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Legal Recognition of Same-Sex Relationships in Europe

**NATIONAL, CROSS-BORDER
AND EUROPEAN PERSPECTIVES**

Katharina Boele-Woelki and Angelika Fuchs (eds)

Fully revised 2nd edition



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In the last twenty years the legal recognition of same-sex relationships in Europe has undergone significant changes, both on a national and European level. By now, more than half of the Member States of the European Union have introduced legislation on the formalisation of same-sex relationships; most of them have provided for registered partnerships and some allow homosexual couples to enter into marriage. This book provides the reader with an updated overview of registration schemes and same-sex marriages in Europe. It also comments on the legal aspects of same-sex couples and their children, including surrogate motherhood, in different European jurisdictions and addresses cross-border and European issues.

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LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE

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European Perspectives

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Edited by

Katharina BOELE-WOELKI
Angelika FUCHS



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PREFACE

The first edition of our book on *The Legal Recognition of Same-Sex Couples in Europe* was positively received. The foundation-stone of that book, published in 2003 as the first volume of the European Family Law Series, was laid at a conference organised by the Academy of European Law (ERA), which took place in Uppsala. Since then, the situation concerning the legal status of same-sex couples in Europe has undergone significant changes, both at national and European level. Eight years later, a follow-up conference was organised. The second edition includes the unabridged and updated versions of the papers presented and discussed at the ERA conference on the Legal Recognition of Same-Sex Relationships in Europe, held in Trier on 11-12 April 2011.

The *first part* of this second edition provides the reader with a colourful picture of the different national laws on registration schemes in Europe. Since 1989, when Denmark became the first country to introduce registered partnerships, the legal recognition of same-sex relationships has been on the political agenda in many countries. By now, half of the Member States of the EU have introduced legislation on the formalisation of same-sex relationships; most of them have provided for registered partnerships and some allow homosexual couples to enter into marriage. The *second part* focuses on same-sex couples and children, addressing legal aspects of parenthood and surrogate motherhood. The *third part* addresses cross-border issues. It discusses the difficulties same-sex couples might face if they live abroad or if they want to obtain a divorce or dissolution of their registered partnership in another country. Not only the substantive law of the Member States but also their private international law approaches differ to a large extent. In the *final part* of this book, European perspectives are opened up, including rights granted under the European Convention of Human Rights, the question of non-discrimination, including employment conditions and pension rights, and family reunification.

The editors are grateful to all the authors for contributing to this book and delivering their papers at such short notice.

Katharina BOELE-WOELKI

Angelika FUCHS

Utrecht/Trier, 1 January 2012



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PART ONE

**FORMALISATION AND LEGAL
CONSEQUENCES OF SAME-SEX
MARRIAGES AND PARTNERSHIPS**



THE NORDIC COUNTRIES: SAME DIRECTION – DIFFERENT SPEEDS

Ingrid LUND-ANDERSEN

1. INTRODUCTION

On 1 October 1989, the world's first registration of a gay couple's partnership took place in the Danish capital Copenhagen, in what became a worldwide media event. At that time Axel and Eigil Axlil had been together for nearly 40 years, 32 of which had been under a common last name. They had combined their first names into the family name of Axlil in 1957, when they were in prison for gay rights activism. Many gay couples changed their name in this way, until the government halted this early precursor to a civil union. Not until the Registered Partnership Act was introduced in Denmark in 1989 did it again become possible for same-sex couples to have a common last name.

Denmark, Norway and Sweden constitute Scandinavia, and together with Finland and Iceland they constitute the Nordic countries. These countries have a shared tradition of trying to harmonise family law as they are neighbours, and their cultures and social conditions are very similar.¹ As regards the legal recognition of same-sex partnerships, their developments have taken the same direction, although the tempo has differed.

¹ See in more detail LUND-ANDERSEN, Approximation of Nordic Family Law within the Framework of Nordic Cooperation, in: ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, pp. 51–61 and LØDRUP, The Reharmonisation of Nordic Family law, in: BOELE-WOELKI/SVERDRUP (eds.), *European Challenges in Contemporary Family Law*, 2008, pp. 17–26.

