

Same-sex Couples Fitting into the Heterosexual Norm: How the Early Stages of Same-sex Union Regulations Privileged Only “Heterosexual-like” Couples*

Parejas del mismo sexo adaptándose a la norma heterosexual: la manera como las primeras etapas de regulación de las uniones de parejas del mismo sexo privilegiaron solo a las parejas heteronormadas

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Abstract

This article critically analyzes the legal reforms that regulated same-sex couple relationships through institutions other than marriage between 1989 and 2001. I begin with the Danish registered partnership as the first formal regulation for same-sex couples and end before the Netherlands' same-sex marriage legalization in 2001, which shifted the discourse towards pursuing marriage equality. From the analysis of legal sources and secondary materials, I identify the clash between three distinct discourses. First, an assimilation between opposite-sex (heterosexual) couples and same-sex couples that categorized gays and lesbians as "heterosexual-like" subjects in order to achieve legal recognition. Second, opposing voices within the gay and lesbian activist community demanding different forms of regulation capable of rejecting the patriarchal structures of economic dependence traditionally embedded in marriage law. Third, traditional agendas from conservative groups fighting against any form of legal recognition of same-sex (homosexual) couples. I conclude that the assimilationist discourse, which I argue promoted heteronormative couples, gained ground because it was more strategic for achieving recognition under family law.

KEYWORDS

Same-sex couples, assimilation, gay and lesbian subjects, heterosexual norm, marriage, unmarried cohabitation, civil union, registered partnership, life partnership, and pacte civile de solidarité (civil solidarity pacts).

Resumen

Este artículo de revisión analiza críticamente las reformas legales que regularon las relaciones de parejas del mismo sexo a través de instituciones diferentes al matrimonio entre 1989 y 2001. Comienzo con la unión registrada danesa como primera forma de regulación de las parejas del mismo sexo y termino antes de la legalización del matrimonio homosexual en Holanda en 2001 que cambió los discursos hacia la búsqueda del matrimonio igualitario. Identifiqué en los materiales legales y fuentes secundarias el choque entre tres discursos distintos. En primer lugar, la asimilación entre parejas heterosexuales y parejas del mismo sexo que categorizó a gais y lesbianas como sujetos "heterosexuales" para lograr el reconocimiento legal. En segundo lugar, voces contrarias dentro del activismo de gais y lesbianas que reclamaba diferentes formas de regulación capaces de rechazar las estructuras patriarcales de dependencia económica tradicionalmente arraigadas en el derecho matrimonial. Tercero, agendas tradicionales de grupos conservadores luchando contra cualquier forma de reconocimiento de parejas homosexuales. Concluyo que los discursos de igualdad, que desde mi perspectiva promueven parejas heteronormadas, ganaron terreno, ya que eran más estratégicos para lograr el reconocimiento del derecho de familia.

PALABRAS CLAVE

Parejas del mismo sexo, asimilación, sujetos queer, norma heterosexual, matrimonio, unión de hecho, unión civil, sociedad registrada, sociedad de vida y pactos civiles de solidaridad.

INTRODUCTION

This paper analyzes the reforms adopted to regulate same-sex couple relationships, emphasizing the first legal models on unmarried cohabitation and formal unions established by Western governments between 1989 and 2001. I analyze this period of time to explore the legal recognition of same-sex couple relationships through institutions other than marriage—registered partnerships, civil unions, life partnerships, the *pacte civil de solidarité* (or civil solidarity pact, hereinafter *PACS*)—along with the civil effects granted to unmarried cohabitation. The time frame studied ends with the Netherlands’ legalization of same-sex marriage in 2001. After that, the possibility of accessing the traditionally heterosexual institution of marriage became a reality, prompting the discourses that sought alternative ways of gaining recognition for same-sex couples to shift to pursuing marriage equality. I emphasize whether these early reforms considered the characteristics of economic relations between same-sex partners or if, conversely, they obviated this by merely extending the model of opposite-sex couples.

Exploring the regulatory reforms that gave legal recognition to same-sex couple relationships with this particular sensitivity¹ aims to reveal whether that process sought to incorporate same-sex couples into family law by widening its scope to encompass gay and lesbian unions, or whether it determined that same-sex partners should fit into the heterosexual norm of coupledom.² Controversial as it may seem, this approach does not seek to undermine same-sex families’ achievements in the legal realm, but rather to spotlight a dominant discourse in family law that seems to maintain the heteronormativity and patriarchal structures underlying the institution of marriage.³ These structures are present in property-sharing regimes, the obligation to provide

1 In using the expression “sensitivity,” I refer to this article’s perspective for engaging with the research question. As I state later in this introduction, I acknowledge the benefits of formal equality, but I seek to bring forward other discourses that opposed the mere extension of heterosexually conceived family-law regimes to same-sex couples. The purpose behind such “sensitivity” is to criticize the assimilationist tendencies that framed homosexuals inside couple relationships “just like heterosexuals,” obscuring their particularities in the economic sphere.

2 See the description of marriage and associated traditional gendered heterosexual roles in Ettelbrick, P. (2004). *When is Marriage a Path to Liberation*. In A. Sullivan (Ed.), *Same Sex Marriage: Pro and Con*, 118–124, see both conservative and liberal approaches to same-sex marriage, also applicable to legal recognition through “marriage-like” relationships in Feldblum, C.R. (2005). *The Moral Case for Marriage Equality and More Gay Is Good: The Moral Case for Marriage*. *Yale Journal of Law & Feminism*, 17, 160–161.

3 In this line, see the work of Eskridge, W.N. Jr. (2002). *Equality Practice: Civil Unions and the Future of Gay Rights*, 1st Edition, Yuvraj Joshi (2012), 231–242. *Respectable Queerness*, *Columbia Human Rights Law Review*, 43(2), 424; Polikoff, N.D. (1993). *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*. *Virginia Law Review*, 79(7), 1451; Polikoff describes

economic support, and the application of the principle of solidarity between the members of a couple as if everyone in a couple develops, or should develop, economic dependence. From my perspective, these institutions inextricably linked to marriage law and considered to provide benefits to legally recognized couple relationships, foster economic dependence and mutual economic responsibility in couple relationships, and create the expectation that members of couples will behave according to traditional caregiver-breadwinner family roles.

