

The Nordic Countries in the Vanguard of European Family Law

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The question that sets the theme for this celebratory volume of the Scandinavian Studies in Law is ‘What is Scandinavian Law’? As an attempt to partially answer that question in a slightly roundabout way, this article endeavours to identify fields of family law where specific and genuine Nordic influences in other, non-Nordic jurisdictions can be found. This has proved to be a more than worthwhile undertaking because despite not being centrally located in Europe, the Nordic countries arguably have played a central role in the development and shaping of family laws in Europe and indeed in what some believe to be an emerging European family law.

One could not only write a short article on this topic, but easily a book or two. Therefore it is necessary for the purposes of this article to focus on some of the many areas one could pick. The most striking example of Nordic influence is probably the recognition of same-sex relationships, and this will be dealt with in the first (and to some extent in the second) part of this article. The second part will look at the recognition of couples living in non-formalised relationships, usually referred to as cohabitants or cohabitees. This is another area where the legislation of the Nordic countries, and here Sweden in particular, has contributed and is contributing greatly to the ongoing debates in many European countries. Finally, the recognition of gender change will be looked at in the third part. While not obviously a problem at the heart of family law, it nevertheless is a crucial one for those involved. Not only has the possibility of physical and/or legal gender change created a new discussion and outlook on the importance of gender in family law, but we can see an actual European development in this area which once again was influenced or at least anticipated in the Nordic countries. Curiously, the pioneer in this field, Sweden, seems to have fallen behind the social, medical and legal developments in this area of law. This has led to a call for reforms and proposals have been made accordingly.

1 The Legal Recognition of Same-sex Relationships

1.1 *The First Steps Taken in Sweden*

In 1973, when in other countries homosexual conduct still was criminalised and prosecuted,¹ the committee on legal affairs (lagutskottet) of the Swedish Parliament (riksdag) declared that ‘from society’s point of view, cohabitation between two persons of the same sex is a perfectly acceptable form of family life’.² Given that until 1944 homosexual conduct had been prosecuted in Sweden,

1 It was only in 1981 that the European Court of Human Rights ruled in *Dudgeon v United Kingdom*, (1981) 4 E.H.R.R. 149 that sexuality was an essential part of anyone’s private life and a prohibition of homosexual conduct between consenting adults was a breach of Article 8 ECHR. Still, it took the further cases of *Norris v Ireland*, (1988) 13 E.H.R.R. 186 and *Modinos v Cyprus*, (1993) 16 E.H.R.R.) 485 for other countries to accept that Article 8 provided this protection for individuals. The discrimination of homosexuals nevertheless continued and continues, cf and *Sutherland v UK*, (1996) 22 E.H.R.R. CD182.

2 Lagutskottes betänkande (LU) 1973:20 i anledning av Kungs Majt:s proposition 1973:32 med förslag till lag om ändring i giftermålsbalken m.m., jämte motioner, p. 116. This was later referred to by Statens offentliga utredningar (SOU) 1984:63. Homosexuella och

this was quite a statement, but one that since has never been in doubt. This statement for the first time bestowed acceptance and legitimacy upon homosexual relationships, making it clear that discrimination based on sexual orientation was unacceptable in Sweden.³

In 1977/78 a commission was installed to investigate the position of homosexuals in society, and this commission published its report in 1984.⁴ The report concluded that while homosexual men and women were in many spheres of public life still being disadvantaged, the best way to deal with this was to extend the existing rules for heterosexual cohabitants to same-sex couples; this was done in 1987 and thus Sweden was the first country in the world to incorporate same-sex relationships into the family law system⁵ (see below 2.3). Only one member of the commission argued in favour of opening up marriage to same-sex couples,⁶ thus forecasting developments to come. Further, the possibility of creating some form of registration for same-sex couples to give them marriage-like rights and duties was contemplated and rejected.⁷

1.2 Denmark Introduces the Registered Partnership

At the same time the legal status of same-sex relationships was debated in Denmark. The Danish Parliament (folketing) in May 1984 passed a resolution stating that homosexual men and women must be given the possibility to live openly in society; therefore a commission was to look into proposals for ending any form of discrimination, including proposals for regulation of stable, long-term relationships.⁸ The Danish Ministry of Justice nominated such a commission, chaired by the former member of parliament, Poul Dam. This appointment must have been a controversial choice, because Dam as early as 1968 had created quite a stir by proposing a bill on 'long-term relationships and their dissolution'.⁹ According to this bill, couples, both opposite-sex and same-sex, were to be given the opportunity to register their relationship after three years of living together at the request of one of the partners¹⁰ to obtain the same

samhället. Betänkande av utredningen om homosexuellas situation i samhället, p. 87 f. For an overview of the development see Ytterberg, Hans, "From Society's Point of View, Cohabitation between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Life": A Swedish Story of Love and Legislation, in: Wintemute, Robert/Andenæs, Mads (eds.), *Legal Recognition of Same-Sex Partnerships: a Study of National, European and International Law*, Hart Publishing 2001, pp. 427 ff.

3 On the overall effect of this on the future development see Ytterberg (n. 2) pp. 428 f.

4 SOU 1984:63 (n. 2).

5 Cf. Widegren, Bo/Ytterberg, Hans, *Homosexuella sambor – inbörd och mottagande av en ny rättsfigur*, SvJT 1990, 491.

6 SOU 1984:63 (n. 2) p. 251.

7 Ibid, p. 91, 96, 99.

8 Cf. Betänkning 1127/1988, p. 7 and the account of the appointment of the commission at pp. 104 ff.

9 Lovforslag No. 35, Folketinget 1968-69, Blad no. 48.

10 So in effect the registration could have been effected against the express will of the other!

rights as married couples. The bill was not seriously considered at the time. However, the legal rules it suggested were the same as those being discussed in some countries today. Similar provisions, even without the requirement of registration, have become law in other countries such as New Zealand¹¹ and Slovenia.¹²

The Danish commission in its 1988 report presented a 'sketch' of an act on registered partnerships for same-sex couples. Interestingly, the commission in the end voted *against* proposing such legislation, by a very narrow margin of 6:5. The majority, including the chair Poul Dam, held that the necessity for such legislation had not been proved; the couples that needed the protection the most were those who would not opt for a registration anyway.¹³

Despite the recommendation of the majority not to do so, a bill was set forth by members of parliament¹⁴ in 1988, without further explanation or motives and simply referring to the vote of the minority of the commission. Surprisingly, the bill passed with a large majority¹⁵ and without much debate; only the Christian-conservative parties seriously opposed the bill.¹⁶

The main aim of the bill was to show society's acceptance and indeed approval of homosexual relationships, by allowing homosexual couples to choose a formal, legally recognised status.¹⁷ In doing so, Denmark was prepared

11 For an account of the New Zealand legislation see Jessep, Owen, *Legal Status of Cohabitants in Australia and New Zealand*, in: Scherpe, Jens M./Yassari, Nadjma (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck, Tübingen, 2005, pp. 528 ff., 542 ff.; Atkin, Bill, *The Rights of Married and Unmarried Couples in New Zealand – Radical New Laws on Property and Succession*, (2003) 15 *Child and Family Law Quarterly* 173 ff. and *The Challenge of Unmarried Cohabitation The New Zealand Response*, (2003) 37 *Family Law Quarterly* 303-325; Atkin, Bill/Parker, Wendy, *Relationship Property in New Zealand*, Butterworths, Wellington 2001. For a comparison with English law, see Miles, Jo, *Principle or pragmatism in ancillary relief?*, (2005) *International Journal of Law, Policy and the Family* (Special issue) 242 ff.

12 For an account of the Slovenian legislation see Rijavec, Vesna/Kraljić, Suzana, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, in: Scherpe/Yassari (n. 11), pp. 375 ff. and Kraljić, Suzana, *Consequences deriving from cohabitation-relations between partners and between parents and children*, in: Boele-Woelki, Katharina (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Antwerp 2003, pp. 339 ff.

13 Betænkning 1127/1988, pp. 125 ff.

14 Lovforslag No. L 117 and 118 til Lov om registreret partnerskab (22.11.1988).

15 71 for, 47 against, 5 abstentions. See Folketingets forhandling 1988-89, column 10840.

