, alimony, etc.). So sexual orientation law clearly is not only about sexuality. The use of the word 'sexuality' as a synonym for 'sexual orientation' (or as a generic term for homosexuality, heterosexuality and bisexuality) is inaccurate and misleading.

Therefore, in our search for a common ground in sexual orientation law, we can largely forget about sex, forget about gender and forget about sexuality. There is another reason, too: Not every lesbian, gay or bisexual person wants to be defined as a sexual being, or as somewhere between masculine and feminine.

5. Orientation!

Today I submit to you, that *orientation* is the key word in the concept of 'sexual orientation' and that the whole field of comparative sexual orientation *law* can be captured in the *right to relate*.[44] This is true not only for same-sex and different-sex relationships, but also for same-sex and different-sex behavior, for same-sex and different-sex attraction, and for lesbian, gay and bisexual identities, lifestyles and expressions. It is all about persons *being oriented towards* one or more other persons. It is all about persons relating to each other.[45] And this is something the law should *not* be indifferent about.

The fact that homosexuality has to do with sex, gender and sexuality, may explain much of the hostility towards homosexual behavior, relationships and individuals. But the fact that homosexuality is an orientation, can explain why this legal and social hostility has been causing

[44] See paragraph 2, above.

[45] A point that I will not further explore here, has been made by Grigolo: 'The ways a human being "chooses" to be and to relate to others are mutually dependent' (2003, p. 1024). The close link between relating and being, has also been made by the psychologists Hanley & Abell; after mildly having criticized Maslow for presenting relationships too much as mere 'tools' by which the 'love and belongingness needs are met' (2002, p. 38), they speak of 'relatedness' (even the 'poetry of relatedness') and of 'our ability to extend ourselves in relationships to each other and the world around us' (2002, p. 55).

such intense suffering. Many legal and social obstacles to same-sex affection have frustrated – and continue to frustrate – people in one of their most basic human needs, the need to relate to other human beings. The fact that homosexuality is in essence about persons relating to other persons, can also explain why law in many places is becoming less hostile towards homosexuality – why court decisions and written rules are slowly becoming more *same-sex-friendly*. Remarkable progress has been made in the legal recognition of homosexuality in many countries of the world and in many international organizations. It seems safe to assume that this progress has been helped a lot by the fact that many people (including a growing number of law-makers and judges) have recognized that homosexuality is not only about sex, gender and sexuality, but primarily about people relating to other people. About affection and love.

Relating to other human beings is as fundamentally human as eating food, or as being creative. That this is a fundamental human need, has been forcefully formulated in 1943 by the psychologist Abraham Maslow, and has been popularized, criticized and developed by many other writers on psychology.[46] Maslow spoke about 'love needs' and about 'love and affection and belongingness needs'. He emphasized that these 'involve both giving *and* receiving love', and that the 'thwarting of these needs is the most commonly found core in cases of maladjustment and more severe psychopathology'. Furthermore he stressed that 'love is not synonymous with sex'. As examples he gave: 'friends, or a sweetheart, or a wife, or children', and also: 'affectionate relations with people in general […] a place in his group'.[47] This seems to be a direct precursor of terminology that courts started to use in the last quarter of the twentieth century (as we will see below).

It is almost a standard exercise in human rights courses to relate the various categories of human needs distinguished by Maslow in 1943, with the various human rights enumerated in the Universal Declaration of Human Rights in 1947.[48] There are many parallels ranging from the 'physiological needs' and the right to food, via the 'safety needs' and the right to security of

[46] See for example Hanley & Abell 2002.

[47] Maslow 1943, p. 380-381.

[48] But see Donnelly (2003, p. 14), who is critical of founding human rights on human needs: 'Human rights are "needed" not for life but for a life of dignity.'

person, to the 'need for self-actualization' and the rights relating to education and culture.[49] Apart from 'marriage' [50] and 'family',[51] however, the words 'love' and 'affection' did not make it into the text of the Universal Declaration. Neither did 'friendship' or 'relationship'. The same is true for almost all human rights treaties that were adopted thereafter.[52]

It was not until 1976 that a human rights body started to speak about *'the right to establish and to develop relationships with other human beings'*. In May 1976 the European Commission of Human Rights considered this right to be included – 'to a certain degree' – in the right to respect for private life, a right explicitly guaranteed by article 8 of the European Convention on Human Rights. The Commission did so in two (unsuccessful) cases. The first one was about Iceland:

> 'The applicant […] is not permitted to keep a dog in the city of Reykjavik. […] The question before the commission […] is […] whether the keeping of a dog belongs to "private life" within the meaning of Article 8 of the Convention. For numerous anglo-saxon and French authors the right to respect for "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity […]. In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.' [53]

The second case was decided the next day, and concerned a challenge to the regulation of abortion in Germany. The Commission quoted its decision of the previous day (emphasizing the words 'to a certain degree') and adds that 'therefore sexual life is also part of private life; and in

[49] See Maslow 1943, p. 372, 375 and 382; and articles 25, 3, 26 and 22 of the Universal Declaration of Human Rights respectively.

[50] Article 16 Universal Declaration of Human Rights.

[51] Articles 12, 16, 23 and 25 Universal Declaration of Human Rights.

[52] The possible exception is art. 28 of the African Charter on Human and Peoples' Rights of 1981 (see below).

[53] Eur. Comm'n H.R. 18 May 1976, *X v. Iceland*, appl. 6825/74 (admissibility).

particular that legal regulation of abortion is an intervention in private life which may or may not be justified under Article 8(2).' [54]

In 1984 the U.S. Supreme Court started to speak about *'choices to enter into and maintain certain intimate human relationships'* that 'must be secured against undue intrusion by the State'. The Supreme Court added that this 'could be called […] freedom of intimate association'.[55] In the United States, the last four words stuck as shorthand for the new right that the Supreme Court had deducted from its earlier case law on privacy.[56]

The similarity between the European and American phrase is striking. However, I have not (yet) been able to discover whether in 1984 the U.S. Supreme Court, directly or indirectly, was inspired by the two 1976 decisions of the European Commission of Human Rights. Nor did I find out whether Court or Commission relied on Maslow (or on similar psychological literature).