A review of the political debates, judicial decisions, and legal reforms that took part in state recognition of same-sex couple relationships in the time frame chosen shows that the above-described institutions and the discourses they entail within family law were subtly extended to and imposed on same-sex couples. These impositions derived from a heterosexually based legal and regulatory framework that disregarded opposition by some relevant activists, the fact that numerous homosexual subjects in couple relationships rejected patriarchal economic dependence, and the tendency of same-sex unions to have more egalitarian patterns of economic distribution, both in the domestic sphere and in their paid activities outside the home (Carrington, 2000, p. 193; Warner, 1999, 126; Bendall and Harding, 2018, pp. 151, 152).⁴

Discussions about assimilation and the heterosexual norm are not new in family law.⁵ Scholars in Europe and North America engaged in this debate by assessing formal equality between same-sex and opposite-sex couples. Based on those analyses, they questioned assimilationist

Martha Fineman's critique of marriage, and the traditional dependence it has, even after the achievement of formal equality between men and women inside marriage, in Polikoff, N.D. (2000). Why Lesbians and Gay Men Should Read Martha Fineman. *American University Journal of Gender, Social Policy & the Law*, 8(1), 173. *Respectable Queerness*, 43 *Columbia Hum. Rights Law Rev.* 415, 424 (2012)

4 See, for instance the specialization of home by choice instead of being imposed based on gendered assumptions in Carrington, C. (2000). *No Place Like Home: Relationships and Family Life Among Lesbians and Gay Men*. Chicago: The University of Chicago Press Joshi, *supra* note 5 at 428; Warner (1999), M. Beyond Gay Marriage. *GLQ: A Journal of Lesbian and Gay Studies*, 5(2), 119–171 Bendall and Harding's empirical study shows that after formal equality, same-sex partners will show a tendency towards more interdependency as they are now within the legal framework of family law, see further in Bendall, C., & Harding, R. (2018). Heteronormativity in Dissolution Proceedings: Exploring the Impact of Recourse to Legal Advice in Same-Sex Relationship Breakdown. In Brake, E. & Ferguson, L. (Eds.). <https://ebookcentral.proquest.com/lib/mcgill/detail.action?docID=471841>; Joshi, *supra* note 5 at 428; Michael Warner, *Beyond Gay Marriage*, 5 *GLQ J. Lesbian Gay Stud.* 119, 126 (1999)

5 See, for example, the discussions in the 1950s taking place in Scandinavian countries regarding the gender neutrality of marriage and the idea of sameness among the spouses in Rydström, J. (2008). Legalizing love in a cold climate: The history, consequences, and recent developments of registered partnership in Scandinavia. *Legalizing love in a cold climate: The history, consequences and recent developments of registered partnership in scandinavia*, 11 *Sexualities* 193, 194 (2008)

discourses and promoted views that sought to enforce substantive equality between all forms of family (Herring, 2015, p. 24; Leckey, 2014, pp. 6, 16-19). However, as stated by Yuvraj Joshi (2012), same-sex unions were only recognized inasmuch as they resembled “heterosexual-like” relationships. The “respectability” of gay and lesbian unions, he argues, would depend on their ability to follow the “norms and values of heterosexuality” (p. 416). In the end, the gay and lesbian rights movement was divided into two camps regarding how to achieve state recognition. There were those Joshi called liberals (queer liberationists), who firmly opposed assimilation, and others he referred to as conservatives. The latter ones argued that formal equality (assimilation) would open the door to gay and lesbian subjects through a legal and regulatory framework responsive to their dynamics, or that by entering such institutions they would have the power to transform them (Ettelbrick, 2004, p. 121; Hunter, 1991, pp. 18-19; Polikoff, 2008).⁶ Yet the achievement of formal equality for lesbian and gay couples served to silence the opposing voices that criticized dominant heteronormativity. Family law rules ended up being only for those who became “good gay couples” and conformed to heterosexual standards (Clarke, 2003, pp. 519-529; Norrie, 2000, pp. 365-369; Rydström, 2008, pp. 198-199).

METHODOLOGY

I employed both legal doctrinal analysis of foreign law and the functional method of comparative law (Michaels, 2006, pp. 345-347) to assess reforms adopted in the countries that legalized same-sex unions between 1989 and 2001. Accordingly, I reviewed written scholarly analysis of the legislative reforms and judicial rulings contributing to legal recognition of same-sex couple relationships, and I identified the similarities and differences in these processes. I also analyzed retrospective critiques of the adopted reforms. Regarding the use of comparative methodology, I borrowed from Ran Hirschl’s guiding principles to employ this method. As such, I started by defining what the purpose of comparing is, the extent to which I generalize or dig into the specific context of what is being compared, how the method interacts with other methodologies, and whether such an exercise is suited to my research objectives (Hirschl, 2016, p. 1416).

I analyzed the similarities and differences between the processes that led to the first forms of legal recognition of same-sex unions. In doing so, I emphasized the economic effects that the regulations produced for these couple relationships to find out if same-sex couples’ characteristics influenced these processes or if they were disregarded, favoring assimilationist discourses

⁶ Hunter affirmed that marriage was transformed by social forces before and that the impact of gay and lesbian couples’ ability to marry “would dismantle the gender structure in every marriage see further in Hunter, N.D. (1991). *Marriage, Law, and Gender: A Feminist Inquiry. Law & Sexuality: A Review of Lesbian and Gay Legal Issues*,

that posed gays and lesbians as heterosexual-like couples. Using the different views and political agendas that influenced the reform processes that I gathered from the scholarship, I classified these processes based on the extent to which those views were ultimately reflected in the legal and regulatory reforms, highlighting the most similar and dissimilar cases.

Regarding the comparison’s degree of generalization, I included all the countries that implemented legal reforms during this temporal scope to correlate the different paths taken (Di Robilant, 2016, pp. 1343-1344). However, due to the number of compared regulations, I had to sacrifice contextual details that I leave for future research, but that does not compromise the aim of the proposed methodology to engage with this paper’s research question.⁷ Briefly, the countries I studied adopted three main types of legal frameworks that reveal whether traditionalist, assimilationist, or queer liberation views on same-sex couples’ economic lives dominated the process: first, the regulation of unmarried cohabitation between same-sex partners with limited legal effects; second, registered unions with identical effects to marriage but under a different name;⁸ and third, registered unions with different effects from those granted to married couples.

I divided this paper into three sections. First, I provided the key concepts for this literature review. Second, I grouped the most similar cases together based on the criteria set in the previous section and described the different models adopted to legalize same-sex unions. Finally, I made some concluding remarks on the different views that held sway during the legal and regulatory reforms: (i) the traditionalists who demanded the exclusion of same-sex couples from certain traditional categories; (ii) the assimilationists who conformed to a “separate-but-equal” approach; and (iii) the queer liberationists aiming for the creation of new institutions able to embrace the characteristics of same-sex unions’ economic relations. In the end, I share the practical view that same-sex couples should find the best way to be recognized, even if that means walking the path of assimilation, as happened in most legal systems in the West. Once their relationships are state-sanctioned, it is for academics and activists to scrutinize the changes to laws on marriage and unmarried cohabitation needed to adequately reflect gay and lesbian couples’ economic lives.

⁷ See a much wider scope in the work carried out by Yun-Chang when analyzing 153 wealth transfer laws in Chang, Y. (2018). Wealth transfer laws in 153 jurisdictions: An empirical comparative law approach 103 *Iowa Law Rev.* 1915, 1941 (2018 (p. 1941)).

⁸ The expression formal unions refers to those couple relationships that require a public deed, public registry, or legally binding document to produce legal effects, such as marriage.