16 Cf MPs Inger Stilling Pedersen (Kristeligt Folkeparti [KRF]), Folketingets forhandling 1988-89, columns. 10473 f., 10476, 10826 und 10834-10836; Glønborg (KRF) *ibid*, column 10477 f.; Fischer (Konservative Folkeparti) *ibid*, column 10824 f.; Bjørn Elmquist (Venstre) *ibid*, column 10828 f., 10831; Kofod-Svendsen (KRF) *ibid*, column 10837 f.

17 See Betænkning 1127/1988, pp. 122 ff. and Lund-Andersen, Ingrid, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?*, in: Wintemute, Robert/Andenæs, Mads (n. 2) p. 418. Its main aim was not, as a German scholar stated wrongly, 'to combat the AIDS-disease by stabilising same-sex unions', cf Wacke, Andreas, *Die Registrierung homosexueller Partnerschaften in Dänemark*, FamRZ 1990, pp. 347 ff. (at 349). While this was mentioned in the deliberations, it was deemed to be of minor

to be the first and only country worldwide to offer such a formal legal regime for same-sex couples. This was a bold and courageous step at the time, and, we can say now, one that has undoubtedly achieved its aims, as the introduction of the registered partnership has led to a wide-ranging acceptance of homosexual relationships and lifestyles in general.¹⁸ In addition, it also has set an example for many other countries to follow. Indeed, it is a unique achievement and one that the Danish legislator can truly be proud of. Even members of the majority of the committee which in 1988 had voted against recommending such legislation, namely Poul Dam and Svend Danielsen, have now stated that in hindsight creating the registered partnership was the right step to take.¹⁹

The structure and content of the Danish Registered Partnership Act²⁰ of 1989 are elegant in their simplicity: instead of drafting a statute that determined the rights and duties of registered partners, the Registered Partnership Act only has 5 substantive sections. The technical approach is to simply refer to the provisions for married couples as a rule and then state the exceptions which were deemed necessary at the time, although by now these exceptions have vanished almost entirely. The key advantage of this approach – aside from its simplicity – is that while making clear that the two legal regimes are separate in principle, nevertheless it is apparent that the registered partnership is meant to be the *functional equivalent of marriage* for all intents and purposes (apart from the expressly listed exceptions). This not only means that a tedious listing of all the provisions applying to this legal regime is unnecessary, but there is also little doubt about the proper way to apply the legal rules. Their scope is well-known to practitioners and courts alike as they are the same that apply to marriage. In addition, the political message is clear: registered partnership is marriage in everything but name (again apart from the listed exceptions). This approach to regulating same-sex relationships has come to be known as ‘Nordic model’.

1.3 *The Other Nordic Countries Follow and the ‘Nordic Model’ is Created*

It is the ‘Nordic model’ and not the ‘Danish model’ because Denmark did not stand alone for long. Just four years later a very similar act was passed in

significance, see Nielsen, Linda, *Family Rights and the Registered Partnership in Denmark*, (1990) 4 Int. Journal of Law and the Family pp. 297 ff. (at 298).

18 See Lund-Andersen (n. 17) pp. 417 ff. and Dopffel, Peter/Scherpe Jens M., *Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder*, in: Basedow, Jürgen/ Hopt, Klaus J./Kötz, Hein/Dopffel, Peter (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, Mohr Siebeck Publishers, Tübingen 2000, pp. 12 ff.

19 As Svend Danielsen expressly stated in his lecture at the Fifth European Conference on Family Law, Civil Law aspects of emerging forms of registered partnerships on 15 March 1999 in The Hague.

20 Lov om registreret partnerskab. Originally act no. 372 of 7.6.1989. The act has been amended several times, the current act is no. 938 of 10 October 2005, as amended by act no. 500 of 6 June 2007.

Norway on 30 April 1993,²¹ albeit with much more controversy and by a much narrower margin.²² Sweden followed suit and in 1994 passed its own Registered Partnership Act.²³ Iceland passed its equivalent of the Registered Partnership Act in 1996.²⁴ Finland took quite a bit longer: the Finnish Registered Partnership Act was only passed in 2001.²⁵ By then all Nordic countries has a version of a registered partnership in place, and all of these more or less followed the approach Denmark had taken in 1989.

With the Danish act of 1989 the world had changed. From now on there was a country that provided a model, one that – as it turned out – worked and covered the needs of those same-sex couples that wanted to choose a legal framework for their relationship. Every other country contemplating regulating same-sex relationships now had a yardstick against which any suggested regulation would have to be measured. This secured considerable interest in and influence of the Danish Act and its application in practice. After the other Nordic countries gradually adopted similar legislation, the interest and influence naturally grew, as did the pressure on other jurisdictions to provide some sort of legislation for same-sex couples.

1.4 European Initiatives and Cases

In 1994 the European Parliament passed a ‘resolution on equal rights for homosexuals and lesbians in the EC’²⁶ in which the European Commission and the Member States were called upon to ensure equal treatment of all citizens irrespective of their sexual orientation; many other European initiatives followed. The Nordic model was always considered. In fact, it *had* to be considered. In the case of *Lisa Jacqueline Grant v South-West Trains Ltd*²⁷ same-sex relationships were first debated by the ECJ, but the Nordic model really was in the centre of the decision of 31 May 2001, *D and Kingdom of Sweden v Council of the European Union*.²⁸ In the case a Swedish national living in a registered partnership and working for the European Council claimed a household

21 Lov om registreret partnerskap, act no. 40 of 30.4.1993. For a brief description of the Act see Lødrup, Peter, *Registered Partnership in Norway*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 1994*, pp. 387 ff.

22 58 for and 40 against in the first chamber, the Odelsting, and 18 for and 16 against in the second chamber, the Lagting, cf *Forhandlinger i Odelstinget 1993*, pp. 495 ff., 451 and *Forhandlinger i Lagtinget 1993*, pp. 36 ff, 54.

23 Lag (1994:1117) om registrerat partnerskap. The votes in parliament were 171 for, 141 against, 5 abstentions and 36 absent.

24 Lög um staðfesta samvist of 12.6.1996 (Nr. 87). For a brief description of the Act see Björgvinsson, Davíð Þór, *General Principles and Recent Developments in Icelandic Family Law*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 1995*, pp. 215 ff.

25 Laki rekisteröidystä parisuhteesta/Lag om registrerat partnerskap no. 950 of 28.9.2001.

26 Official Journal of the European Communities no. C 61, 28.2.1994, p. 40, also (German) Bundestags-Drucksache 12/7069 of 10.3.1994.

27 Case C-249/96, 17.2.1998, [1998] 1 C.M.L.R. 993 = 1998] All E.R. (EC) 193.

28 Joined cases C-122/99 P und C-125/99 P, European Court Reports 2001, I-4319 = FamRZ 2001, 1053 ff.

allowance from his employer that was only given to married couples. In this he was supported not only by the Kingdom of Sweden but also by the Kingdoms of Denmark and the Netherlands as interveners. They all in principle claimed that the registered partnership was designed as the functional equivalent of marriage and hence, while the wording of the Staff Regulations did not expressly mention registered partnerships, the household allowance should nevertheless be paid to such couples. The ECJ felt that it could not re-interpret the term ‘marriage’ to include same-registered partnerships, especially since the legal regimes were regarded as distinct from marriage in the relevant member states.²⁹ Still, the ECJ stated that the legislature could change that and, for example, amend provisions of the Staff Regulations to include registered partnerships, despite that fact that so far it had not shown any intention to do so.³⁰ This changed quickly, though, and on 19 May 2003 an ‘Agreement in Council on the details of the new Staff Regulations for employees of the EU’ was announced by the Council, including the intention to give ‘allowances and insurance coverage for same-sex partnerships where there is no access to legal marriage’,³¹ which was subsequently enacted.

It was not only on the European level, but also on the national level, that the ‘Nordic Model’ exerted considerable influence. In the following, Germany and England & Wales will serve as examples to support that point.