It seems likely the U.S. Supreme Court in 1984 will have been aware of the European Commission decisions in the German abortion case.[57] It is probable that the Supreme Court was in part relying on an article by Karst of 1979/1980, but the latter did not quite define his notion of 'intimate association' in the terms used later by that Court. Karst did not refer to Maslow, nor to the European Commission of Human Rights. Karst did refer to some psychologists,[58] but in coining the phrase 'freedom of intimate association' he based himself on the ruling of the

[54] Eur. Comm'n H.R. 19 May 1976, *Brüggemann & Scheuten v. Germany*, appl. 6959/75 (admissibility).

[55] U.S. Supreme Court 3 July 1984, *Roberts v. United States Jaycees*, 468 U.S. 609, at 617.

[56] Idem: 'Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion' (per Justice Brennan, at 617-618).

[57] Eur. Comm'n H.R. 19 May 1976, *Brüggemann & Scheuten v. Germany*, appl. 6959/75 (admissibility); and idem 12 July 1977 (merits).

[58] Karst 1979/1980, p. 632.

U.S. Supreme Court in *Griswold v. Connecticut*,[59] about the right of a married couple to use contraception, where in a couple of sentences the Court called marriage both 'intimate' and 'an association'.[60] Those words of the Supreme Court may well have been a late echo of the writings of John Witherspoon. In the late 18th century he gave a list of the 'perfect rights in a state of natural liberty', including a man's 'right to associate, if he so incline, with any person or persons, whom he can persuade (not force) — Under this is contained the right to marriage.'[61] Later Richards has suggested that Witherspoon's formulation is abstract enough to support the articulation of a 'right to intimate life' that goes beyond marriage.[62]

It is likely that members of the European Commission in 1976 were aware of the famous *Griswold* case. But that does not quite explain how the Commission got inspired that year to articulate a far more general 'right to establish and to develop relationships with other human beings'. It may well have helped that in the year before they had already considered 'a person's sexual life' to be an 'important aspect' of private life.[63] Social and cultural trends of the 1960s and 1970s may of course also have had an impact on members of the Commission.

In later years, also other national and international courts, and political lawmakers, have started to recognize that human beings should be respected in their orientation towards other human beings – also when that orientation is between people of the same sex or gender, and also when that orientation expresses itself in sexual desire or sexual activity. This has led to the inclusion of 'sexual orientation' (or similar terms) in the interpretation of many international,

[59] U.S. Supreme Court 7 June 1965, *Griswold v. Connecticut*, 381 U.S. 479.

[60] Idem: 'Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions' (per Justice Douglas, at 486).

[61] JOHN WITHERSPOON, LECTURES ON MORAL PHILOSOPHY (V.L. Collins ed., Princeton University Press, Princeton 1912), p. 69 ('Lecture X. Of Politics').

[62] Richards 1999, p. 74-75

[63] Eur. Comm'n H.R. 30 September 1975, *X v. Germany*, appl. 5935/72.

European, national and sub-national legal prohibitions of discrimination,[64] or even in the explicit wording of such prohibitions.[65] More fundamentally, the general notion that human beings should be respected in their orientation towards other human beings, has gained strong recognition in human rights law. The *'right to establish and develop relationships with other human beings'*, has now become part of the standard case law of the European Court of Human Rights, since it wrote in 1992:

> 'The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.' [66]

[64] The cases in which an international human rights body for the first time considered sexual orientation to be covered by a treaty article prohibiting discrimination in general, are the following: UN Human Rights Committee 31 March 1994, *Toonen v. Australia*, comm. 488/1992; Eur. Comm'n H.R. 1 July 1997, *Sutherland v. United Kingdom*, appl. 25186/94; Eur. Ct. H.R. 21 December 1999, *Mouta v. Portugal*, appl. 33290/96; African Commission on Human and Peoples' Rights, March/April 2009, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, comm. 284/03, par. 155; Inter-Am. Ct. H.R. 24 February 2012, *Atala Riffo and daughters v. Chile*, par. 83-93.

[65] The first country to explicitly prohibit sexual orientation discrimination in national legislation, was Norway (1981, since then followed by some 55 other countries; see Waaldijk 2009). The first national constitution including an explicit prohibition of sexual orientation discrimination was that of South Africa (1994, see Cameron 2001). South Africa has since then been followed by six other countries (see Paoli Itaborahy 2012, p. 16). The first explicit mention of sexual orientation discrimination in a treaty was art. 13 of the EC Treaty (inserted in 1999 by the Treaty of Amsterdam; since the Treaty of Lisbon came into force in 2009 that provision can be found in art. 19 of the Treaty on the Functioning of the European Union; see also art. 10 of that Treaty, and art. 21 of the Charter of Fundamental Rights of the European Union). The only other treaty provision, so far, which explicitly mentions discrimination on grounds of 'sexual orientation' (and 'gender identity') is art. 4 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 2011, CETS No. 210).

[66] Eur. Ct. H.R. 16 December 1992, *Niemietz v. Germany*, appl. 13710/88, par. 29.

The European Court in December 1992 did not explicitly refer to the decisions in which the European Commission of Human Rights had first articulated this right. But these decisions had been mentioned a few months earlier by Judge Martens in a concurring opinion, where he wrote:

> 'Expulsion severs irrevocably all social ties between the deportee and the community he is living in and I think that the totality of those ties may be said to be part of the concept of private life, within the meaning of Article 8. […] It is true that, at least at first sight, the text of this provision seems to suggest otherwise. Read as a whole, it apparently guarantees immunity of an inner circle in which one may live one's own, one's private, life as one chooses. This "inner circle" concept presupposes an "outside world" which, logically, is not encompassed within the concept of private life. Upon further consideration, however, this "inner circle" concept appears too restrictive. "Family life" already enlarges the circle, but there are relatives with whom one has no family life stricto sensu. Yet the relationship with such persons, for instance one's parents, undoubtedly falls within the sphere which has to be respected under Article 8. The same may be said with regard to one's relationships with lovers and friends. I therefore share the view of the Commission, which has repeatedly held that "respect for private life" "comprises also to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality" […].' [67]

Since 1998, the Constitutional Court of South Africa, perhaps more eloquently, recognizes the right *'to establish and nurture human relationships'*.[68] And so does the High Court of Fiji, since

[67] Eur. Ct. H.R. 26 March 1992, *Beldjoudi v. France*, appl. 12083/86.