KEY IDEAS FOR THIS LITERATURE REVIEW

In this section, I specify the key concepts for this analysis. To begin, I borrow three categories described in scholarship from the 1990s and early 2000s and revisited in recent publications that frame the different discourses used by traditionalists, assimilationists, or so-called moderates, and queer liberationists regarding state recognition of same-sex couple relationships. These categories distinguish the different political agendas at play during the various reform processes and provide a way to classify how the first forms of same-sex union regulation dealt with the characteristics of homosexual couples’ economic ties.

I then delve into the legal concepts of unmarried cohabitation and formal unions different from marriage —like the registered partnership, the civil union or the *PACS*, among others— along with the economic effects that countries’ regulations traditionally produce for couple relationships, i.e., the property-sharing regimes, spousal support, and other economic benefits arising from family solidarity (e.g., a surviving spouse’s pension, spouse’s health protection, and spousal inheritance rights). This section analyzes the regulatory frameworks in relation to the different political agendas on same-sex couples’ recognition to see how these new institutions embodied (i) the exclusion of same-sex couples from certain traditional categories; (ii) a separate-but-equal approach; or (iii) the creation of new institutions able to embrace the characteristics of same-sex unions’ economic relations.

The opposing discourses on legal recognition of same-sex couples

Yuvraj Joshi (2012) described two opposing movements inside the lesbian and gay activist community that participated in the legal and judicial reform in the United States that led to same-sex couples’ recognition: gay conservatives and queer liberationists (p. 417). This distinction separates those movements that sought access to the same institutions that heterosexuals had from others that pursued different forms of regulation that would prevent the patriarchal gender role structures of marriage and other associated implications from being extended to them (Cooper, 2001, pp. 74–75; Joshi, 2012, pp. 422–430).

Prior to Joshi’s reading, other scholars like William Eskridge, Janet Halley, and Paula Ettelbrick—who actively participated in the U.S. debate over same-sex marriage— described the different political opinions espoused, both by lesbian and gay activists and other social participants. They coincided in identifying three main views. First, the traditionalists who rejected any form of recognition for homosexual relationships. Second, a group of so-called moderates or assimilationists (where Joshi’s conservatives belonged) who relied on liberal principles to demand some form of state recognition, by extending the existing categories or creating new ones with

equivalent benefits. Finally, those who valued the acceptance of homosexual lifestyles but rejected certain notions associated with marriage, which includes Joshi’s queer liberationists (Eskridge, 2002, pp. 197-201; Ettelbrick, 2004, pp. 118-124; Halley, 2001, pp. 97-111). As Divina Cooper (2001) summarizes, some of the reasons for this rejection by liberationists include “the historically patriarchal function and property associations of marriage that made certain state-sanctioned institutions incapable of offering a route to liberation or equality” and the “sexual and cultural assimilation; the privileging of couples; the belief that marriage represents a misguided conception of how to create enduring kinship relations; the privatization of welfare within the couple, thus relieving the state of responsibility to support unemployed/elderly/disabled persons; and the belief that visibility will equal increased state surveillance, regulation and control (pp. 74-75).”

Although these three views were particularly relevant in the U.S. process that led to same-sex couples’ legal recognition in Alaska, Hawaii, and Vermont (Eskridge, 2002, pp. 14-82), they also appeared in other processes that occurred in most of the Western countries I analyzed. Of course, I am aware that each context had its specificities, but there are common aspects that prove useful to our purpose here. For instance, in Nordic states, there were lesbian feminist movements that rejected the idea of extending marriage-like institutions that would reproduce the notion of economic dependence that women and feminists had fought so hard to repeal during the 1970s. The mere idea of a state regulation that would resemble marriage was rejected by these Scandinavian lesbian feminists, particularly because they rejected the patriarchal structures of economic dependence underlying marriage law (Rydström, 2008, pp. 196-199).

As in the Scandinavian region, other European countries also had these opposing views among those who fought for the recognition of same-sex unions (Gambinno, 2013, p. 107). For instance, both discourses were present in the French political process leading to the *PACS*’ regulation. On the one side were scholars like Daniel Borrillo (2001B), for whom marriage should be open to all as neither sexual orientation nor sex itself could be the basis for preventing access to this institution and its benefits (pp. 487-489). That position resembles the view of U.S. assimilationists, who gave more importance to gaining access to a privileged status than to its implications in terms of reinforcing marriage and its social consequences. On the other side of the debate were lesbian and gay community movements like the *Front Homosexuel d’Action Revolutionnaire*, which fought heteronormativity and patriarchy inside traditional family law and other state-centered contexts (Martin and Théry, 2001, pp. 135-158; Sibalis, 2010, pp. 38-40). Some of these movements sought a different regulatory framework capable of recognizing the diverse lifestyles of those in the community without direct reference to heterosexual institutions like marriage (Martin, 2000, p. 5).

Regarding traditionalists, there were political groups in France, the Scandinavian countries, and other European countries like Spain, Germany, the Netherlands, and Belgium that fiercely opposed state recognition of same-sex unions. Other, more moderate groups neither shared homosexual lifestyles nor supported their couple relationships, but did support legal recognition of those unions based on neutral liberal principles like “equality, privacy, and autonomy” (Bamforth, 2001, pp. 35-45). Most of them, however, were more likely to support separate-but-equal regulations that maintained marriage as a heterosexual union while accepting that sexual orientation should not prevent a couple from having state recognition and enjoying the associated correlative rights.

My review of the legislative and legal proceedings held between 1989 and 2001 shows that these three opposing discourses played a part in the first reforms to incorporate same-sex couples into family law. As I have pointed out, these discourses varied depending on the context in which they occurred, but they also had common elements. While some groups (which Joshi calls gay conservatives in the U.S. context) sought formal recognition of their relationships akin to that of heterosexuals, using the idea of assimilation, other organizations (framed as queer liberals or liberationists)⁹ considered that extending marriage-like institutions would only impose their concepts on homosexual couple relationships, which might not fit their ways of life. Finally, there were traditionalists who embodied what Eskridge (2002) calls “the politics of preservation,” opposing any form of legal recognition of homosexual unions (p. 135). Identifying these different discourses at play in the recognition of same-sex couple relationships is necessary for assessing how they were reflected in the reform processes critically analyzed in this article.

Accordingly, the next subsection describes the family law institutions that traditionalists wanted to keep for heterosexual unions only, while assimilationists and liberationists were debating over how to adequately regulate homosexual couples’ relationships.