2. REGULATION OF SAME-SEX RELATIONSHIPS

	Registered Partnership Acts Introduced	Registered Partnership Acts Repealed	Gender-neutral Marriage Introduced
Denmark	1989		
Norway	1993	2009	2009
Sweden	1994	2009	2009
Greenland	1996		
Iceland	1996	2010	2010
Finland	2001		

2.1. REGISTERED PARTNERSHIP ACTS

Denmark was the first of the Nordic countries to introduce a Registered Partnership Act for same-sex couples in 1989.² With a few exceptions, namely the right to marry in church, the right to adopt a child, and the right to the joint custody of children, a registered partnership had the same legal consequences as a marriage. It should be noted that the gender-specific provisions of Danish law applying to one of the parties in a marriage did not apply to registered partnerships.³ In addition, the provisions of international treaties did not apply to registered partnerships, unless the other parties to a treaty agreed to their application.

Similar Registered Partnership Acts followed in Norway (in 1993),⁴ in Sweden (in 1994),⁵ in Iceland (in 1996),⁶ in Greenland (in 1996)⁷ and in Finland (in 2001).⁸ A Registered Partnership Act has not yet been implemented in the Faeroe

² Law No. 372 of 7 June 1989, with effect from 1 October 1989. The Act is described by LUND-ANDERSEN, The Danish Registered Partnership Act, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 13–23. See also JEPPESEN/KRONBORG, National Report on Registered Partnership in Denmark, *XVIIIth Congress of the International Academy of Comparative Law*, 2010.

³ This refers to provisions concerning filiation and to a provision from the time when matrimonial law was based on a family pattern with a male breadwinner and a female housewife.

⁴ Law No. 40 of 30 April 1993.

⁵ Law 1994:1117. See SAVOLAINEN, The Finnish and the Swedish Partnership Acts – Similarities and Divergences, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 24–40.

⁶ Law No. 87/1996.

⁷ Regulation 320 of 26 April 1996.

⁸ Law No. 95/2001. See SAVOLAINEN, The Finnish and the Swedish Partnership Acts – Similarities and Divergences, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 24–40.

Islands.⁹ None of the Registered Partnership Acts has been extended to heterosexual couples.

2.1.1. Adoption

The exceptions concerning children have been repealed by amendments to the Registered Partnership Acts.

In Denmark, from 1 July 1999 onwards, it became possible to adopt a child of the other partner provided that the child has not been adopted from abroad. The consequence of such stepchild adoption is that the registered partners can have joint custody. Similar to a spouse, a registered partner does not need approval from the authorities to adopt.¹⁰ The reason why the possibility of adopting a stepchild was introduced was because of the emergence of a new understanding of ‘the best interests of the child’. Firstly, it was pointed out that if a person living in a registered partnership has a child, that child might effectively have only one biological parent, either because the mother has not disclosed the name of the father to the authorities, or because the other parent has died. In these cases, the child will be in a less advantageous legal position than children within a marriage, with regard to both inheritance and divorce. Secondly, in those circumstances in which the raising of a child requires contact with the authorities, it would be important for the child that the registered partners should have the same legal status as other parents.

Four years later, Sweden took a major step in allowing both stepchild adoption and joint adoption for registered partners. The reason for opening up joint adoption to homosexual couples was that an extensive study of children in homosexual families could not point to any differences with regard to development and the formation of gender identity between children growing up in homosexual families and those growing up in heterosexual families.¹¹ Consequently, couples that have entered into a registered partnership may be considered as adoptive parents in the same way as married couples. Two partners can adopt a child jointly, and one partner can adopt the other partner’s child – whether biological or previously adopted. The requirements for personal eligibility apply equally to registered partners and to married couples who wish to adopt. The starting point for eligibility is the capability of the applicants to offer favourable conditions for a child to grow up in. As regards international

⁹ Greenland and the Faeroe Islands are self-governing regions under the Danish Crown.

¹⁰ The regulation of stepchild adoption is described by LUND-ANDERSEN, *The Danish Registered Partnership Act*, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 17–18.

¹¹ See Government Committee Report on *Barn i homosexuella familjer* (“Children in Homosexual Families”), SOU 2001:10.

adoptions, the restrictions and conditions imposed by the child's country of origin apply.¹²

In 2006, Iceland gave partners in registered partnerships the same rights as those which been introduced in Sweden.