[68] Constitutional Court of South Africa 9 October 1998, *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, par. 32: 'Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy.' (per Justice Ackerman). See also par. 117: 'The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.' (per Justice Sachs)

2005.[69] Since 2010 also the Inter-American Court of Human Rights recognizes *'the right to establish and develop relationships with other human beings'*:

> 'Regarding the alleged violation of Article 11 of the American Convention based on the same facts, the Court has specified that […] its contents include, *inter alia*, the protection of private life. […] Moreover, the concept of private life is a wide-ranging term, which cannot be defined exhaustively, […] but includes, among other protected forums, sexual life, […] and the right to establish and develop relationships with other human beings. […] The Court finds that the rape […] violated essential aspects and values of her private life, represented an intrusion in her sexual life, and annulled her right to decide freely with whom to have intimate relations, causing her to lose total control over these most personal and intimate decisions, and over her basic bodily functions.' [70]

Like the Universal Declaration of Human Rights, the *African Charter on Human and Peoples' Rights* does not contain a right to private life. However, article 28 of the African Charter seems to contain a *duty* to relate to other human beings: 'Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.' (And a duty, of course, implies a right to comply with the duty.) Furthermore, it can be argued that a right to privacy is implied by other rights in the African Charter, especially every individual's right to 'respect for his life and the integrity of his person', the right to 'respect of the dignity inherent in a human being' and the right to 'liberty and security of his person'.[71]

The *International Covenant on Civil and Political Rights* provides in article 17 that no one 'shall be subjected to arbitrary or unlawful interference with his privacy', but the Human Rights

[69] High Court of Fiji at Suva 26 August 2005, *McCoskar v. State*: 'In my view the Court should adopt a broad and purposive construction of privacy that is consistent with the recognition in international law that the right to privacy extends beyond the negative conception of privacy as freedom from unwarranted State intrusion into one's private life to include the positive right to establish and nurture human relationships free of criminal or indeed community sanction.'

[70] Inter-Am. Ct. H.R. 30 August 2010, *Fernández Ortega et al. v. Mexico*, par. 129. See also Inter-Am. Ct. H.R. 31 August 2010, *Rosendo Cantú et al. v. Mexico*, par. 119; and Inter-Am. Ct. H.R. 24 February 2012, *Atala Riffo and daughters v. Chile*, par. 161-162.

[71] Murray & Viljoen 2007, p. 90, referring to articles 4, 5 and 6 of the African Charter.

Committee has not yet had a chance to consider whether this includes a right to establish and develop relationships. However, in *Toonen v. Australia*, the Committee did note that 'it is undisputed that adult consensual sexual activity in private' is covered by the concept of 'privacy'.[72] It remains unclear whether less sexual or less private aspects of homosexual orientation would be protected too.

The European, South African, Fijian and Inter-American formulations are wider than the phrase used by the U.S. Supreme Court with its limitation to certain 'intimate' human relationships. This is relevant, because not all sexual or intimate behavior is part of a relationship that is (already) 'intimate'. A first or second date with someone (or indeed a brief encounter or a one-night stand) may involve very intimate behavior and deep emotional attraction, but even so it would be too early to speak of an 'intimate relationship', let alone an 'intimate association'. The wider terminology, used outside the USA, therefore seems preferable.[73]

The formulation without the word 'intimate' is also to be preferred over the words 'most intimate aspect of private life', that the European Court of Human Rights has been using since its 1981 *Dudgeon* judgment (finding that the Northern Irish laws against sex between consenting adult men amounted to a violation of the right to respect for private life).[74] Personal relationships are not always, and certainly not all the time, 'intimate'. Relationships often start in very public places (at work, in a disco, online), and often develop through joint public behavior (dancing, holding hands, kissing).[75] The notion of 'establishing relationships' also

[72] UN Human Rights Committee 31 March 1994, *Toonen v. Australia*, comm. 488/1992, par. 8.2.

[73] In the USA there seems to be quite a lot of case law and academic writing trying to establish a demarcation line between 'intimate' and non-intimate relationships or associations. The inclusive approach advocated by Karst (1979/1980) has not been fully followed by the courts (for a recent example from the stream of articles criticizing the courts, see Roling 2012). An interesting effort to approach the notion of 'intimacy' more analytically, was made by Udell (1998, p. 278-280). She set out with three criteria ('three qualities that correlate with intimacy'): cohabitation, sexual intimacy, and (explicit or implicit) commitment, adding as fourth criterion the existence of close blood ties. She then listed all possible relationships according to how many of these criteria they met. Lau (2006, p. 1298 and 1301) points out that the freedom to intimate association is narrowly focused on 'family'.

[74] Eur. Ct. H.R. 22 October 1981, *Dudgeon v. United Kingdom*, appl. 7525/76, par. 52. The most recent use of this phrase can be found in Eur. Ct. H.R. 2 March 2010, *Kozak v. Poland*, appl. 13102/02, par. 83.

[75] Cases concerning a gay or lesbian couple being refused service in a bar or restaurant because they kissed – as lovers do –, have made it to courts and equality bodies in quite a number of countries.

covers pre-relational attraction and affection. Once established, amorous relationships can indeed be very intimate between the partners involved. But the further their relationship develops, the partners may take a more public and social profile as a couple. Their partnership is then no longer *only* defined by its intimacy. It is this very *social* aspect of their private life that can be obscured by the use of the word 'intimate'. Another advantage of leaving out the word 'intimate', is that the resulting higher abstraction may more readily be recognized as a common human need, and as something which is also a core element of other fundamental freedoms, especially those of religion, assembly, and association.

Before turning to the legal implications of this fundamental *right to relate*,[76] it seems appropriate to point out that – in large parts of the world – the recognition of such a right has been enhanced by a combination of several non-legal stepping stones. Of these I have already mentioned the popularized psychological theory of Maslow, that 'love needs' are one of the five categories of basic human needs.