The regulatory frameworks for couple relationships and their economic effects

The modern state regulated marriage as the main institution that governed the family. Nevertheless, this legal institution had different purposes over time, and the very notion we associate with it is a modern one. Yuval Merin (2002) approaches this subject by exploring the relationship between the changes in family law through history and their influence or impact on the access of same-sex couples to marriage-like institutions and marriage itself. In his text, he states that marriage was not always related to the romantic love that we often attribute to the institution;

⁹ I use the term queer as employed by Yuvraj Joshi (2012) to describe identities and practices that do not conform to heteropatriarchal notions of gender and sexuality” (p. 416).

instead, for much of history, it was an instrument used to “consolidate land, money, and power, not sexual attraction” (p. 6). Later, with the influence of Christianity, marriage would also include the goal of procreation and child-rearing. However, most Western countries went through a process of secularization during the 18th century that transferred most of the matters concerning marriage to the state (pp. 5-7), “transforming marriage from a sacrament to a secular contract” (p. 6). Today, and most importantly for the modern state, marriage is “a secular, state-sanctioned, legally recognized, permanent and exclusive union between two equal individuals” (p. 7).¹⁰

Marriage, as previously described, was the only kind of couple relationship that Western countries recognized as offering a status and benefits that some might consider worth fighting for. Thus, any relationship, in whatever form, that did not comply with the rules of marriage remained outside the scope of the law. In this sense, heterosexual unmarried cohabitation —a long-lasting relationship between two individuals of the opposite sex who lived as a couple without being married— did not produce legal effects. Susana Espada (2007) offers a brief historical description of unmarried cohabitation in continental Europe, emphasizing the case of Spain from the time of Roman Law to the 1978 Spanish Constitution, which helps exemplify the state’s treatment of these *de facto* relationships (pp. 47-63). Similarly, Rebecca Probert (2012) describes the status of unmarried cohabitants in the common law legal tradition from 1600 to 2010, analyzing the treatment of these relationships in legal sources to elucidate the law’s attitude towards them over time (pp. 277-282; Lind, 2014, p. 644). Both authors coincide on the predominant lack of regulation of these factual relationships but also affirm that as unmarried cohabitation became a more prevalent reality, legal regulations appeared (Espada, 2007, p. 63; Lind, 2014, p. 651).

Making this historical and conceptual distinction between marriage and unmarried cohabitation becomes relevant for this study, precisely because same-sex couple relationships had access to unmarried cohabitation and marriage-like institutions during the early stages of state recognition. While some countries rejected the possibility of formalizing marriage for same-sex couples, they were willing to give unmarried cohabitants marriage-like benefits and obligations. Thus, some states —such as the Scandinavian countries, France, and the U.S. state of Vermont— created alternative formal unions with similar effects to those of marriage to regulate same-sex couple relationships (Eskridge, 2002, pp. 22-42, pp. 83-126; Nielsen, 1990, pp. 297-299). Other countries and jurisdictions where that type of regulation was difficult due to its similarity to

10 See for instance the legislation regulating marriage, its requirements, conditions of validity, grounds of nullity and grounds for divorce in the Canadian Civil Marriage Act (S.C. 2005, c. 33); Arts. 143-227, Civil Code (France).

marriage—such as some jurisdictions in Spain, Canada, at the national level and in some provinces and Belgium in the 1990s—opted to grant some legal effects to same-sex unmarried cohabitation, either through an express declaration made by the de facto partners or by extending such effects to the fact of cohabitation itself.

Some of the benefits deriving from the legal recognition of same-sex couples, whether through formal unions or unmarried cohabitation, were economic in nature. For instance, the mutual aid and support between members of the couple translated into the obligation to provide spousal support and the property-sharing regimes. Inside the civil law tradition, these economic regimes ranged from universal communities in which all property belonging to the spouses or partners, and property acquired during the union, belonged to both and had one administrator (traditionally the husband), to partnerships in which both members of the couple were administrators of the assets and gains obtained during the union (Acedo, 2013, pp. 143-191; Alarcón, 2005, pp. 10-29; Aramburo, 2019, pp. 329-332).¹¹ Canadian and English law as examples of the common law tradition do not provide default property regimes as in the civil law tradition. They consider spouses to have separate property during marriage and under regimes for unmarried cohabitation (common-law marriage¹²), but allocate under certain criteria the distribution of matrimonial property or its net value when the relationship ends (Alarcón, 2019, p. 66).¹³

Apart from the traditional legal consequences of recognized couple relationships, often reserved only for married couples, the state also grants a long list of benefits. Some examples are the surviving spouse pension, access to health care and social security for the partner or spouse, and joint tax statements and fees, among other privileges that encourage gaining access to such status. Many of these benefits motivated some gay and lesbian activists’ push for legal recognition of their relationships, while other movements—especially queer liberationists—rejected them for encouraging marriage-like economic dependence. These opposing agendas inform the critical analysis carried out in the next section; between assimilation and differentiation, the former prevailed in legal and judicial reforms that framed same-sex unions

11 There are several systems often described as matrimonial economic regimes (*régimes matrimoniaux*) that vary between universal communities, community property of movable and acquired assets, community of accrued gains, participation in the accrued gains, and separation of property.

12 Common-law marriage is the term used in common law jurisdictions such as Canada—with the exception of Quebec, where a civil law system exists—the United States, and England to refer to unmarried cohabitation.

13 See for instance Sections 4-16, The Family Law Act, R.S.O. 1990, Ch. F.3, Sections 37-41, The Matrimonial Proceedings and Property Act 1970, c. 45.

as heterosexual-like relationships morally and legally entitled to the same treatment as opposite-sex couple relationships.

EARLY STAGES OF SAME-SEX UNIONS

After describing the key concepts of this paper, in this section I address the early stages of the legal and regulatory reforms that recognized same-sex couple relationships, emphasizing the different economic effects of the unions adopted and the distinct positions of the groups mobilizing for and against such recognition in each jurisdiction. I use the expression “early stages” since I analyze the first regulations admitting these unions. From my review of these processes in the states studied, I propose three categories based on the discourses at play in achieving state recognition: traditionalists, assimilationists, and liberationists. The order I propose starts with countries that recognized a limited set of rights due to social pressure from traditional groups aiming to preserve the recognition of heterosexual couple relationships, and which therefore only offered certain economic benefits through forms of unmarried cohabitation. I then turn to those countries that enacted regulations creating a formal or registered union with the same set of economic effects as marriage, with a differentiated institution available for same-sex couples or available for all couples. Finally, I conclude with the case of German life partnerships and the French *PACS*, which instituted registered unions with a slightly differentiated economic regime.

The reform processes show variations regarding the economic effects of the recognized couple relationships adopted in each state. Some countries followed more traditionalist aims of preserving the *status quo*, while others created new registered unions with slightly differentiated rules from those of hegemonic marriage. Although some of the adopted regulations tried to offer a new set of rules capable of recognizing the particularities of same-sex unions, most of them extended all the economic effects of heterosexual marriage without considering their suitability to homosexual households. The following table specifies each state with the year of the reform, the three main political views that influenced the process, and to what extent I observed their influence concretized in the economic effects granted to each type of union.