1.5 The Nordic Influence on National Legislators

When Germany considered the legislation on the legal status of same-sex couples as a reaction to the abovementioned resolution by the European Parliament,³² the German Ministry of Justice asked the Max Planck Institute for Comparative and International Private Law in Hamburg for a comparative legal survey.³³ In this survey the Nordic countries naturally featured very prominently,³⁴ and the Max Planck Institute in the end expressly recommended

29 Ibid, paras. 36 f.

30 Ibid, para 38.

31 Press release 19.5.2003, reference: IP/03/710.

32 N. 26 above.

33 Subsequently published as Basedow, Jürgen/ Hopt, Klaus J./Kötz, Hein/Dopffel, Peter (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, Mohr Siebeck Publishers, Tübingen 2000. But even before this study, the registered partnership legislation of the Nordic countries had attracted academic interest, see for example for Germany Grib, Susanne, *Die gleichgeschlechtliche Partnerschaft im nordischen und deutschen Recht*, Ars Una Publishers, Neuwied 1996 and for Austria Verschraegen, Bea, *Gleichgeschlechtliche „Ehen“*, Medien und Recht Publishers, Vienna 1994.

34 Dopffel, Peter/Scherpe Jens M., *Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder*, in: Basedow et al. (n. 33) pp. 7-49, and the explanatory introduction by Kötz, Hein/Dopffel, Peter, *ibid*, pp. 1-4. For the Swiss equivalent see the report published by the Bundesamt für Justiz, *Die rechtliche Situation gleichgeschlechtlicher Paare im schweizerischen Recht*, June 1999, where in the comparative overview the Nordic countries are discussed on pp. 7 ff.

‘following the example of the Nordic countries’,³⁵ albeit possibly with modifications that the German legislator regarded as appropriate. Ultimately, for political reasons the German legislator did not quite follow that approach when introducing the German version of a registered partnership, the *eingetragene Lebenspartnerschaft*. Instead the *Lebenspartnerschaftsgesetz*³⁶ followed a different technique, in order to make it more obvious that this was a legal regime different from marriage. The approach chosen was not a general reference to the marriage provisions but rather an enumeration of the rules that should apply to same-sex couples. But despite the technical and some substantial differences, the result nevertheless emulates the Nordic one to a significant extent: a separate legal regime as functional equivalent to marriage with legal consequences very much akin to those of marriage. In the *travaux préparatoire* the Nordic Countries received considerable attention³⁷ and were certainly discussed extensively at the drafting stage. Curiously, in the debate there often was a reference to Norway and the apparently low numbers of people registering their partnership.³⁸ Opponents argued that the low numbers in Norway clearly indicated that there was no need for such a legal regime. Proponents on the other hand put forward that the numbers had to be put into perspective, given Norway’s population structure; further it was argued convincingly that this was not a question of numbers but one of general acceptance of same-sex relationships which also benefited those who did not register,³⁹ which – as described above with reference to Denmark⁴⁰ – proved to be correct, and as we shall see this was also utilised as an argument for law reform in England and Wales.

England and Wales took the same approach as Germany and created a rather bulky piece of legislation, the Civil Partnership Act 2004, which has 264 sections and 30 schedules.⁴¹ Again, the objective was to create a legal regime

35 See Dopffel, Peter/Kötz, Hein/Scherpe, Jens M., *Rechtsvergleichende Gesamtwürdigung und Empfehlungen*, in: Basedow et al. (n. 33) pp. 393-423, especially p. 422.

36 Gesetz über die Eingetragene Lebenspartnerschaft, enacted by the Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften of 16.02.2001, Bundesgesetzblatt I 2001, pp. 266 ff. of 22.02.2001. The statute as been amended subsequently in 2004 and 2005. For a brief description of the Act in English see Dethloff, Nina, *The Registered Partnership Act 2001*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 2002*, pp. 171 ff.; in German: Dethloff, Nina, *Die Eingetragene Lebenspartnerschaft - Ein neues familienrechtliches Institut*, NJW 2001, 2598 ff; Schwab, Dieter, *Eingetragene Lebenspartnerschaft - Ein Überblick*, FamRZ 2001, 385 ff; Schwab, Dietder (ed.), *Die Eingetragene Lebenspartnerschaft - Text, Amtliche Materialien, Abhandlungen*, Giesecking Publishers, Bielefeld 2002; Wellenhofer-Klein, Marina, *Die eingetragene Lebenspartnerschaft*, C.H.Beck, München 2003.

37 Cf Bundestags-Drucksache 14/3751, pp. 33 ff.

38 See the data given in Dopffel/Scherpe (n. 18) pp. 38 f.

39 Cf Scherpe, Jens M., *Gleichgeschlechtliche Lebensgemeinschaften in Norwegen und Deutschland*, in: Henningsen, Bernd (ed.), *Hundert Jahre deutsch-norwegische Begegnungen*, Berliner Wissenschafts-Verlag 2005, p. 119.

40 See above and Lund Andersen (n. 17) p. 418.

41 The Act also applies to Scotland (Part 3 of the Act) and Northern Ireland (Part 4 of the Act).

distinct from marriage, so a general reference to the provisions for married couples was seen as inopportune.⁴² The legislation was influenced to a considerable degree by ‘Northern European Models and by the Danish Civil Registration scheme in particular’,⁴³ which had been in place for a decade by the time the debate in England ensued. In 2001 the then Minister for Women and Equality, Barbara Roche, had given the task of looking into the issue of civil partnership legislation to the Women and Equality Unit at the Department for Trade and Industry. This unit published their report in 2003, recommending – principally along the lines of the Nordic model – a civil partnership scheme that would create a functional equivalent of marriage for same-sex couples,⁴⁴ a ‘marriage in everything but name’.⁴⁵ A significant aim of the proposed scheme was to effect a cultural change, a change of attitudes towards same-sex partners in general. When describing this aim, the paper expressly refers to Denmark, where there ‘is evidence that the Danish Registered Partnership Act passed in 1989 has changed attitudes towards lesbians, gay men and bisexual people in Denmark’.⁴⁶

The examples of Germany and England & Wales give clear evidence of the pioneering role that Denmark and subsequently the other Nordic countries have had in regulating formalised same-sex relationships. At the time of writing, the opening-up of marriage to same-sex couples is being debated in the Nordic countries,⁴⁷ and by the time this paper is published this may well be a reality. Here the Nordic countries might then follow the example of the Netherlands,⁴⁸

42 For a discussion of the context of the reform and genesis and scope of the Act in general see Woelke, Andrea (ed.), *Civil Partnership – Law and Practice*, London 2006, pp. 1 ff.; Harper, Mark/Downs, Martin/Landells Katherine/Wilson, Gerald (eds.), *Civil Partnership – The New Law*, Jordan Publishing, Bristol 2005, especially pp. 7 ff. and 24 ff.; Wood, Helen/Lush, Denzil/Bishop, David, *Cohabitation – Law, Practice and Precedents*, 3rd ed. Bristol 2005 and Welstead, Mary, *Reshaping Marriage and the Family – The Gender Recognition Act 2004 and the Civil Partnership Act 2004*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 2007*, pp. 185 ff.

43 Harper et. al (n. 42) pp. 26 (at 3.12) and 28 (at 3.18).

44 Women and Equality Unit at the Department for Trade and Industry, *Civil Partnership: A framework for the legal recognition of same-sex couples*, 2003.

45 Cf Sir Mark Potter P in *Wilkinson v Kitzinger and others* [2006] EWHC 2022 (Fam) [at 88] (‘marriage in all but name’) and Baroness Hale, *Homosexual Rights*, [2004] Child and Family Law Quarterly 125 (‘marriage in almost all but name’).

46 Women and Equality Unit at the Department for Trade and Industry (n. 44) p. 13, n. 2, citing an article by Ingrid Lund-Andersen (n. 17).

47 For Sweden see SOU 2007:17 Äktenskap för par med samma kön – Vigsselfrågor, which recommends opening up marriage for same-sex couples while at the same time abolishing the registered partnership; for Denmark see the Forslag (2006-07 B 76) til folketingsbeslutning om at indføre en ægteskabslovgivning, som ligestiller homoseksuelle med heteroseksuelle, a bill to open up marriage for same-sex couples, brought before Parliament (Folketinget) on 6.1.2007 by members of the Det Radikale Venstre-party; for Norway see Forslag om endringer i ektenskapsloven mv, Høringsnotat utgitt av Barne- og likestillingsdepartementet of May 2007. The author would like to thank Prof Dr Maarit Jänträ-Jareborg for information on these recent developments.

Belgium,⁴⁹ Spain,⁵⁰ Canada⁵¹ and South Africa⁵² – but, in a sense, completing a development that began in the Nordic Countries.