Secondly there seems to be a strong cultural (and religious, and economic) imperative to form a close relationship with someone. Precisely because there is such a cultural and legal emphasis on loving, partnering and family, the cultural and legal disapproval of same-sex love can hit individuals extra hard. Homophobia is a stigma on something that simultaneously, at a higher level of generalization, is being presented as one of the highest forms of happiness. It is a typical example of a double-bind. You could say that everyone is being told by society that they must find someone to love, but many lesbian women and gay men are also told that this must not be someone they would *love* to love.

Thirdly the gradual recognition of a non-discriminatory right to relate, owes a lot to the courage and pride of a growing number of women and men who have been coming out as same-sex *lovers*, as same-sex *partners*, as same-sex *spouses*.[77] Thereby making the point that partnering –

[76] See paragraphs 6, 7 and 8, below.

[77] At least two same-sex couples wrote a book about getting married in Canada and about going to Court to get that marriage recognized, see Bourassa & Varnell 2002 (they were one of the couples involved in the case decided by the Court of Appeal for Ontario on 10 June 2003: *Halpern v. Canada (Attorney*

and indeed marrying – is not for heterosexuals only. Two of the most 'out' same-sex couples in the world are present here today. In deep respect for them, I take off my hat and bow.

And fourthly there is an extensive body of art, literature and entertainment portraying this psychological need, this cultural duty, and this same-sex practice. The Rector discourages the use of multimedia in this auditorium. So I will not play some of the songs and scenes that spring to mind. Many of these do not evoke an existing relationship, but a longed-for relationship. Like poems expressing *'to friendship such a boundless deep desire'.*[78]

I would just suggest you picture the film *8 Femmes*, made in 2002 by François Ozon, where the one lesbian character, the black housekeeper, sings the 1973 Dalida song *'Pour ne pas vivre seul'*.[79] Or think of Robert, the supposedly happy single in Stephen Sondheim's musical *Company* of 1970, singing the song *'Being alive'*.[80]

6. Law

So the right to relate is a right grounded in a human need, in a cultural duty, in a gay and lesbian practice, in a multimedia poetic portrayal, and – importantly – also in hard law.

The right to establish and develop relationships has been recognized explicitly in various human rights cases,[81] some of which actually deal with homosexual orientation.[82] Implicitly, the right

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General) (2003) O.R. (3d) 161); and see Gilligan & Zappone 2008 (and their case decided by the High Court of Ireland on 14 December 2006: *Zappone & Anor -v- Revenue Commissioners & Ors* [2006] IEHC 404; appeal pending in Supreme Court of Ireland).

[78] This is how I would translate the words '*naar vriendschap zulk een mateloos verlangen',* that now are part of Amsterdam's Homomonument. It is the fourth line of the poem 'Aan eenen jongen visscher', written in 1917 by Jacob Israël de Haan, the full text of which can be found at www.dbnl.org/tekst/haan008lied01_01/haan008lied01_01_0024.php.

[79] This 1973 song (text by Sébastien Balasko, see www.seconhandsongs.com/work/73375) is the oldest that I know where both love between women and marriage between men is explicitly mentioned.

[80] Sondheim 2010, p. 194-195.

[81] See for a recent example: Eur. Ct. H.R. 3 April 2012, *Gillberg v. Sweden*, appl. 41723/06 (Grand Chamber), par. 66: 'The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects

to relate can also be discerned in other national and international decisions, especially those that have made an end to prohibitions of same-sex *sexual behavior* or of same-sex *marriage*, or that have challenged other forms of anti-homosexual *discrimination*.[83] Similarly, the enjoyment of the right to relate has been greatly advanced by legislative developments on these issues in many countries.[84]

At the European Court of Human Rights and the Human Rights Committee, homosexual couples have first been recognized in a 'most intimate part' of their private life (i.e. in their sexual life).[85] Later they obtained some recognition as *de facto* cohabiting partners,[86] and more recently as having family life.[87] But – so far – they did not yet get recognized as being entitled to 'marriage'.[88] Similarly, sex between same-sex adults is now legal in some 120 countries, a number that has doubled since 1970 (France was the first to decriminalize in 1791). Legislation against discrimination on grounds of sexual orientation has been adopted in some 55 countries (Norway was the first in 1981). Same-sex couples enjoy at least some legal recognition in around 35 countries (Netherlands was the first in 1979). For them, marriage is now an option in 11 countries (Netherlands was the first in 2001) and in parts of another 3 countries, while some

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of the person's physical and social identity. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.

[82] After the South African and Fijian courts applied the right to relate in cases challenging the criminalization of same-sex sexual activity (see above), now also the European and Inter-American Courts of Human Rights have invoked this right in connection with sexual orientation; see Eur. Ct. H.R. 22 January 2008, *E.B. v. France*, appl. 43546/02, par. 43 and 49; and Inter-Am. Ct. H.R. 24 February 2012, *Atala Riffo and daughters v. Chile*, par. 161-162.

[83] See the national cases from many countries summarized in Jernow 2011.

[84] Waaldijk 2009; Paoli Itaborahy 2012, p.11-21.

[85] Eur. Ct. H.R. 22 October 1981, *Dudgeon v. United Kingdom*, appl. 7525/76; UN Human Rights Committee 31 March 1994, *Toonen v. Australia*, comm. 488/1992.

[86] Eur. Ct. H.R. 24 July 2003, *Karner v. Austria*, appl. 40016/98; 29 July 2003 in *Young v. Australia*, comm. 941/2000.

[87] Eur. Ct. H.R. 24 June 2010, *Schalk & Kopf v. Austria*, appl. 30141/04, par. 94. See also Inter-Am. Ct. H.R. 24 February 2012, *Atala Riffo and daughters v. Chile*, par. 174-178.

[88] UN Human Rights Committee 17 July 2002, *Joslin et al. v. New Zealand*, comm. 902/1999; Eur. Ct. H.R. 24 June 2010, *Schalk & Kopf v. Austria*, appl. 30141/04.

15 other countries are now offering – through partnership registration – a formal recognition that is not quite marriage (Denmark was the first to do so in 1989).[89]

A narrow element of the right to establish and develop relationships could already be found in the right to marry, the right to found a family and in the right to respect for family life.[90] As we have seen, international and national courts have now articulated the wider and more fundamental right to establish and develop relationships (as one of the aspects of the right to respect for private life.) This right has been phrased by these courts in such a way that it covers the whole field of application of the rights to marry, to found a family and to respect for family life. These are now just aspects of the right to relate, and thereby of the right to respect for private life.