Table. Comparative overview of early legal reforms and political views on the economic recognition of same-sex couples’ relationships

Year of the legal and regulatory reform	Countries and/or jurisdictions	Traditionalists	Assimilationists	Liberationists
June 7, 1989	Denmark	Registered Partnership	Registered Partnership	
April 30, 1993	Norway	Registered Partnership	Registered Partnership	
June 23, 1994	Sweden	Registered Partnership	Registered Partnership	
June 12, 1996	Iceland	Registered Partnership	Registered Partnership	
January 1, 1998	The Netherlands	Registered Partnership	Registered Partnership	
July 15, 1998	Spain – Catalunya	Stable Unmarried Unions (uniones estables no casadas)	Stable Unmarried Unions (uniones estables no casadas)	
November 23, 1998	Belgium	De Facto Union (Union de fait)	De Facto Union (Union de fait)	
April 26, 1999	Spain – Aragon	Stable Unmarried Couples (Parejas estables no casadas)	Stable Unmarried Couples (Parejas estables no casadas)	
April 26, 1999	Greenland	Registered Partnership	Registered Partnership	
November 15, 1999	France	Civil Solidarity Pacts (Pactes Civiles de Solidarité PACS)	Civil Solidarity Pacts (Pactes Civiles de Solidarité PACS)	Civil Solidarity Pacts (Pactes Civiles de Solidarité PACS)
June 29, 2000	Canada (Laws adopted by the Parliament of Canada and some provincial statutes)	Common-law marriage	Common-law marriage	
July 1, 2000	United States – Vermont	Civil Union	Civil Union	
February 16, 2001		Life Partnership (Lebenspartnerschaft)	Life Partnership (Lebenspartnerschaft)	Life Partnership (Lebenspartnerschaft)

Note. *A darker green means that the given political view had a stronger influence on the economic regime and the institution adopted in each process. All regulations were somehow influenced by traditionalist and assimilationist views. Only two of the regulations showed a slight departure from marriage law to include same-sex couples’ characteristics in the economic effects arising from such unions.

Source: own elaboration.

Limited recognition of same-sex unmarried cohabitation in Spain, Canada, and Belgium

This subsection analyzes the extension of certain economic benefits to same-sex unmarried cohabitants. Here I address the regulation of unmarried cohabitation for homosexual couples in Spain, Canada, and Belgium.¹⁴

Although the legal recognition of unmarried cohabitation was initially rejected for same-sex unions to ensure that only opposite-sex couples could enjoy certain legal benefits, eventually the reasoning in Spain, Canada, and Belgium was to provide some or all of the prerogatives of cohabitation to those who had equivalent commitments as a couple. Thus, they extended certain legal benefits granted to opposite-sex unmarried cohabitants to same-sex couples in stable relationships—without conferring full marriage benefits in either case (Glass and Kubasek, 2008, pp. 165-167).¹⁵

Traditionally, family law did not confer rights on unmarried cohabitants and instead privileged only married couples (Capote, 2000, pp. 12-22). This different treatment overlooked the fact that couples lacking a conventional tie, such as marriage, also engaged in long-lasting relationships very similar to those of married couples. Unmarried cohabitants also had reciprocal economic relations requiring legal recognition and protection to avoid injustices and ensure formal equality among diverse family forms (Lind, 2014). Aiming to address these needs for legal protection, some countries granted legal effects to unmarried cohabitation that is either formally declared by the *de facto* spouses or that lasts more than two to three years. In the beginning, this recognition benefited only opposite-sex couples (Richards, 2002, pp. 312-313). Spanish, Canadian, and Belgian law later coincided in extending legal recognition to same-sex *de facto* unions to ensure some protection for them while respecting the conservative demand to keep lesbians and gays away from marriage or marriage-like institutions.

Notably, the demands for such recognition were partly related to the economic benefits enjoyed by married couples, including spousal support, pensions, health care, and inheritance rights. These rights also included the possibility of claiming some sort of asset division at the

14 I acknowledge that Sweden, Norway, and Iceland first regulated same-sex unmarried cohabitation in the 1980s and early 1990s, but I chose to focus on the formal unions adopted during the 1990s in Nordic countries for this analysis. See the table of same-sex couples' recognition Eskridge (2002, p. 115).

15 Consult amendments to sections 42 to 65 of the Canada Pension Plan Act in Modernization of Benefits and Obligations Act [2000, c. 12] to extend rights to same-sex common-law partners and Law 15 of 1998 adopted by Catalunya's Chamber regulating stable same-sex couple relationships.

relationship’s termination or in the event of one partner’s death.¹⁶ Therefore, some countries found that by granting same-sex couples the status of unmarried cohabitants, they could ensure the protection of those unions without extending marriage. This extension of the status of unmarried cohabitants benefited some couples who did not have access before to any legal protection of their couple relationship. Yet it circumscribed all homosexual subjects to the category of “heterosexual-like” unmarried cohabitants, which from my perspective produced two consequences. First, all same-sex unmarried cohabitants had mutual support obligations with their partners, even if their relationships were not founded on economic dependence. Second, other kinds of relationships, like non-monogamous relationships that did not resemble “heterosexual-like” unions, were excluded.

Spain: As previously described, the justification for permitting same-sex cohabitants to enjoy the limited set of rights granted to de facto spouses obeyed the notion that homosexual couples were “just like” heterosexual ones, except for the sexual orientation of their members. Consequently, denying them access to the same rights would be discriminatory in nature as it implied differential treatment without justification. This idea of formal equality guided gay and lesbian movements in Spain in procuring legal recognition in some regions of the country. For instance, the Spanish regions of Catalunya and Aragon passed laws conferring the same rights granted to opposite-sex de facto couples on same-sex unmarried cohabitants (Capote, 2000, pp. 25-36).¹⁷

These regulations established the same economic and personal regimes for homosexual and heterosexual de facto couples (Espada, 2007B, p. 91). The legislation in Catalunya created two types of unions, one for opposite-sex couples and another for same-sex couples, but this distinction did not impact the economic rights of de facto spouses. Instead, the section referring to homosexual unions only ensured that all references to marriage were excluded, and it provided a specific set of rules concerning the requirements for the union’s validity. Spanish scholars have explained Aragon’s choice not to differentiate between same-sex and opposite-sex couples as Catalunya had by noting that before the 2005 introduction of same-sex marriage in Spain, marriage was considered constitutionally protected and its legal definition excluded same-sex unions (Talavera, 1998). Therefore, Aragon’s legislators deemed it unnecessary to create two different regimes to highlight the difference between same-sex couple relationships and marriage.

16 See for example these regulations: Article 29 of Law 15 of 1998 of Catalunya and Sections 42 to 65 of the Canadian Modernization of Benefits and Obligations Act, SC 2000, c 12.

17 See Law 15 of 1998 enacted by the Parliament of Catalunya and Law 6 of 1999 enacted by the Parliament of Aragon.

Indeed, Luis Capote Pérez (2000, p. 28) described that as Spanish law considered unmarried cohabitation to be a lower-status relationship, the economic effects were restricted to spousal support on a need and compensatory basis, and unless otherwise agreed, partners were considered to be separate in terms of property. Economic support among unmarried partners (de facto spouses) responded to the idea of an economic imbalance produced by the relationship (pp. 28, 30, 35). Underlying that approach, there is an anticipatory rule for protecting economic dependence. Yet this aspect of the regulation can be easily explained by the fact that the law did not distinguish greatly between same-sex and opposite-sex relationships and, therefore, protection of the caregiver role in traditional heterosexual families was required (Espada, 2007A, pp. 132-133).