2 The Legal Recognition of Cohabitation Relationships

2.1 Cohabitation as a Social Fact

One of the great social trends in western countries is that more and more couples live together without being married. Cohabitation, still regarded as ‘sinful’ not too long ago, is increasingly becoming a normal fact of life if not the norm. The reasons for cohabiting are manifold, ranging from informed decisions against the legal consequences to indifference to or ignorance of these consequences. Some couples see cohabitation as an alternative to marriage (or registered partnerships), some as a ‘trial period’ that will eventually lead up to a more formalised family union, and for some cohabitation just ‘happens’ without any serious consideration of legal consequences. In any event, it is a fact that many children live in these relationships, sometimes joint children of the cohabitants but often also children from previous relationships with other partners.⁵³ Historically, the law’s basic attitude towards cohabitation relationships is best summarized by the famous quote by Napoléon: “*Les concubins ignorent la loi, la loi ignore donc les concubins*”.⁵⁴

48 See Boele-Woelki, Katharina, *Registered Partnership and Same-sex marriage in the Netherlands*, in: Boele-Woelki, Katharina/Fuchs, Angelika (eds.), *Legal Recognition of Same-Sex couples in Europe*, Intersentia Publishers, Antwerp 2003, pp. 41 ff. For an outline of the preparation of the act to open up marriage to same-sex couples and the discussions surrounding it, see Forder, Caroline, *To Marry or Not to Marry: That is the Question*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 2001*, pp. 301 ff.

49 See Pintens, Walter, *Entwicklungen im belgischen Familien- und Erbrecht*, FamRZ 2004, 1420 ff.; Pintens, Walter/Scherpe, Jens M., *Gleichgeschlechtliche Ehen in Belgien*, Das Standesamt – Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands (StAZ) 2003, 312-323.

50 See Ferrer Riba, Josep, *Same-sex Marriage, Express Divorce and Related Developments in Spanish Marriage Law*, 2006 *International Family Law Journal* 138 ff. and Martín-Casals/Ribot, Jordi, *Ehe und Scheidung in Spanien nach den Reformen von 2005*, FamRZ 2006, 1331 ff.

51 See Bailey, Martha, *Same-Sex Marriage and Faith-based Arbitration of Family Law Disputes*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 2007*, pp. 131 ff.; Bailey, Martha, *Resuscitating the Significance of Marriage*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 2005*, pp. 133 ff.; Bailey, Martha, *Children, Same-sex Marriage and Cohabitation*, in: Bainham, Andrew (ed.), *The International Survey of Family Law 2003*, pp. 81 ff.

52 See the Civil Union Act which came into effect on 30 November 2006.

53 In Sweden, Denmark, France and Slovenia some 40-50 % of all children are born outside of marriage, cf. the respective national reports by Ryrstedt, Lund-Andersen, Ferrand and Rijavec/Kraljić as well as the demographical survey by Kreyenfeld/Konietzka, all in: Scherpe, Jens M. /Yassari, Nadjma (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, Mohr Siebeck Publishers, Tübingen, 2005, pp. 415 ff., 455 ff., 211 ff., 375 ff. and 45 ff.

54 Sometimes also cited as "les concubins se passent de la loi, la loi se désintéresse d'eux".

2.2 *The Legislative Response to Cohabitation in Europe*

The statement of Napoléon is not true for today's legal world. In many countries we find legislation specifically for cohabitants, thus acknowledging the existence of this form of living together and its relevance for society. The legislation varies in extent. In many countries, Germany and England among them, there is no coherent legal regime for cohabitants. But even in those countries some statutes refer, or apply, to cohabitants,⁵⁵ moreover, in many court decisions the law had to take a stance towards cohabitation, often resorting to curious constructs⁵⁶ in order to arrive at just and fair results. Some countries, however, have a separate legal regime for cohabitation. In a number of countries some form of registration or contract is required for the legal rules to apply, some formal act.⁵⁷ Therefore these legal regimes can be referred to as 'formal cohabitation'.⁵⁸ In other countries no such formal procedure is required, the legal rules generally coming into effect when a certain set of facts applies. This can be referred to as 'informal' cohabitation.⁵⁹

These two ways of dealing with the legal 'problem' of cohabitation are fundamentally different. The insurmountable flaw for 'formal cohabitation' is that the rules inevitably only apply to those couples that have formalised their relationship. The legal situation of those who do not thus remains unchanged, and in all legal systems that have introduced 'formal cohabitation' we find additional rules for informal cohabitation. This in effect means that introducing rules for 'formal cohabitation' simply create another 'layer' of family law

55 For example in England *see* s. 36, 38 Family Law Act 1996 (there even is a definition of cohabitation in s. 62); s. 1(1)(ba), (1A), (1B) Inheritance (Provision for Family and Dependents) Act 1975; for Germany *see* § 563 II 4 BGB.

56 For England *see e.g.* *Pettitt v Pettitt* [1970] AC 777; *Gissing v Gissing* [1971] AC 886; *Lloyds Bank v Rosset* [1991] 1 AC 107; *Drake v Whipp* [1996] 1 FLR 826; *Oxley v Hiscock* [2005] Fam 211, 242-245 and most recently *Stack v Dowden*, [2007] UKHL 17; for a comprehensive summary of the current law of England and Wales *see* The Law Commission, *Consultation Paper No 179, Cohabitation: The Financial Consequences of relationship breakdown*, 2006, pp. 42 ff. and The Law Commission, *Report No 307, Cohabitation: The Financial Consequences of relationship breakdown*, 2007, pp. 17 ff. (both available at: "www.lawcom.gov.uk/cohabitation.htm").

For Germany *see e.g.* Martiny, Dieter, *Rechtsprobleme der nichtehelichen Lebensgemeinschaft während ihres Bestehens nach deutschem Recht*, Wellenhofer, Marina, *Rechtsprobleme bei Auflösung der nichtehelichen Lebensgemeinschaft – unter Lebenden und im Todesfall*, and Dethloff, Nina, *Nichteheliche Lebensgemeinschaft und Kinder*, all in: Scherpe/Yassari (n.53), pp. 79 ff., 101 ff., 137 ff.; for a comprehensive account *see* Grziwotz, Herbert/de Witt, Siegfried/Huffmann, Johann-Siegfried, *Nichteheliche Lebensgemeinschaft*, C.H.Beck, 3rd ed. Munich 2006.

57 In France, Belgium, the Netherlands there are 'formal cohabitation' regimes; for a description of those *see* the national reports by Ferrand, Pintens and Boele-Woelki/Schrama in: Scherpe/Yassari (n.53) pp. 211 ff., 277 ff., 307 ff.

58 Scherpe, Jens M., *The Legal Status of Cohabitants – Requirements for Legal Recognition*, in: Boele-Woelki, Katharina (ed.), *Common Core and Better Law in European Family Law*, Intersentia, Antwerp 2005, pp. 283 ff.; Scherpe, Jens M., *Protection of Partners of Informal Long-term Relationships*, *International Law FORUM du droit international* 7: 207-213, 2005.

59 *Ibid.*

rules,⁶⁰ as can be seen in the following diagrams depicting the basic structures of family law rules in some European countries:

A.

Marriage (opposite-sex couples only)	Registered / Civil Partnership (same-sex couples only)
Informal Cohabitation	
Cohabitation without legal effects	

Examples: *Nordic Countries*,⁶¹
Germany, England, Switzerland

B.

Marriage (both opposite- and same-sex couples)
Formal Cohabitation
Informal Cohabitation
Cohabitation without legal effects

Examples: *Netherlands, Belgium*

C.

Marriage	<i>No functional equivalent for same-sex couples</i>
Formal Cohabitation	
Informal Cohabitation	
Cohabitation without legal effects	

Example: *France*

D.

Marriage	<i>No functional equivalent for same-sex couples</i>
Informal Cohabitation	
Cohabitation without legal effects	

Example: *Portugal*

The main criticism against the regulation of ‘informal cohabitation’ is that this might violate the autonomy of the parties involved, as the rules are specifically designed to apply without an explicit declaration of will and hence possibly against the express wishes of the couple or at least one of the cohabitants. In short, had they wanted to formalise their relationship they would have married (or done the same-sex equivalent where marriage is not available to same-sex

60 Scherpe (n. 58) pp. 286 f.; Scherpe, Jens M., *Protection of Partners of Informal Long-term Relationships*, *International Law FORUM du droit international* 7: 207-213, 2005.