The new constellation of some of the elements of article 8 of the European Convention on Human Rights is as follows:

- Not only the individual lives of people, but also the establishing and developing of relationships with other human beings are covered by the right to respect for private life.[91]
- Not only family relationships are covered by this right to establish and develop relationships, but also non-family relationships ('of a professional or business nature').[92]
- Not only marital and parenting relationships, but also non-marital partnerships are covered by the right to respect for family life.[93]

[89] Waaldijk 2009; Paoli Itaborahy 2012, p.11-21. In June 2012 Denmark became the 11th country to open up marriage to same-sex couples.

[90] Art. 8 and 12 of the European Convention on Human Rights. See also art. 17 and 23 of the International Covenant and Political Rights, art. 18 of the African Charter of Human and Peoples' Rights, and art. 11 and 17 of the American Convention on Human Rights.

[91] Since Eur. Ct. H.R. 16 December 1992, *Niemietz v. Germany*, appl. 13710/88, par. 29.

[92] Idem.

[93] Since Eur. Ct. H.R. 18 December 1986, *Jonhston and others v. Ireland*, appl. 9697/82, par. 55-56.

- Not only different-sex partnerships, but also same-sex partnerships are covered by the right to respect for family life.[94]

Therefore, family life (including marriage) is now a sub-category of private life.

The question arises whether the right to marry should be seen as an aspect of the right *to establish* relationships, or as an aspect of the right *to develop and nurture* a relationship. Nowadays, in most Western cultures, marriage is rarely a way to start a relationship. Marriage can no longer be classified as family *formation*. For most couples that get married, marriage is now a form of family *formalization*. Therefore marriage should primarily be considered under the heading of the right to *develop* relationships rather than under the right to *establish* relationships.

The same question can be asked regarding sexual activity. At least for many people in many Western cultures, sex is no longer *only* a way of developing and nurturing an existing relationship. For many people – gay men not excluded – sexual intimacy is also a way of establishing a relationship. Therefore both the right to establish relationships and the right to develop relationships require that criminalization of homosexual behavior must stop.

Most laws prohibiting sex between people of the same sex are not very effective in preventing such sex from taking place. But these laws do create enormous obstacles for gays, lesbians and bisexuals to come out, to meet potential partners and to develop relationships. These laws create scope for blackmail and extortion,[95] they generate fear for exposure, they promote the idea that anti-homosexual discrimination is justified, they encourage thinking that anti-homosexual violence is not so bad, and they portray homosexuals as criminals.[96] Thereby these laws have a great negative effect on the possibilities to establish and develop relationships.

[94] Since Eur. Ct. H.R. 24 June 2010, *Schalk & Kopf v. Austria*, appl. 30141/04, par. 94.

[95] See Thoreson & Cook 2011.

[96] See Cameron 1993, p. 455-456.

Although there has been a constant stream of decriminalization's, especially since the late 1960s,[97] for many countries decriminalization still seems far away. The important thing is to *also* welcome steps that do not yet reach the international minimum standard of complete decriminalization,[98] but that do get closer to meeting that requirement, and thereby allow a *few* more people to have intimate relationships.

The history of other countries provides a long list of possible intermediate small steps.[99] For many of these steps (such as a non-prosecution policy, selective prosecution, or lenient sentencing) no parliamentary legislation is required, just some initiative of government, minister of justice, police director, prosecution service, or courts. Any such step already makes it a *little* easier for people to establish and develop relationships. A progressive realization of this aspect of private life should also be possible in some of the more conservative countries of the world. It would be realistic to keep in mind that many European and American countries have also moved very slowly, often incrementally, in getting rid of their penal provisions on homosexuality. [100] And almost all countries of the world are still preserving some form of legal condemnation of homosexual orientation (sometimes just by using different words for what is in fact marriage between two people of the same sex, or by refusing to rely on same-sex marriages for filiation purposes).

Countries that *for the time being* preserve the criminalization of homosexuality, should be encouraged to *at least* compensate with other measures supporting the right to relate. For example: active police action in cases of anti-homosexual violence or extortion;[101] non-discriminatory respect for the freedoms of association, assembly and information; and inclusion of sexual orientation in anti-discrimination laws. Before getting rid of their criminal prohibitions

[97] See Waaldijk 2009.

[98] This minimum standard has been set in a series of cases, starting in Europe with Eur. Ct. H.R. 22 October 1981, *Dudgeon v. United Kingdom*, appl. 7525/76; and at global level with UN Human Rights Committee 31 March 1994, *Toonen v. Australia*, comm. 488/1992.

[99] See for some European examples: Waaldijk 2000.

[100] All this in line with what I call the 'law of small change' (Waaldijk 2001, p. 439-441, quoted above in paragraph 3).

[101] See also Thoreson & Cook 2011.

of homosexual sex, at least five countries in Africa have included a prohibition of sexual orientation discrimination in laws on employment.[102]

7. Coming out and coming together

The right to relate has two aspects, the right to establish (or enter into) relationships, and the right to develop (or maintain, nurture) relationships.[103] The right to establish same-sex relationships, implies two specific rights:

- the right *to come out* (as being attracted to one or more persons of the same-sex);
- the right *to come together* (with people with a similar orientation and/or of the same sex, or with people who do not condemn homosexuality).

These two implied rights are necessary for people to find a (potential) partner – a partner that is of the same sex *and* of the same orientation. Without at least some coming out or some coming together, a woman would never be able to establish an intimate relationship with another woman, and a man would never be able to establish an intimate relationship with another man. The rights to come out and to come together, are also very helpful to find friends who personally know what it is to be attracted to the samesex or to have a same-sex partner or to face discrimination in that context.

The right to come out may be supported by the freedom of expression, but also as a core element in the right to relate (as part of the right to respect for private life).[104] The right to come out covers a wide range of expressions, ranging from wearing a rainbow armband or

[102] For some details of this interesting and promising deviation of the 'standard sequence' (Waaldijk 1993/94) in the legal recognition of homosexual orientation, see Waaldijk 2009 and Paoli Itaborahy 2012.