In Norway, since 2009, it has been possible for registered partners and couples of the same sex who have entered into a marriage to apply to adopt according to the same rules as apply to heterosexual spouses. However, the adoption of a child of the other partner is not allowed if the child has been adopted from a country that does not allow adoption by same-sex partners.

Finland followed in 2009, but only made provisions for stepchild adoption. Under the Finnish rules, there is no distinction between biological children and children who have been adopted from abroad.

Finally, in 2010, Denmark made it possible for registered partners to adopt jointly.¹³ As with married couples, with the exception of stepchild adoption, registered partners cannot adopt as a single person. It is a condition for registered partners who want to adopt a child from abroad that the foreign country agrees to the adoption of children by registered partners of the same sex. Thus far, no child has been adopted from abroad by partners living in a Danish registered partnership. The change to the Danish adoption rules implied that it was permitted to transfer custody to registered partners by an agreement approved by a regional authority. This possibility may be a less far-reaching alternative to family or stepchild adoption, as the ties between a child and its biological parent or parents are maintained for the purposes of inheritance, the duty to maintain the child and the right to have contact with the child.

2.1.2. Conditions for the Registration of a Partnership – Residence and Nationality

In Denmark, there is an important difference between a registered partnership and marriage, namely the requirement of close links with Denmark when entering into a registered partnership. While two foreigners who are not domiciled in Denmark, but are legally allowed to stay, can marry in Denmark, even though they may be staying for only a short period of time, a partnership can only be registered if at least one of the parties is habitually resident in

¹² See Family Law, Information on the rules, *Regeringskansliet*, 2009, p. 25.

¹³ See Law No. 537 of 25 May 2010. During the preceding years, the possibility of allowing registered partners to adopt jointly had been discussed several times in Parliament. On 17 March 2009, a majority voted in favour of a resolution ordering the Government to introduce a bill on foreign adoption by registered partners.

Denmark and is a Danish citizen, or if both parties have been habitually resident in Denmark for two years immediately preceding the registration.¹⁴ The legal situation is the same in Finland.¹⁵

For these purposes, habitual residence in and citizenship of Norway, Sweden, Finland or Iceland is considered equivalent to Danish habitual residence and citizenship. In addition, the Minister of Justice may decide that habitual residence in and citizenship of a country that has legislation on registered partnerships corresponding to that of Denmark is also equivalent to Danish citizenship and habitual residence.¹⁶ This has been decided with regard to the Netherlands,¹⁷ Belgium and Spain.¹⁸ According to the Finnish Registered Partnership Act, citizenship of a foreign state whose legislation allows for the registration of a partnership with substantially the same legal effects as provided in the Act is to be treated as equivalent to Finnish citizenship.¹⁹ Such foreign states must be designated by a Government Decree.

2.1.3. Statistics on Registered Partnerships in Denmark and in Finland

2.1.3.1. Denmark

It is presumed that about 5% of the population are homosexual, which in Denmark corresponds to about 250,000 persons. From this perspective, only a limited proportion of homosexuals have entered into registered partnerships.

	Registered Partnerships		Dissolved Partnerships		Surviving Partner		Total
	Men	Women	Men	Women	Men	Woman	
1990	518	122	1	–	1	3	645
1998	2275	1266	322	218	225	31	4337
2002	2895	2061	519	389	266	56	6186
2009	3943	3955	874	870	325	106	10073

Statistics for Denmark, *Statistikbanken* per 1 January 2009.

¹⁴ See Section 2(2) of the Danish Registered Partnership Act.

¹⁵ See Section 10(1) of the Finnish Registered Partnership Act.

¹⁶ See Section 2(3) of the Danish Registered Partnership Act.

¹⁷ By Ministerial Order No. 929/2001.

¹⁸ By Ministerial Order No. 199/2010. The Department of Family Affairs is currently considering whether to include more countries.

¹⁹ Section 10(2).

From 1 January 1990 to 1 January 2009, a total of 10,073 people registered their partnerships. A total of 1,744 people had dissolved their partnerships, and 431 persons living in a registered partnership had died. From 1990 to 1998, almost twice as many men as women had registered their partnerships. This may be due to the fact that a large number of those men who had their partnerships registered in the early 1990s wanted to secure the other partner immediately, because one or both of them were HIV-positive. Today, just as many women as men have their partnerships registered.