61 As noted above, there currently are plans to open up marriage to same-sex couples in some of the Nordic countries, *see* above 1.5, especially n. 47.

couples, i.e. registered their partnership). This assertion is, as I have written elsewhere,⁶² flawed for the following reasons:

First, although certainly there is not always an active (and mutual) choice not to marry, in some cases there may be. This then is both a *negative* choice (the couple or at least one of them chose not marry) and a *positive* choice (the couple chose to cohabit). This positive choice to cohabit can and should also have consequences. There is no reason why the negative choice should be more significant than the positive one, certainly not merely because some of these consequences will resemble those of marriage. With the decision to cohabit, particularly if it is long-term, comes the assumption of responsibility, and there is no logical reason why this assumption of responsibility should not have legal consequences.

Second, the autonomy of the parties can be safeguarded by allowing the couple to opt out of the consequences of cohabitation (i.e. to make an active negative choice) (an option that is available in, e.g., Sweden, Croatia, New Zealand and Slovenia and has been proposed by the Law Commission of England and Wales).⁶³ There is no obvious reason to assume that the couple have decided to avoid the consequences of cohabitation at the same time as taking the negative decision regarding marriage (or same-sex equivalent). In fact, making such an assumption could in some respects also be seen as infringing the autonomy rights of the parties.

Once again it was a Nordic country, Sweden, which took a pioneering role in the development of rules for cohabitation. This time, interestingly, the other Nordic countries did not follow this lead, but the Swedish legislation nevertheless had a profound impact on the development of legal rules in other European countries.

2.3 Sweden as the Paradigm for 'Informal Cohabitation'

Sweden was the first country to create a separate legal regime for cohabitants in 1987, but the first individual legal rules concerning cohabitants can be found as early as 1946.⁶⁴ Several later statutes also dealt with cohabitants, mainly in the area of tax law and social welfare. The first major piece of legislation specifically for cohabitants was the *Lag (1973:651) om ogifta samboendes gemensamma bostads* (Act on the joint dwelling of unmarried cohabitants), but its scope was rather limited. It concerned only certain forms of housing and who

62 Scherpe, Jens M., *Protection of Partners of Informal Long-term Relationships*, International Law FORUM du droit international 7: 207-213, 2005.

63 See the national reports by Ryrstedt, Hrabar, Jessep and Rijavec/Kraljić in: Scherpe/Yassari (n.53) and Hausmann, Rainer, *Einführung*, in: Hausmann, Rainer/Hohloch, Gerhard (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, Erich Schmidt Verlag, Bielefeld 2004, pp. 55 ff. and The Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Consultation Paper No. 179 (May 2006) and Report (Law Com No 307, July 2007), available at <http://www.lawcom.gov.uk/cohabitation.htm>.

64 *Lag om folkepensionering (1946:431) § 1* where a couple could be regarded as married for the purposes of the act if the lived together like a married couple for a relevant period of time, cf. Agell, *Åktenskap – Samboende – Partnerskap*, Iustus Förlag, Uppsala, 3rd ed. 2004, p. 228.

would have the right to occupy after separation, and did not deal with the property relations as such. Interestingly, at that point in time, only 6.5% of couples living together were unmarried cohabitants,⁶⁵ but nevertheless it was felt that the right to occupy the dwelling needed to be dealt with, particularly when there were children involved,⁶⁶ and the bill passed without much political resistance.⁶⁷

After considerable debate⁶⁸ in 1987 the *Lag (1987:232) om sambors gemensamma hem* (Cohabitees (Joint Homes) Act 1987), applying only to couples of the opposite sex, was adopted. Broadly speaking, the aim of the Act was to ensure that when the couple split up there would be an equal sharing/net value division of a limited category of property, namely the joint home and the household goods. Thus there is a clear distinction between the (rather limited) regime offered to cohabitants⁶⁹ and the legal rules applying to marriage.

Very shortly after the Cohabitees (Joint Homes) Act 1987 was passed, the *Lag (1987:813) om homosexuella sambor* extended these and other rights to same-sex couples.⁷⁰ This, as outlined above (1.1), was at first deemed to be sufficient for the legal relations of same-sex couples, but Sweden in 1994 then introduced the registered partnership, following the Danish and Norwegian example. The fact that cohabitants were dealt with in separate acts continued to be criticised⁷¹ and in 2003 both acts were replaced by the new *Sambolag (2003:376)* (Cohabitees Act 2003) which applies to both opposite-sex and same-sex couples.⁷²

65 See SOU 1972:41 Äktenskap och familj I, p. 45 and Ryrstedt, *Bodelning och bostad – Ekonomisk självständighet eller gemenskap*, Juristforlaget i Lund, 1999, p. 255.

66 See SOU 1972:41 Äktenskap och familj I and Prop. 1973:32. Ändringar I giftermålsbalken m.m.; for a short account see Ryrstedt (n. 65) pp. 255 ff.

67 Ryrstedt (n. 65) p. 257.

68 Cf SOU 1978:55 Att Sambo och gifta sig: fakta och föreställningar; SOU 1981:85 Äktenskapsbalk. Förslag av familjesakkunniga and Agell (n. 64) pp. 226 ff.

69 For a description of the legal rules, see Ryrstedt, *Legal Status of Cohabitants in Sweden*, in: Scherpe/Yassari (n.53) pp. 415 ff., Håkansson, Göran, *Die rechtliche Behandlung der nichtehelichen Lebensgemeinschaften in Schweden*, in: Blaurock, Uwe (ed.), *Entwicklungen im Recht der Familie und der außerehelichen Lebensgemeinschaften*, Alfred Metzner Verlag 1989, pp. 9 ff. and Ryrstedt, Eva, *Delning mellan sambor i Sverige – gällande rätt och föreslagna förändringar i ett komparativt perspektiv*, in: Numhauser-Henning, Ann (ed.), *Normativa perspektiv: festschrift till Anna Christensen*, pp. 375 ff.

70 For the underlying policies see SOU 1984:63 (n. 2) and Widegren, Bo/Ytterberg, Hans, *Homosexuella sambor – inbörd och mottagande av en ny rättsfigur*, SvJT 1990, 491 ff.

71 Cf Dir. 1997:75, utvärderingen av sambolagen m.m.

72 The new act did not change the substance of the law but was motivated by wanting to ensure equal treatment for opposite-sex and same-sex couples, cf. Prop. 2002/03:80 Ny Sambolag.

2.4 *Swedish Cohabitation Legislation as a Yardstick for European Legislators*

As the paradigm for legal rules for cohabitants that do not require a formal act (referred in this article as ‘informal’ cohabitation,⁷³ but also called ‘unregistered cohabitation’,⁷⁴ ‘Redress Model’ or ‘Safety Net System’,⁷⁵ or ‘Presumptive Scheme’⁷⁶) the Swedish legislation has proved to be a point of reference, if not a yardstick in both academic debates and law reform in Europe.

The fact that the Swedish legal rules in principle have been in place since 1987 and thus have been tested over time has made the legislation even more useful for this. Interestingly, the political debates and arguments in Sweden concerning the legislation are mirrored all over Europe where such legislation is now being debated. Recurring points are the relationship of such rules to those of marriage; the danger of creating an alternative to marriage, a so-called marriage-light; the fear that the institution of marriage might suffer permanent damage as couples will no longer marry if given another option;⁷⁷ the autonomy of the parties⁷⁸ etc. Much can be learned by studying the Swedish debates and the concerns raised – and which problems actually materialised after the legislation was in place. However, this needs to be done with care as admittedly the social and cultural circumstances make a comparison less than straightforward.⁷⁹ Nevertheless the ‘Swedish model’ has had considerable influence as a basis for debate and as an object of comparison, as can be seen for

73 See above 2.2 and references in n. 58.

74 *Options Paper, Presented by the Working Group on Domestic Partnership to the Tánaiste and Minister for Justice, Equality and Law Reform* (Ireland), 2006, pp. 30 f. (available at “www.justice.ie/en/JELR/Pages/Domestic_partnership_options_paper”).