[103] See the various wordings of this right by the different courts quoted in paragraph 5, above.

[104] According to principle 6 of *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (of 2007), the 'right to privacy ordinarily includes the choice to disclose […] information relating to one's sexual orientation […]' (see www.yogyakartaprinciples.org).

displaying subtle codes that can be picked up by others, to a simple 'I think I am in love with you' (at least if you use those words to someone who does not yet know that you might be attracted to persons of the same sex). And ranging from a classic 'there is something I want you to know', to telling your students about your wife or telling your colleagues about your boyfriend. It can be done casually, ambiguously, very privately. It is often done by hints, but you can also reveal your orientation on a webpage or in an interview, or by joining a float or a boat in the right parade.

And that shows the fuzzy line between coming out and coming together. Many people come out without saying anything, just by going to a place or an event where they will not be assumed to be heterosexual. That is one of the reasons why gay bars, beaches and baths, and lesbian campsites, cruises and cafés are so important. And online dating sites, LGBT networks at universities and in companies, and gay-straight-alliances at schools and nursing homes, plus a queer film festival in every region. Vital in providing chances to meet others who might be interested in sharing a feeling, or in sharing a future. If coming out and coming together were impossible, then same-sex relationships would not be formed and established, let alone nurtured and developed.

The clearest example of this *right to come out* can perhaps be found in refugee law. As put by the UN High Commissioner for Refugees:

> 'A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action. […] There is no duty to be "discreet" or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships.'[105]

[105] *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, Geneva: United Nations High Commissioner for Refugees, 2008, par. 25-26 (with references case law from several countries). See also Jansen & Spijkerboer 2011, p. 33-39, with additional references to national policy guidelines and administrative practice, and to case law, including the important judgment of the United Kingdom Supreme Court of 7 July 2010, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31. On this precise question the Dutch Council of State (in three cases concerning asylum seekers from Senegal, Uganda, and Sierra Leone) on 18 April 2012 has asked for a preliminary ruling from the Court of Justice of the European Union (see

If that is so in refugee law, the same should surely apply in education,[106] care,[107] and employment,[108] including military employment.[109] Coming out is one of the core aspects of sexual orientation, and should therefore be covered by any applicable prohibition of sexual orientation discrimination. It is a topic that cries out for a thorough comparative legal study, looking at the different ways a 'right to come out' is being denied, recognized, constructed and applied. Such a study should take account of the functional equivalence of the many ways in which the right to come out can be frustrated: police arrests, loss of job, eviction from home, expulsion from school, bullying, violence, etc.

It can be argued that the right to come out, also translates into a duty to proactively protect against anti-homosexual violence and bullying. Such a duty might apply both in public places, and at work, at school, in care, etc. If a public or private environment is unsafe, then the right to come out, and the right to come together, and thereby the right to relate, become illusionary.

Public authorities should, of course, not deny LGBTs the enjoyment of the freedoms of assembly and association. This already follows from constitutions and international human rights treaties guaranteeing those freedoms. The right to relate, and its implied right to come together, reaffirm that these freedoms are crucial for certain minorities.

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www.raadvanstate.nl/pers/persberichten/persbericht/?pressmessage_id=192); the Court of Justice has given these three cases (of X, Y and Z) the numbers C-199/12, C-200/12 and C-201/12.

[106] In the Netherlands, for example, the coming out of a lesbian, bisexual or gay student in primary, secondary or higher education should be covered by the strict prohibition of discrimination on grounds on the 'sole fact' of homosexual orientation (a prohibition that according to article 7(2) of the Dutch General Equal Treatment Act also fully applies in any private school based on religion; see Waaldijk 2004, par. 13.4.5).

[107] The right to come out should not be frustrated in, for example, homes for the elderly. If an inhabitant of such a home – or a couple of inhabitants – chooses to come out as lesbian, gay or bisexual, there should be no negative response from the management, and adequate protection against negative responses from other inhabitants.

[108] Discrimination because of someone's coming out appears to be covered by the European Union's Employment Equality Directive (2000/78/EC) and in many members states by the legislation implementing that Directive. See Waaldijk & Bonini-Baraldi 2006, p. 40-41, 112-113 and 213-214.

[109] See Richardson 2000, p. 119-200.

The right to relate, however, is of even greater relevance with respect to events and networks *inside a private or public organization*. Employees of big companies and of other organizations, and students (and staff) in schools and universities, in many countries have been taking initiatives for occasional LGBT meetings, or even started regular LGBT networks within their organizations. Leiden University is no exception.[110] Comparative legal research could find out how different legal systems are dealing with employers and educational establishments that block such initiatives.[111] Is refusal to allow such a meeting or network seen as a possible form of sexual orientation discrimination, or as a possible violation of the freedom of assembly or association? Are arguments being used that acknowledge the importance of these initiatives for the right to relate of employees and students?

And, speaking of functional equivalence: What about the more informal ways of coming together that have developed in the world of same-sex? Think of private parties that get raided by the police in some countries. And all those gay (and lesbian) bars and discos. What about bath houses and open air cruising areas in many cities throughout the world? And do not forget the numerous virtual meeting and dating spaces online. For many people, such avenues to meet others are an essential way of establishing relationships – for an hour, for a night, for a summer, for a lifetime.[112] The right to relate makes it possible to investigate this legally unchartered terrain from a human rights perspective.

[110] See www.de-lgb.nl for the Leidsche Ganymedes Borrel, and www.workplacepride.org for an increasing number of logos of (Dutch) companies and other employers with an LGBT network.

[111] Not all European Union member states seem to cover this sort of discrimination in their legislative implementation of the Employment Equality Directive (2000/78/EC). See Waaldijk & Bonini-Baraldi 2006, p. 45-46 and 117-118.

[112] See on the rights of potential couples: Lau 2006, 1289-1291.