Canada: In Canada, the legal recognition of gay and lesbian unions took place at both the national and subnational level before 2001.¹⁸ By that time, the Parliament of Canada had enacted the Modernization of Benefits and Obligations Act, which amended pieces of legislation to recognize same-sex couples, and several provinces had extended spousal or equivalent status to same-sex couples (Bailey, 2004, p. 162; Boyd and Young, 2003, pp. 763-765).¹⁹ Additionally, the Supreme Court of Canada in *M. v. H.* recognized that differential treatment between homosexual and heterosexual couples was unjustified on constitutional grounds.²⁰ On that basis, the provinces issued the first regulations extending the same cohabitational rights of opposite-sex couples to gay and lesbian unions. Therefore, the Canadian approach to regulation of same-sex unions, as Robert Leckey (2014) suggests, applied the notion of formal equality and assimilation to extend rights and benefits to those couples (pp. 5-11). Some family law rules on matrimonial property are often extended in common law provinces to unmarried cohabitants after a certain number of years of living together; therefore, after the provinces extended those benefits to homosexual common-law spouses, any differences concerning the economic lives of those

18 Section 2. m.v, vi of the Parenting and Support Act c.160 R.S. of N.S. 1989 of the Canadian Province of Nova Scotia; Pérez, supra note 47 at 47.

19 “Definition of Spouse Amendment Act, S.B.C., ch. 29 (1999); Definition of Spouse Amendment Act, S.B.C., ch. 24 (2000). Ontario enacted *An Act to Amend Certain Statutes Because of the Supreme Court of Canada’s Decision in M. v. H.*, S.O., ch. 6 (1999), which added “same-sex partners” to sixty-five pieces of legislation that referred to a “spouse”. Quebec amended twenty-eight statutes to grant same-sex couples the same benefits and obligations as opposite-sex common-law couples. *An Act to Amend Various Legislative Provisions Concerning De Facto Spouses*, S.Q., ch. 14 (1999). Nova Scotia extended the application of many statutory provisions that applied to opposite-sex common-law spouses to same-sex couples. *The Law Reform Act*, S.N.S., ch. 29 (2000), S.N.S. 2000, c. 29”. Boyd, S.B., & Young, C.F.L., (2003, p. 789).

20 *M v H* [1999] 2 SCR 3.

couples were obscured. Traditional dependence as embodied in marriage law was the default regime for same-sex couples as well.

The different economic relations that existed between same-sex partners in Canada before achieving formal equality were not part of the debate regarding their access to common-law marriage benefits. Instead, the Supreme Court’s approach in 1999 emphasized the similarities between same-sex and opposite-sex relationships. That clarified matters by affirming that a legal distinction was discriminatory and thus, unconstitutional.²¹

Belgium: Like other French-influenced legislative frameworks, Belgian family law was regulated by the 1804 French Civil Code that did not grant legal effects to unmarried cohabitation or homosexual unions. However, as *de facto* relationships became more common and courts recognized that some legal effects traditionally associated with marriage were exclusively benefiting opposite-sex couples, Belgium regulated unmarried cohabitation and allowed same-sex couples into the law.²² As Olivier De Schutter and Anne Weyembergh recall, on November 23, 1998, legislation was enacted creating “statutory cohabitation.” This law created what they called a “third way” between marriage and cohabitation, allowing same-sex and opposite-sex couples to declare their cohabitation, which in turn produced several legal effects: the protection of the shared residence and furniture, the presumption of *indivision*²³ when unmarried cohabitants were unable to prove that the property belonged to one of them only,²⁴ and joint liability for common debts.²⁵ Very similar to the case of Spain, the legislature chose to grant limited legal benefits to the declaration of unmarried cohabitation in order to establish a distinctive line between the relationships available to same-sex couples and heterosexual marriage (De Schutter and Weyembergh, 2001, pp. 466-467).

Unmarried cohabitants: “just like heterosexual couples”: An overview of regulations conferring unmarried cohabitant status on homosexual partners shows that rights were conferred mostly as if same-sex partners were “just like” heterosexual ones. The reasoning of courts and legislators seemed to be that queer subjects, by being capable of long-lasting cohabitation,

21 *M v H*, supra note 61.

22 Law of November 23, 1998 adding arts 1475-1479, Civil Code (Belgium).

23 In English, “community property” can be used to refer to the French term of *indivision* from section 1478 of the Belgian Civil Code. This terminology in Belgian law refers to a presumption that all acquisitions by unmarried cohabitants during their cohabitation belong to them both in equal parts.

24 Art 2, Law of November 23, 1998, adding art 1478, Civil Code (Belgium).

25 Art 2, Law of November 23, 1998, adding art 1477, Civil Code (Belgium).

should benefit from some, if not all, the same privileges that opposite-sex couples had. And distinctions in the law, such as the one adopted in Catalunya, did not respond to differences in the economic dynamics between homosexual and heterosexual couples, but rather reflected a traditional, religious discourse that aimed to make clear that same-sex unions were a far cry from marriage.

Formal or registered unions with economic effects equivalent to those of marriage adopted in Nordic states (Denmark, Sweden, Norway, Iceland, and Greenland), the Netherlands, and the U.S. state of Vermont

This subsection explores legal reforms that adopted civil or registered unions to confer legal recognition on same-sex couples. This phenomenon of legalizing homosexual unions through formal agreements began in Scandinavia and spread to some other countries in Western Europe. Crucially, the reform process in all these countries shows the importance of the different groups that mobilized and lobbied legislative authorities. Gay and lesbian collectives reached their goal of obtaining unions with legal effects for same-sex couple relationships. Nevertheless, the voices rejecting the fact that these legal effects mirrored those of marriage—maintaining patriarchy and dependence in economic relations—often went unheard.²⁶ The movement to achieve formal equality based its discourse on the idea of assimilation (Nielsen, 1990, p. 297), instead of promoting an agenda of substantive inclusion in family law.

Scandinavian countries were the first in the world to recognize same-sex unions in their family law (Rydström, 2008, p. 194). Hens Rydström analyzes how this process unfolded in Denmark, Sweden, and Norway and how it spread to Greenland and Iceland. His work also highlights the different roles played by gay and lesbian movements and the gender neutrality of those countries' family law regimes since the 1960s. He further addresses how groups mobilized and influenced parliamentary debates to achieve the adoption of registered partnership laws. Denmark, in 1989, was the first to pass a law regulating a form of civil union exclusively available to gay and lesbian couples (Digoix, 2020, p. 2; Rydström, 2008, p. 194).

As already mentioned, the Scandinavian process included opposing voices, mostly from feminist and lesbian groups, that rejected that the institution adopted to regulate same-sex couple relationships resemble marriage. They justified their opposition by pointing to feminist

²⁶ The discussions presented in this section highlight some voices from feminist, lesbian, and gay community movements in Denmark and France that opposed marriage-like regulations. These approaches failed to attain a legal framework that explicitly created an economic regime rejecting the traditional economic dependence embedded in marriage.

movements’ achievements in the 1970s, vindicating formal equality for women inside the family. For them, marriage perpetuated patriarchal structures of dominance and dependence, affecting a weaker party, which was often the woman. Although they accepted the importance of legal recognition of their unions, they argued against an institution that would maintain the roles of caregiver and breadwinner underlying marriage rules. Feminist movements opposed what the matrimonial economic regime tends to establish: “mutual economic responsibility” (Rydström, 2008, pp. 197-199).