75 The Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (LRC 82-2006), Dublin 2006, p. 21.

76 The Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees* (LRC CP 32-2004), Dublin 2004, p. 3.

77 Statistical evidence seems to indicate that cohabitation legislation has no relevant impact on marriage and divorce rates, cf. Kiernan, Ursula/Barlow, Anne/Merlo, Rosangela, *Cohabitation Law Reform and its Impact on Marriage: Evidence from Australia and Europe*, [2007] *International Family Law* 71 and Kiernan, Ursula/Barlow, Anne/Merlo, Rosangela, *Cohabitation Law Reform and its Impact on Marriage*, [2006] *Family Law* 1074. See also Prop. 2002/03:80 Ny Sambolag, p. 24; Ryrstedt (n. 69), p. 418.

78 On the autonomy point see Scherpe, Jens M., *Protection of Partners of Informal Long-term Relationships*, *International Law FORUM du droit international* 7: 207-213, 2005, esp. pp. 211 ff.

79 Take for example the question of maintenance: for many European legal systems, especially Germany, maintenance is an integral part of ancillary relief. In Sweden, however, maintenance after divorce is less readily granted; indeed the Äktenskapsbalk, chapter 6, s. 7(1) states that in principle each of the spouses is responsible for their own maintenance after divorce. Thus it is less surprising (if at all) that when it came to legal rules for cohabitants we do not find any that relate to maintenance. For a brief comparative overview of English, German and Nordic matrimonial property law rules, see Scherpe, Jens M., *Matrimonial Causes for Concern? A Comparative Analysis of Miller v Miller; McFarlane v McFarlane* [2006] *UKHL* 24, [2007] 18 *King’s Law Journal* (formerly *King’s College Law Journal*) 348 ff.

example in the Reports and Consultation Papers of the Irish Law Reform Commission⁸⁰ and the Law Commission of England and Wales,⁸¹ in the Irish Options Paper⁸² and comparative academic studies.⁸³

3 The Legal Recognition of Gender Change

3.1 Sweden Allows a Legal Change of Gender in 1972

In 1972 Sweden introduced its Lag (1972:119) om fastställande av könstillhörighet i vissa fall (Act on the determination of gender in certain cases).⁸⁴ For the legal recognition of a gender different from the one a person was genetically born with, there were a number of conditions. Firstly, the 1972 Act requires a person to have felt a sense of belonging to the other gender since his or her youth to have lived accordingly for quite some time (§1 (1)). Further, the person seeking a legal recognition of gender changed must be at least 18 years old and must be infertile, either because of an operation or by natural occurrence (§ 1 (2)). Finally, the gender recognition is only open to those who are unmarried⁸⁵ and Swedish nationals (§3). Some of these came under pressure as not only social acceptance but especially scientific knowledge of gender dysphoria advanced and a new lag om ändring av könstillhörighet (Gender Recognition Act), taking into these developments, has been proposed⁸⁶ (see below 3.3).

While some of the provisions of the 1972 Act, which still is in force, seem somewhat outdated, one must not forget that it was the world's first national law regulating the civil status change for transsexuals⁸⁷ and thus a truly remarkable, pioneering work for its time. Once again a piece of legislation from the Nordic countries was the first of its kind and the template for all other regulation of that

80 Sweden here is mentioned in The Law Reform Commission (n. 75) pp. 22, 42 ff. and The Law Reform Commission (n. 76) pp. 4 and 20. The Swedish model was also discussed frequently in the meetings of the Legal Advisory Group for the project of which the author of this article was a member.

81 Sweden is referred to in The Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Consultation Paper No. 179 (May 2006) on pp. 108, 131 f., 145, 147, 242 f., 248, 256, 267, 272, 283, 288, 297 and 302 and Report (Law Com No 307, July 2007) on pp. 2, 47, 65, 70, 107 and 139, both available at "www.lawcom.gov.uk/cohabitation.htm".

82 The Options Paper (n. 74) mentions Sweden on pp. 31 ff.

83 Cf. Scherpe, Jens M., *Rechtsvergleichende Gesamtwürdigung – Empfehlungen zur Rechtsstellung nichtehelicher Lebensgemeinschaften*, in: Scherpe/Yassari (n.53), pp. 571 ff. and references in n. 58.

84 Though the Act has been amended several times (Lag 1975:737; Lag 1980:214; Lag 1991:514; Lag 1993:1285; Lag 1995:23), the principal provisions have remained largely unchanged.

85 Or registered partners after the Registered Partnership Act came into force.

86 See SOU 2007:16 Ändrad könstillhörighet – förslag till ny lag.

87 See Prop. 1972:6, pp. 26 and 52.

legal area that followed⁸⁸. Some of those statutes will briefly be described in the following.

3.2 *Other Countries Follow Sweden's Lead – and Overtake it*

Until 1980, when Germany decided to introduce the *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen* (*Transsexuellengesetz – TSG*),⁸⁹ Sweden stood alone in Europe in having an Act on recognition of gender change. The Act was controversial in Germany and the debate fraught with misapprehensions; for example, the Bundesrat criticised and opposed the bill, stating that ‘transsexualism could not sufficiently be distinguished from other phenomena such as homosexuality and transvestitism’ (!).⁹⁰

3.2.1 **Germany - 1980**

It is unsurprising that the German legislator looked towards Sweden for guidance, as can be seen from the fact that the parliamentary materials expressly refer to Sweden,⁹¹ and that the Act shows a clear resemblance to the Swedish one.⁹² Yet, the requirements for recognition of the legal change of gender were somewhat more restrictive than in Sweden: the age limit was 25,⁹³ the person needed to have lived for three years according to the perceived gender and have German nationality,⁹⁴ had to be unmarried and without the physical ability to procreate and a sex-change operation must have been performed.⁹⁵ Several of these conditions have been challenged successfully in the German Constitutional Court (Bundesverfassungsgericht). Most notably, the age limit of 25 years was held to be violating Art. 3 (principle of equality) of the Basic Law (Grundgesetz (GG), the German Constitution)⁹⁶ and thus an age limit no longer exists.

88 Cf also Will, Michael, *Geburt eines Menschenrechts – Geschlechtsidentität im europäischen Recht*, in: Lüke, Gerhard/Ress, Georg/Will, Michael (ed.), *Rechtsvergleichung, Europarecht und Staatenintegration, Gedächtnisschrift für Léontin-Jean Constantinesco*, Carl Heymanns Verlag Köln 1983, pp. 911 ff., noting the importance of the Swedish Act for the further development on p. 917.

89 Bundesgesetzblatt I 1980, p. 1654

90 Bundestags-Drucksache 8/2947, p. 18.

91 Bundestags-Drucksache 8/2947, p. 10. As was also pointed out, other countries only had an administrative practice or singular court decisions concerning this matter (ibid, pp. 9-11).

92 For an account of the development leading up to the German act see Will (n. 88) pp. 917 ff. For a report on the first years of the act see Pfäfflin, Friedemann, *Fünf Jahre Transsexuellengesetz – Eine Zwischenbilanz*, StAZ 1986, pp. 199 ff.

93 After considerable discussion, cf. Bundestags-Drucksache 8/2947, p. 20, Bundesrats-Drucksache 329/80, p. 7, Bundesrats-Drucksache 426/80, p. 1.

94 With some exceptions for persons without a nationality and refugees etc., see § 1 (1) No. 1 TSG.

95 Although a change of name can be affected without the need for such an operation (so-called “Kleine Lösung”).

96 See Bundesverfassungsgericht 16.3.1982 (1 BvR 938/81), BVerfGE 60, 123 ff. and Bundesverfassungsgericht 26.1.1993 (1 BvL 38, 40, 43/92), BVerfGE 88, 87 ff. = Bundesgesetzblatt 1993 I, p. 326.