8. Nurturing relationships

There is a great variety in the way different countries of the world are giving effect, or not, to the right of same-sex partners to develop and to nurture their relationship.[113] Comparative legal studies in this field have mostly focused on one or two aspects (often the status that may be available to same-sex couples that want to formalize their relationship, or the legal consequences that the law attaches to their relationship or to its status).[114] For more comprehensive comparative research, it seems useful to distinguish analytically between five aspects of the right to develop relationships: respect, protection, recognition, formalization, and recognition of foreign formalization.

a. *Respect.* This follows most directly from the wording of the right from which the right to relate has been derived: the right to respect for private life.[115] Not criminalizing the intimate behavior of the partners involved, may be seen as the bare minimum of respect that is due according to current interpretations of international human rights law.[116]

b. *Protection.* Typically, intimate relationships can be protected by two specific types of regulation: Privacy legislation on the one hand, and anti-discrimination legislation on the other. Any legal prohibition of sexual orientation discrimination, should be interpreted as also protecting against discrimination on grounds of the *same-sex-ness* of a relationship.[117]

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[113] It is the Constitutional Court of South Africa that introduced the very appropriate notion of 'nurturing' a relationship in this context. See its judgment of 9 October 1998, *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, par. 32.

[114] For example Waaldijk 2004, 2005 & 2008; see also the references in paragraph 2, above.

[115] Interestingly, the constitutions of Romania and Moldova not only require protection and respect for family and private life, but also for 'intimate life'. See art. 26 of the Constitution of Romania (since 1991), and art. 28 of the Constitution of Moldova (at least since 2000).

[116] See paragraph 6, above.

[117] See Lau 2006, p. 1306, and Waaldijk & Bonini-Baraldi 2006, p. 113-117. The point has already been accepted in international case law since: Eur. Ct. H.R. 24 July 2003, *Karner v. Austria*, appl. 40016/98; and UN Human Rights Committee 29 July 2003, *Young v. Australia*, comm. 941/2000. The Court of

A difficult question is whether it is unlawful sexual orientation discrimination, if a blood bank refuses blood donations from men in monogamous same-sex relations, while accepting blood donations from men in different-sex monogamous relations. One way out of this dilemma, is to say that discrimination presupposes a victim, and that a denied option to donate blood does not make the would-be donor a victim. However, as we have seen already, a measure that excludes someone on grounds of homosexual behavior, may also indirectly affect other people.[118] In a case like this much would depend on the way the blood bank explains the reasons for the refusal. That needs to be done sensitively, specifically and accurately. Unspecified – and therefore untenable and offensive – generalizations claiming that 'sex' between men is many times more dangerous than heterosexual 'sex', carry the serious risk of frightening some (young) people back into secrecy, abstinence, or solitude, with all kinds of risk for their emotional and physical wellbeing.

c. *Recognition.* The third aspect is whether the law attaches any legal consequences (rights, benefits, obligations, responsibilities) to a same-sex relationship. The minimum norm, now well developed in international human rights law, requires that legal consequences that are made available to unmarried different-sex partners, should also be made available to unmarried same-sex partners.[119]

With the recognition in 2010 that same-sex partners can have 'family life' in the sense of article 8 of the European Convention on Human Rights,[120] the minimum norm may be starting to rise. It can now be argued that countries should at least provide same-sex

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Justice of the European Union has also accepted this, first in its judgment of 17 February 1998 in Case C-249/96, *Grant v. South West Trains Ltd.* (par. 47), and more explicitly in its judgment of 1 April 2008 in Case C-267/06, *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen*. See also Eur. Ct. H.R. 24 June 2010, *Schalk & Kopf v. Austria*, appl. 30141/04, par. 99, where the Court speaks of the need of same-sex couples 'for legal recognition and protection of their relationship'.

[118] See paragraph 3, above.

[119] Eur. Ct. H.R. 24 July 2003, *Karner v. Austria*, appl. 40016/98; UN Human Rights Committee 29 July 2003, *Young v. Australia*, comm. 941/2000.

[120] Eur. Ct. H.R. 24 June 2010, *Schalk & Kopf v. Austria*, appl. 30141/04, par. 94.

families with some of the most important legal consequences of marriage. The right to develop and nurture relationships, may help to decide which rights are most important for a couple. Perhaps the right to seek a residence permit for a foreign partner? Or the right to provide your partner with some material security in case you would die first? Or the right to assume certain legal and financial responsibilities for your partner's children?

d. *Formalization.* Countries take different views as to whether or not – and if so in what format – same-sex partners deserve a right to formally establish legal ties with each other and/or with each other's children. So far, international law provides no minimum standard for the formalization of same-sex family life.[121]

Does the right to relate imply a right to become relatives? For children this can be important: Will they get a permanent and legal link to a parent's partner who is in fact like a parent to them? And what if three or four adults, perhaps in two households, are in fact parenting toghether? Different legal systems are experimenting with different ways to meet the desire of some same-sex families to formalize *all* relationships in their *de facto* family.

In some of the countries where same-sex marriages are possible, a much discussed issue regarding family formalization is how to deal with *refusing registrars*,[122] i.e. registrars with (religiously inspired) conscientious objections against taking part in same-sex marriage ceremonies. If such a registrar would ask to be replaced by a colleague, and no couple therefore gets frustrated in their desire to get married, then there is not a direct victim, so probably no case of discrimination. But again, as in the case of blood

[121] UN Human Rights Committee 17 July 2002, *Joslin et al. v. New Zealand*, comm. 906/1999; Eur. Ct. H.R. 24 June 2010, *Schalk & Kopf v. Austria*, appl. 30141/04.

[122] In Dutch they are called *'weigerambtenaren'*. There is no judicial case law in the Netherlands yet on the question whether or not the dismissal of such a civil servant (or the rejection of a job applicant) for refusing to do same-sex marriage ceremonies should be considered as discrimination on grounds of religion. On 15 April 2008 the Dutch Equal Treatment Commission gave as its opinion that such a rejection of a job applicant was objectively justified and therefore not prohibited as indirect discrimination on grounds of religion (*oordeel* 2008-40).

donation,[123] there may be indirect victims. Just imagine a still insecure lesbian or gay child of the refusing registrar. What disastrous signal does that child get, when his or her own parent is refusing to help a loving couple in formalizing their family life. And what will the child feel when it sees that this refusal is being tolerated by the law? Still, making a martyr out of that parent would not help the child, nor anyone else. The dilemma may be solvable by making sure that every child in every primary and secondary school at least gets some information that is free from anti-homosexual bias. And by making sure that every refusing registrar is made fully aware of the harmful effects his or her refusal may have on others, on persons beyond the actual marrying couple.

e. *Recognition of foreign formalization.* Finally, I could tell you sad stories about the non-recognition of foreign same-sex marriages, partnerships and adoptions. Let me first mention two promising judgments of the European Court of Human Rights, requiring Luxembourg and Greece to recognize foreign single-parent adoptions. These two cases are not about same-sex families, but they are clear examples of how the right to relate (as well as the right to non-discrimination and the right to respect for family life) requires the recognition of the foreign formalization of a family relationship.