In the end, Denmark,²⁷ Sweden,²⁸ and Norway²⁹ adopted different forms of registered partnerships open only to same-sex couples that resembled marriage in almost every aspect, including the matrimonial economic regimes that were largely extended (Nielsen, 1990, p. 301). Greenland, Iceland (Eskridge, 2002, p. 89), the Netherlands (Van de Burght, 2000, p. 81),³⁰ and the U.S. state of Vermont adopted similar laws for registered partnerships or civil unions that made express reference to the legal effects of marriage (Bailey, 2004, p. 161; Eskridge, 2002, pp. 43–127; Rydström, 2008, pp. 109–202). In the case of the Netherlands, for example, the matrimonial property regime was fully extended to registered partners; although they could opt out through a mutual agreement, the default regime imposed the matrimonial property regime, which assumes the equal division of assets at the relationship’s termination. When choosing an economic regime for registered partners, legislators did not create a different system but instead made express reference to the matrimonial regime regulated by the Dutch Civil Code (Borrillo, 2001a, p. 690; Van der Burght, 2000, pp. 84–91).

Formal unions, in the shadow of marriage law: An overview of the registered partnership laws and their reform processes confirms that different agendas and political proposals were at play during the legal reform that achieved a separate-but-equal regulatory framework. Assimilationist discourses gained more attention and acceptance for achieving legal recognition of same-sex couple relationships. In the Scandinavian case, regulations created exclusively for homosexual couples fully extended the financial regime of marriage to registered partners, overriding the objections of feminist and lesbian movements that rejected the dependence underlying marriage regimes. One way or another, these state-recognized couple relationships

27 Section 3.1. of the Danish Registered Partnership Act, June 7, 1989 (Denmark).

28 Section 5 of the Registered Partnership Act, June 23, 1994 (Sweden).

29 Section 3 of the Norwegian Act on Registered Partnership for Homosexual Couples, April 30, 1993 (Norway).

30 The Registered Partnership of the Netherlands was open to both same-sex and opposite-sex couples.

achieved the pragmatic aim of extending “marriage-like relationships” to homosexuals, using a different name to avoid offending traditional groups in society.

A slight departure from the economic effects of marriage: The case of Germany and France

This subsection describes the German and French experiences. Although the paths and results were quite different, they both achieved regulations that slightly departed from traditional marriage law. The three discourses analyzed played an important part in these processes, as I describe below.

Germany regulated life partnerships in 2001, exclusively for homosexual couples. Contrary to the path taken by Nordic countries, the German regime did not extend the full set of rules governing the economic effects of marriage to same-sex unions. Greg Taylor (2003) and Stephen Ross Levitt (2001) sustain that an equivalent regulation, or an express reference to marriage law, could have rendered the new legislation unconstitutional under article 6 of the Federal Constitution; this prompted legislators to draft a bill that would avert such an outcome if challenged before the Federal Constitutional Court (p. 578; p. 478). In analyzing the German reform, Taylor (2003) argues that the legislature assumed that homosexual couples’ economic relations were different from those of their heterosexual counterparts (597). First, same-sex couples would be likely to have dual income, and second —based on the presumption at the time that they would be unlikely to have children— it was presumed that neither member of the couple would have to stay at home to provide child care while the other worked outside the home to financially support the family. Thus, same-sex unions required a specific set of property rules designed for their case.

Indeed, the regulation provided in section 1 that same-sex partners had to define the rules as to their property prior to entering into a life partnership. They could either set their own regime or expressly declare that they wanted the application of marriage law (community of accrued gains) (Levitt, 2001, pp. 482-483). Married couples can also agree on a customized regime through a marital agreement, but if they fail to do so, a default regime is in place, as regulated in sections 1373 to 1390 of the German Civil Code. Outside of property-sharing rules, the German life partnership regulated mutual support between same-sex partners during and even after the relationship in similar terms to that of marriage (Schimmel and Heun, 2001, pp. 588-590). One difference, however, pointing to the notion of partners’ economic independence, rested on post-dissolution support where the legislations treat married spouses and life partners differently (Taylor, 2003, pp. 601-602).

“In the event of dissolution, a court is advised first to look to blood relatives to support the former partner, and then if this group of persons cannot support the relative or does not exist, the former partner’s ability to support will be considered”. “This approach is interesting because the rule is different from the provisions governing support after the dissolution of marriages. In the case of husband and wife after divorce, the court will consider first the husband’s or wife’s ability to pay support before burdening relatives” (Levitt, 2001, p. 473).

The German model took some distance from marriage law for two reasons. First, the German constitutional framework did not allow express references to marriage law. Second, according to Taylor (2003), German legislators took into account some presumed differences between same-sex and opposite-sex couples when drafting the new law (p. 592). Similar mobilizations to those seen in other countries also took place in Germany, since traditionalists (some members of Catholic and Christian political parties) accepted that gays and lesbians required the state’s legal protection, but they disagreed with recognizing their couple relationships because they sought to preserve the rule that only opposite-sex unions could receive such legal recognition (Levitt, 2001, p. 473). On the other side, both the Green and Social Democratic parties were in favor of regulating same-sex partnerships, and they did so after taking power in 1998. Among those in favor of regulating homosexual unions, some wanted to fully extend marriage rules, based on the premise of equality, while others, according to Taylor’s view (2003), wanted to advance legislation that they anticipated would be more suitable for same-sex couples (p. 597).

In the case of France, the French National Assembly adopted the *PACS* to incorporate same-sex couples into family law.³¹ As Claude Martin and Irène Théry (2001) explain, the mobilizations and lobbying in the National Assembly were crucially important for achieving regulations that produced legal effects for homosexual unions. French debates, however, mostly pitted the traditional concepts of family defended by conservative and Catholic political groups against progressive, gay, and lesbian collectives that were pushing for legal recognition of diverse families. Still, Martin and Théry highlight that inside the homosexual community, there seemed to be fragmented views (pp. 140-141).

Borrillo’s approach to the legal recognition of same-sex unions, for instance, showed a deep commitment to formal equality. He acknowledged in his defense of access to marriage, after the adoption of the *PACS*, that “such an institution was not equivalent to marriage, either in its form or in the rights it confers” (Borrillo, 2005, pp. 89-97). Legislative debates did not address equality between homosexual and heterosexual couples, but France did adopt a legal framework

31 Law No. 99-944 of November 15, 1999 (France).

available to both types of unions. From Borrillo’s viewpoint, the *PACS* resulted in a lower status for homosexual couples, who could not access marriage, and reflected a hierarchy wherein heterosexuality was deemed superior to and more legitimate than homosexuality. This approach obscured the differences between homosexual and heterosexual couples, aiming to put both sexualities on equal footing under the law—in other words, to attain formal equality.