Recently another condition, the limitation to German citizens, has been found to be unconstitutional. The Bundesverfassungsgericht held that such a limitation is a violation of Art. 3 (1) 1 GG) in conjunction with Art. 2 (1) in conjunction with Art. 1 (1) GG.⁹⁷ The court in this decision in principle followed expertise that the Max Planck Institute for Comparative and International Private Law had delivered in the proceedings,⁹⁸ the Max Planck Institute also suggested that the restriction constitutes a breach of the ECHR.⁹⁹ How the TSG will be changed after this latest decision is currently under debate.¹⁰⁰

3.2.2 Italy – 1982

Italy introduced its *Norme in materia di rettificazione di attribuzione di sesso* (Act concerning the correction of gender assignment)¹⁰¹ in 1982.¹⁰² Interestingly, the Italian act does not stipulate any requirement as to the nationality of the person applying for a legal recognition of gender change, and therefore the general conflict of laws rules are applicable.¹⁰³ These define that principally the law of the nationality of the applicant determines the applicable rules. In the lead decision by the *Tribunale di Milano*¹⁰⁴ it was held that should the law of nationality not allow a change of gender, then this constituted a breach of the Italian order public and hence Italian law was applicable. This meant that effectively also people of foreign nationality can successfully apply for a legal change of gender in Italy.

97 Bundesverfassungsgericht 18.7.2006 (1 BvL 1/04 – 1 BvL 12/04), FamRZ 2006, 1818; case comments by Roth, Markus, StAZ 2007, 17 and Scherpe, Jens M., FamRZ 2007, 271. Cf also the analysis by Röthel, Anne, *Inländerprivilegien und Grundrechtsschutz der Transsexualität: Gleichwertigkeit von Staatsangehörigkeits- und Aufenthaltsanknüpfung*, IPrax 2007, 204.

98 The expertise is published as Basedow, Jürgen/Scherpe, Jens M. (eds.), *Transsexualität, Staatsangehörigkeit und internationales Privatrecht*, Mohr Siebeck, 2004.

99 Ibid, pp. 153 ff,

100 See Bundestags-Drucksache 16/5445 and the proposals by Basedow/Scherpe, *Alternativen zur bestehenden Regelung*, in: Basedow/Scherpe (n. 98) and in the case commentaries by Roth, Markus, StAZ 2007, 17 and Scherpe, Jens M., FamRZ 2007, 271.

101 Legge 14 aprile 1982, n. 164, Gazzetta Ufficiale n. 106, del 19 aprile 1982, p. 2879.

102 For a description of the act and its history see Patti, Salvatore/Will, Michael R, *Mutamento di sesso e tutela della persona – Saggi di diritto civile e comparato*, 1986, pp. 17-39; Patti, Salvatore/Will, Michael R., *La „Rettificazione di attribuzione di sesso“: Prime considerazioni*, Rivista di diritto civile 1982, II, 729-762, 729 ff.; Will (n. 88) pp. 929 ff.; Vecchi, Paolo Maria, *Der Transsexualismus im deutschen und italienischen Recht – Eine rechtsvergleichende Untersuchung des deutschen und italienischen Gesetzes*, 1991.

103 See Wagner, Stephan, *Italien*, in: Basedow/Scherpe (n. 98) pp. 42 ff.

104 Tribunale di Milano Sez. IX, 17 July 2000, Famiglia e Diritto (2000), 608 ff. See also Tribunale di Milano, 14 July 1997, Rivista di diritto internazionale privato e processuale 1998, 508.

3.2.3 The Netherlands – 1985

The Netherlands amended their Nieuw Burgerlijk Wetboek (NBW, Civil Code) in 1985 to allow for a legal change of gender.¹⁰⁵ The prerequisites now laid down in Art. 28-28c NBW are somewhat similar to the Swedish ones and include, inter alia, that the applicant needs to be sterile and must have undergone surgery as far as that is medically and psychologically feasible. An earlier condition that the applicant needed to be unmarried was deleted when marriage was opened up to same-sex couples in 2001. Foreign nationals can apply for a legal gender change if they reside in the Netherlands legally and have lived in the Netherlands for at least one year before the application (Art. 28(3) NBW).¹⁰⁶

3.2.4 Other countries follow

Other countries followed, for example Turkey in 1988 adopted an Act for gender recognition, which has subsequently been amended.¹⁰⁷ However, in a number of jurisdictions there is no specific legislation for a legal change of gender, but it is affected by administrative measures etc.¹⁰⁸

Sweden's neighbour Finland enacted its legislation on legal change of gender in 2002,¹⁰⁹ 30 years after Sweden. Interestingly, Finland's act differs from the Swedish one in a number of aspects, namely the requirements for the recognition of gender change. This can be explained by scientific progress and also the experiences that other countries, and especially Sweden, had had at that point. The age limit is fixed at 18 (§ 1 Nr. 2) and there is no need to be a Finnish

105 Affected by the *Wet houdende nadere regelen ten behoeve van transseksuelen omtrent het wijzigen van de vermelding van de kunne in de akte van geboorte* of 14 April 1985. Originally the provisions were Art. 29a-29d; for a German translation and comment of the old provisions see Breemhaar, Willem, *Das niederländische Transsexuellengesetz*, StAZ 1986, 204 ff.

106 Cf Metzger, Axel, *Niederlande*, in: Basedow/Scherpe (n. 98) pp. 48 f. and d'Oliveira, Jessurun, *Transsexualität im internationalen Personenrecht*, IPRax 1987, 189 ff.

107 For the original Act see Will, Michael, *Die Sängerin im Zivilgesetzbuch – Zum neuen türkischen Transsexuellengesetz*, in: Pfister, Bernhard/Will, Michael (eds.), Festschrift für Werner Lorenz zum 70. Geburtstag, Mohr Siebeck Tübingen 1991, pp. 825 ff. For the amended act see Will, Michael, *Das Gespenst im Zivilgesetzbuch – Zum neuesten türkischen Transsexuellengesetz*, in: Mansel, Heinz Peter et al. (eds.), Festschrift für Erik Jayme, Selleier European Law Publishers 2004, pp. 1625 ff.; Will, Michael, *Allah Kimseyi Hekime, Hakime Muhtaç Etmesin! Das Menschenrecht auf Geschlechtsidentität im Normenwirrwarr: Türkei und Finnland – Pioniere im Europäischen Familienrecht*, in: Festschrift Kalpsüz (Prof. Dr. Turgut Kapsüz'e Armağan), Ankara 2003, pp. 741 ff.; Atamer, Yeşim, *Türkei*, in: Basedow/Scherpe (n. 98) pp. 74 ff.

108 Cf. for example the national reports on Austria (by Markus Roth), France (by Hans-Jürgen Puttfarcken and Judith Schnier), Switzerland (by Hans-Christoph Voigt), Spain (by Christian Eckl) and Belgium (by Walter Pintens) in: Basedow/Scherpe (n. 98). Belgium and Spain have since passed new legislation on the matter, see Pintens, Walter, *Belgisches Familien- und Erbrecht 2006-2007*, FamRZ 2007 1491, 1493 and Ferrer i Riba, Josep, *Neueste Entwicklungen im spanischen Personen- und Familienrecht in den Jahren 2006-2007*, FamRZ 2007, 1513, 1514 f.

109 For a description of the act and its genesis see Will (n. 107) pp. 757 ff. and Pimenoff, Veronica/Will, Michael, *Zum finnischen Transsexuellengesetz*, StAZ 2003, 71 ff. (with a German translation of the act on p. 90 f.).

national – residency in Finland suffices (§ 1 Nr. 4). Further it is possible for persons who are married or in a registered partnership to effect a legal gender change if the spouse or partner consents. In that case the marriage is converted to a registered partnership or vice versa. Thus, in many ways the Finnish Act represents the new paradigm for an act on legal change of gender.

3.2.5 The European courts

It was not only on the national level, but also on the international and European level that significant developments took place. It is interesting to note that as early as 1989 the European Parliament passed a “Resolution on discrimination against transsexuals”.¹¹⁰ The International Commission on Civil Status (ICCS) “Convention no. 29 on the recognition of decisions recording a sex reassignment” of 12.9.2002 has been signed by a few countries but has not been ratified. Nevertheless, the European developments, and especially the decisions by the European courts, had and continue to have a significant impact on those states that did not allow a legal change of gender, notably the United Kingdom (see below). Therefore they need to be mentioned briefly here,¹¹¹ but space precludes a detailed discussion.

The ECJ held in *P./S. und Cornwall City Council*¹¹² that a discrimination because of gender change constituted a discrimination based on gender. In the ECtHR there were a number of cases concerning transsexuality and legal change of gender,¹¹³ culminating in the *Goodwin* decision,¹¹⁴ where it was finally held that the United Kingdom was in breach of Articles 8 and 12 ECHR by not allowing a legal change of gender.