In the first case, the European Court told Luxembourg that not allowing single-parent adoptions in Luxembourg is no good excuse for refusing to recognize the Peruvian adoption of a Peruvian boy by a Luxembourg mother:

> 'The Court considers that the decision refusing enforcement fails to take account of the social reality of the situation. Accordingly, since the Luxembourg courts did not formally acknowledge the legal existence of the family ties created by the Peruvian full adoption, those ties do not produce their effects in full in Luxembourg. The applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family. […] Bearing in mind that the best interests of the child are paramount in such a case […], the Court considers that

[123] See above, under point b. About the notion of indirect victims of anti-homosexual discrimination, see paragraph 3, above.

> the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention.' [124]

The other case was about the adoption in the United States of a Greek young men by his Greek uncle. The uncle happened to be a monk who had become bishop in Detroit. Very old Greek laws prohibited adoptions by monks in Greece. But the European Court said that these old prohibitions were no good excuse for refusing to recognize this American adoption.[125] Both cases have in common that when there is *de facto* family life, plus a properly obtained foreign formalization of that family life, then that foreign formalization must be recognized.

Such stories and the same convincing legal arguments – but then involving an adoption by same-sex partners, or a same-sex marriage or registered partnership – are bound to come up in national and international courts, and especially in the Court of Justice of the European Union, because the non-recognition of foreign family status can cause major obstacles to the fundamental freedom of movement within the European Union.[126]

Quite a number of such cases have already been decided in the Administrative Tribunals of the United Nations and of the International Labor Organization. Both Tribunals have been quite helpful in recognizing same-sex marriages and partnerships of employees of various international organizations.[127] Until now, however, only few transnational cases have been decided by any court.[128] This seems understandable: because of possible

[124] Eur. Ct. H.R. 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*, appl. 76240/01, par. 132-133. (Please note that this judgment is now also available in English.)

[125] Eur. Ct. H.R. 3 May 2011, *Negrepontis-Giannisis v. Greece*, appl. 56759/08 (judgment only in French, but see the Court's press release in English at http://echr.coe.int/echr/en/hudoc).

[126] See Waaldijk 1996, Bell 2004, Guild 2001, Toner 2004, and chapter 4 of the report HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY – COMPARATIVE LEGAL ANALYSIS (European Union Agency for Fundamental Rights, Vienna 2010), *available at* http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/2010_en.htm.

[127] See the references in Waaldijk 2012.

[128] There are a few cases concerning the recognition of a foreign marriage, including: High Court of England and Wales 31 July 2006: *Wilkinson v. Kitzinger & Ors* [2006] EWHC 2022 (Fam); and High Court

non-recognition, many same-sex couples are probably deciding not to move to certain countries, and thus never run into the actual legal obstacles.

To compensate for this lack of jurisprudence I have conducted a survey among legal experts from most European countries (also outside the European Union). The survey consisted of seven hypothetical cases of same-sex couples moving from country A to country B. The first results sent in by the legal experts revealed a chaotic mosaic of full, partial, unclear and denied recognitions.[129] A foreign second-parent adoption by a same-sex partner would probably not be recognized in a third of the countries surveyed. Also for purposes of inheritance law or survivor's pension, a foreign same-sex marriage would probably not be recognized in a third of the countries surveyed. Slightly better were the results regarding a residence permit for the non-European-Union partner of a European Union citizen; but even for that purpose, a foreign same-sex marriage or registered partnership would probably not be recognized in a quarter of the countries surveyed.

Perhaps the European Court of Human Rights will notice that a majority is forming of European countries that do recognize foreign same-sex marriages and partnerships for at least some purposes. And then the Court might be prepared to apply in such cases the same principles as it has in the single-parent adoption cases against Luxembourg and Greece quoted above. It is the sort of case where it may be useful to remind the court that it has already recognized the right to develop relationships. Crossing a border should not interrupt such relational development. And having established a relationship should not confront a couple with obstacles to the exercise of their freedom of movement.

In short, I submit that the right *to develop* relationships has been and should be made operational through legal respect, legal protection, legal recognition, legal formalization, and through legal recognition of foreign legal formalization. These five aspects of the second 'leg' of

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of Ireland 14 December 2006: *Zappone & Anor v. Revenue Commissioners & Ors* [2006] IEHC 404 (appeal pending in Supreme Court of Ireland). About the second case, see Gilligan & Zappone 2008.

[129] Not yet published.

the right to relate are an essential complement to the first 'leg': the right *to establish* relationships. As we have seen in the previous paragraph, this right to establish relationships implies the right *to come out* and the right *to come together*. Together these seven aspects of the right to relate offer both a research agenda for the discipline of comparative sexual orientation law, and a toolbox for legislative and judicial advancement of sexual orientation law in many parts of the world.

9. Conclusion

Today I have tried to grasp the meaning of (sexual) orientation. I have tried to underline a fundamental right that has been articulated by some of the most important courts of the world – the right to establish and develop relationships with other human beings. And I have tried to give it a shorter name: the right to relate.

I have argued that the right to establish relationships implies the right to come out and the right to come together, and that the right to develop relationships has been and should be made operational through legal respect, legal protection, legal recognition, legal formalization and legal recognition of foreign formalization.

I have tried to convince you that the right to relate has been – and can continue to be – an inspiration for the development of sexual orientation law. And I have tried to show that this right can be used as a common denominator – as an orientation – in the comparative study of all those laws in the world that are anti-homosexual, or that are same-sex-friendly.

A lesson I learned in my research is that many people – and many legal systems – need time to get used to the different aspects of homosexual orientation. One of my aims in teaching comparative sexual orientation law is, that in the future the legal systems that my students will serve, shall require less time to understand the human need to love and to relate.

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