It may be true that the *PACS* embraced formal equality since it was made available to same-sex and opposite-sex couples alike (Francoz-Terminal, 2011, pp. 488-489).³² However, it produced some different economic effects from those of marriage. According to Law 99-994 of November 15, 1999, partners under the *PACS* could opt out of the default property-sharing regime through a written agreement, but if they failed to do so, the law assumed joint possession of all assets (Francoz-Terminal, 2011, pp. 490-491). This rule differed from the community of property regime in the French Civil Code, which did not refer to joint possession but created a universal community of movables and assets purchased during the marriage.³³ Further, the *PACS* law established other economic effects more similar to marriage, such as mutual and material aid between the partners, joint income taxation, and joint liability for debts acquired for everyday life and shared household expenses (Richards, 2002, p. 317). These latter rules and those differing from the matrimonial property regime still maintained the assumption of property-sharing and mutual support that presupposes economic dependence between *PACS* partners, but with a higher degree of discretion.

According to Claude Martin, lesbian and gay movements promoting specific regulatory responses for homosexuals lost their fight for legislation exclusively available to homosexual couples, with the agenda for universal legislation achieving more mobilization and the *PACS*’ adoption (Martin, 2000, p. 5). This triumph explains why debates in the National Assembly did not delve extensively into the different economic dynamics seen in same-sex unions. Instead, the *PACS* defined the type of relationship that same-sex couples should have in order to be legally recognized in France in a way that could also fit heterosexual couples.

New avenues for couple’s relationships, same-sex unions’ contribution to family law: The German and French cases are different, considering that life partnerships were available only to same-sex couples, while the *PACS* regulation opened a new avenue for all couples in France. Notwithstanding this and other differences in the processes, these two countries slightly departed from traditional marriage law regarding property-sharing and maintained mutual aid

32 Article 515-1, Civil Code (France), added by Law 99-994 of November 15, 1999.

33 Arts 1401-1408, Civil Code (France).

and support. In truth, both regulations seemed to provide a higher level of discretion over the legal effects of couple relationships than what was offered to married spouses, while preserving some structures of interdependence in the regime. In these two cases, it seems that traditionalists kept the word marriage out of the reform, assimilationists gained almost all the ground by extending most of the legal effects of marriage, and liberationists had a small influence in widening same-sex couples’ discretion over the economic consequences for the property involved in these relationships.

CONCLUDING REMARKS

I began this article with the question of whether the reform processes regulating same-sex couple relationships considered their particularities when determining the economic effects arising from those legal unions. This analysis showed that assimilationist discourses prevailed for incorporating gay and lesbian couples into the law via the regulation of unmarried cohabitation and registered partnerships or civil unions between 1989 and 2001. These discourses based on formal equality ended up obscuring voices inside gay and lesbian movements that rejected the traditional notions of the family that perpetuated structures of economic dependence. As anticipated, this analysis also revealed a clash between two positions in the lesbian and gay community in the early stages of these reforms: one that sought legal recognition, even if that meant adapting to the heterosexual family model, and another that challenged family structures and sought to achieve a broader recognition that would include queer subjects’ identity and their economic dynamics in family law.

Unmarried cohabitation reforms through judicial decisions and legislative measures remedied a discriminatory distinction between same-sex and opposite-sex couples that required a change. This remedy, however, did not delve into same-sex couples’ economic lives to determine if the matrimonial property regime, or no property-sharing regime at all, would be suitable, or if any such regime should have certain flexibility when economic disparities between the partners were less likely to appear. Likewise, formal unions in Nordic countries and the Netherlands — despite awareness of some lesbian groups’ opposition to marriage law— considered that matrimonial property regimes and spousal support obligations could fit same-sex couples without contemplating empirical evidence of their financial lives. Finally, there is no evidence that the countries that opted to maintain some differences in the economic regimes —as with Spanish and Belgian unmarried cohabitation— based those differences on the lower likelihood of marriage-like economic dependence appearing in these new family forms. On the contrary, it seems that the aim was to maintain a distinction between same-sex unions and marriage as an institution solely for opposite-sex couples that should be preserved as such, according to traditional perspectives of the family.

The French *PACS* and German life partnership took a slightly different path that departed in some respects from marriage law regarding partners’ discretion over the effects on property. Yet mutual support as a characteristic of long-lasting couple relationships and the impermeability of heterosexually conceived marriage also influenced those legislations. In the end, the reforms that granted legal effects to same-sex couple relationships between 1989 and 2001 did not completely ignore the economic lives of same-sex couples when legalizing their unions, but did assume that all couple relationships resemble each other and behave in a way that fits the idealized regime of marriage. In addition, in the effort to pass new legislation, some jurisdictions considered the exercise of private autonomy in same-sex relationships, analyzed the impact of economic dependence, and maintained the exclusivity of marriage or marriage-like relationships as the institutions dominating family law.

Exploring these initial regulations’ economic effects pointed up some common features of both formal unions and unmarried cohabitation, like default regimes considering joint property or property-sharing, the equal division of assets at the relationship’s termination, mutual material support between the members of the couple, and joint liability for debts acquired for everyday life and shared home expenses that encouraged partners to engage in dependent economic relations. They thereby extended the traditional gendered roles of complementarity embedded in marriage, both legally and socially —meaning a breadwinner who provides the money for family maintenance and a caregiver who handles household tasks and often stays out of the job market— to regulated same-sex couple relationships.

It became clear that most systems opted for assimilationist strategies to achieve legal recognition, even if the institutions carried different names. Based on that, I share the perspective that rights need to find a way into legislation through social acceptability, as William Eskridge indicated in his *Equality Practice* book many years ago. In this case, this was done by presenting gays and lesbians as being “just like heterosexuals” in their ability to sustain a long-lasting couple relationship. After that achievement was made, it is for academics and activists to make visible the changes that these new actors effect within these institutions so that additional legal reforms can be implemented.

We as family law scholars should keep scrutinizing how same-sex families, now accepted in some of our countries’ laws, require different approaches to the scope of private autonomy and public ordering, given their economic lives and needs. We are aware that differences exist and that other approaches to legal reform played a role and should not be forgotten. Only in this way will we achieve substantive equality and make room in family law for other understandings that depart from the caregiver-breadwinner dichotomy traditionally based on gender. We must recognize that vulnerabilities and disparities in family settings are caused by multiple factors

applicable to all subjects in couple relationships, even if spouses are of the same sex. Acknowledging these features can help provide adequate legal interpretations that strengthen “the box” once made only for heterosexual couples, so that gay and lesbian couples’ realities can also fit in and can ultimately change “the box” itself.

To this end, future research should identify how the agendas seeking formal equality and those highlighting queer identities transformed as marriage itself became available to same-sex couples. This line of research should keep exploring whether critical discourses gained some space in analyzing economic understandings of couple relationships, or if marriage-like notions of conjugality maintained their predominance in the realm of family law.

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