3.2.6 United Kingdom – 2004

This resulted in the House of Lords in *Bellinger v Bellinger*¹¹⁵ declaring the current English law to be incompatible with the ECHR. This prompted Parliament to pass the Gender Recognition Act 2004,¹¹⁶ one of the most progressive and liberal statutes on the legal recognition of gender change. While the Act requires a minimum age of 18, it is not limited to persons with a specific nationality or residence. Further, legal change of gender does not require

110 Official Journal of the European Communities no. C 256/33 of 9.10.1989.

111 For an outline see Basedow, Jürgen/Scherpe, Jens M., *Das europäische Recht*, in: Basedow/Scherpe (n. 98) pp. 153 ff.

112 Case C-13/94, Official Journal of the European Communities no. C 197/2 of 06.07.1996 = European Court Reports 1996, p. I-2143 = [1996] All E.R. (EC) 397 = Neue Juristische Wochenschrift 1996, 2421 f. See also ECJ case C-117/01, *KB v. National Health Service Pensions Agency and Another*, Official Journal of the European Communities no. C 47/3 of 21.02.2004 = [2004] All E.R. (EC) 1089.

113 *Rees v. United Kingdom* (1987) 9 E.H.R.R. 56; *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622; *X, Y and Z v. United Kingdom* (1997) 24 E.H.R.R. 143; *Sheffield and Horsham v. United Kingdom* (1999) 27 E.H.R.R. 163 ECHR.

114 *Goodwin v. United Kingdom* (2002) 35 E.H.R.R. 18.

115 [2003] 2 A.C. 467.

116 See Welstead (n. 42).

infertility or a physical operation or hormonal treatment. This in effect means that – just like in the Netherlands in special cases – it is possible that a person who legally is a man can give birth to a child. It also means that the same person can legally be the mother of one child (having given birth before the legal gender change) and the father of another (by virtue of the partner conceiving a child by artificial reproduction techniques¹¹⁷). How these legal riddles are solved remains to be seen. Further a married person or someone living in a civil partnership can apply for a gender recognition certificate but will only be awarded an interim one as long as the marriage/civil partnership is not dissolved or annulled.¹¹⁸ The issue of an interim certificate can serve as a ground for annulment according to s. 12(g) Matrimonial Causes Act 1973 or s. 50(1)(d) Civil Partnership Act 2004.

3.3 *Legal Reforms - Sweden on its Way Back to the Top Flight?*

Sweden was the first country to legislate on legal gender change and thus set frame of reference. As already stated, it was a pioneering piece of legislation, drafted at a time when little was known about gender dysphoria and Sweden stood alone in having such rules. One must not forget this when judging the *Lag (1972:119) om fastställande av könstillhörighet i vissa fall* by today's standards. Indeed the limits imposed (age, unmarried status, infertility, Swedish nationality) were probably sensible at the time, and other early legislation like the German one actually contained comparable ones. Because of medical and societal progress the legislation passed in other countries is decidedly more liberal than the Swedish Act of 1972 or the original German Act of 1980. In Germany, this has (as described) led to successful constitutional challenges, forcing change or reform as to nationality and minimum age. Likewise the United Kingdom was forced into reform by the decisions in *Goodwin v United Kingdom*¹¹⁹ and *Bellinger v Bellinger*.¹²⁰ So it is true to say that Sweden has been surpassed by other countries.

This now has been realised and the development of this area of law has sparked a reform debate in Sweden, which in 2007 resulted in the publication of a comprehensive report including a bill.¹²¹ The very thorough report includes not only an abundance of medical findings but also a lot of comparative material; it continuously refers to the legislation of the countries mentioned above and the legal situation in countries which do not have specific legislation but rather an administrative practice (e.g. Denmark, Iceland and Norway).

In order to modernise the Swedish law, the report advocates a liberalisation of the requirements for legal recognition of a gender change in general and thus

117 Cf. the Human Fertilisation and Embryology Act 1990, s. 28.

118 Cf. ss. 4, 5 of the Gender Recognition Act 2004.

119 (2002) 35 E.H.R.R. 18.

120 [2003] 2 A.C. 467.

121 Betänkande av Könstillhörighetsutredningen, Ändrad könstillhörighet – förslag till ny lag, SOU 2007:16. The author would like to thank Associate Professor Margareta Brattström, Uppsala Universitet, and Hovrättslagman Lars Göran Abelson for the helpful discussion of some issues.

bring them into line with the international development. There will no longer be a requirement to be unmarried or not a registered partner.¹²² If, however, the applicant is married or living in registered partnership, a legal change of gender cannot be affected unless the spouse or partner consents to their legal relationship being converted into one that fits with the gender of the persons involved: a marriage will thus be converted into a registered partnership and a registered partnership into a marriage. If the spouse or partner does not agree to this, then there cannot be a legal recognition of the gender change until the marriage or registered partnership has been dissolved. Gender recognition according to the bill would be open to all Swedish nationals and anyone who has been resident in Sweden for at least a year.¹²³

Some of the old prerequisites, however, would be retained – but in a more liberal spirit. For example, under the new proposed statute the age limit for obtaining a legal change of gender would remain at 18, but medical treatment etc. could actually begin earlier;¹²⁴ a further requirement to have the gonads removed, which inevitably leads to infertility, is included in the bill.¹²⁵ This provision is deemed necessary in order to avoid what is possible under U.K. legislation (see above 3.2.6): that a person who legally a man gives birth to a child or that a person who is legally a woman fathers a child. This is deemed to be undesirable, particularly in the interest of the child.¹²⁶ Yet, the possibility of donating sperm or an egg for later use and thus of having genetically related children through IVF treatment is expressly left open to the persons concerned. This is meant to strike a compromise between the interests involved; it allows the transgender person to become a genetic and – through the legislation governing IVF – legal parent of a child.

Whether the proposed legislation comes into effect remains to be seen; the Swedish Act of 1972 in any event is outdated and reform is inevitable. The proposed bill would bring Sweden back to the position it was once held in 1972: at the forefront of the legal development.

4 Conclusion: The Influence of Nordic Law

After having looked at the three topics of same-sex relationships, the legal status of cohabitants and the legal recognition of gender change, what then is ‘Scandinavian Law’? Or at least, what is ‘Scandinavian’ here?

In all three areas Scandinavian countries have rendered pioneering work, of pivotal importance not only for the people concerned directly, not only for their own countries, but for the legal development in these areas throughout Europe and beyond. Some of these steps were quite bold for their time, the legislation

122 *Ibid.*, pp. 193 ff.

123 *Ibid.*, pp. 202 ff.

124 *Cf. Ibid.*, pp. 161 ff.

125 *Ibid.*, pp. 180 ff.

126 *Ibid.*, pp. 182 f.

enacted possibly even being ahead of its time. But maybe the time was ripe for these developments, and it is not surprising that they began in societies that are generally considered to be more liberal than other European ones. Nevertheless, taking such steps requires the courage to embrace new concepts, tolerance of others as a society and a willingness to do what is right – even if one then stands alone in this. Remarkable qualities like these have put the Nordic countries in the vanguard of European family law, setting an example and leading the way, not only in the areas depicted here but also in many others. The impact of the Nordic legislation in these areas cannot be underestimated and European family law has been much enriched by it.

The influence of Nordic Family probably would be even greater were it not for the language barrier. The debates on family law would benefit greatly if there was more material available in English (which seems to have become the *lingua franca*). Admittedly the Nordic Countries are much better than others in providing English summaries and translations of statutes. But if great works like *Nordisk äktenskapsrätt* (by Andres Agell), *Nordisk arverett* (by Peter Lødrup) and *Nordisk børneret I* (by Peter Lødrup, Anders Agell and Anna Singer) and II (by Svend Danielsen) were available in an English translation, the family law of the Nordic Countries would be much more accessible to European family lawyers. A book of the same quality covering the legal status of cohabitants could likewise be assured to be of tremendous importance for the further development of law in this area in Europe. It is to be hoped that in the future such material becomes available to English-speaking jurists.

Scandinavian Law has led, sometimes even paved the way in family law in Europe. Much of what is now national family law in other jurisdictions has been influenced by Scandinavian Law, one way or the other. So in a way, in some areas the laws in various European countries can be considered to be ‘Scandinavian’ – or, vice versa, some Scandinavian laws must now be considered to be ‘European’.