Age	Registered Partnerships		Dissolved Partnerships		Surviving Partner		Total
	Men	Women	Men	Women	Men	Women	
up to 25	31	54	2	10	–	–	97
25–34	545	912	126	157	7	1	1748
34–44	1203	1343	347	360	34	8	3295
45–54	990	925	226	214	70	14	2439
55–64	783	533	120	109	108	33	1686
65–74	319	155	42	16	76	33	641
75 +	72	71	11	4	30	17	205

Statistics for Denmark, *Statistikbanken* per 1 January 2009.

The majority of those who have registered their partnerships have been between 25 and 54 years of age, but the age group 55–64 is also well represented. Very few people under the age of 25 have registered their partnerships.

The number of registered partners with children has increased significantly, from 266 partnerships at the beginning of 2002²⁰ to 702 on 1 January 2009.²¹ These children mainly live in lesbian families, and the new Danish rules on stepchild adoption in 1999 may have contributed to lesbians being more interested in having their partnerships registered. Further, since 2006 lesbians have had access to assisted reproduction by medical doctors in public and private clinics as well as in hospitals.²²

²⁰ News from Statistics for Denmark No. 57 of 12 February 2002.

²¹ Statistics for Denmark, *Befolkning og valg*, 2009:7.

²² Law No. 535 of 8 June 2006.

2.1.3.2. Finland

The Finnish Ministry of Justice has provided the following information:

Year	Registered male partnerships	Registered female partnerships
2002	207	192
2003	271	275
2004	325	357
2005	398	430
2006	455	493
2007	527	562
2008	579	665
2009	625	771
2010	706	895

The total number of registered partnerships in Finland seems to be limited compared to the number of registered partnerships in Denmark. In Finland, the number of women registering their partnerships has increased, and today more women than men register their partnerships.

Year	Number of families consisting of registered partners with children
2002	32
2003	47
2004	59
2005	86
2006	120
2007	146
2008	187

Statistics on the number of families consisting of registered partners with children show that this kind of family is no longer exceptional. However, the chart does not provide information on adoptions, as stepchild adoption was not allowed until 2009.

2.2. GENDER-NEUTRAL MARRIAGE

Since 2008, Denmark has been overtaken by developments in Norway, Sweden and Iceland, as these three countries introduced gender-neutral marriage in 2008, 2009 and 2010 respectively.

After a lengthy debate in the Norwegian Parliament, an amendment to the Marriage Act was enacted on 17 June 2008.²³ The amendment was adopted by 84 votes to 41.²⁴ The new law gives homosexual couples the formal right to marry on the same basis as heterosexuals. According to Section 1 of the Marriage Act, two persons of the opposite sex or of the same sex may contract a marriage. Previously registered partners can have their partnerships converted into marriages. In such a case the partners must submit an application to the National Population Register. On the basis of the application the Register must register the partners as married and provide them with dated confirmation.²⁵ A registered partnership that is not converted remains in force, although the Registered Partnership Act has been repealed, it is seen as no longer necessary. Consequently, it is no longer possible to establish a new registered partnership in Norway.

The amended Marriage Act entered into force on 1 January 2009, and in the first year 658 same-sex couples converted their registered partnerships into marriage. During the following year the number declined significantly, with only 68 registered partners converting their registered partnerships into marriage. In 2010, 264 same-sex couples entered into marriage. Far more women (167 couples) than men (97 couples) contracted a marriage. The number of same-sex marriages was only a little higher in the previous year. As regards the dissolution of same-sex marriages, in 2010 a total of 29 couples were separated and 4 couples were divorced. The corresponding numbers for registered partnerships showed that 60 couples were separated, and 83 couples were divorced.²⁶

Sweden was the next country to introduce gender-neutral marriage, and the amendment to the Marriage Act was adopted by 261 votes to 16.²⁷ The new rules of the Marriage Act came into effect on 15 May 2009. The wording of Section 1 of the Swedish Marriage Act differs from the wording in the Norwegian Marriage Act, as the sex of the spouses is not mentioned. The Swedish Marriage Act states that two persons who enter into a marriage with one another become spouses.

²³ See ASLAN/HAMBRO, New Developments and Expansion of Relationships Covered by Norwegian Law, in: ATKIN (ed.), *The International Survey of Family Law*, 2009, pp. 377–378.

²⁴ See *Ot.prp.* No. 33, 2007–2008.

²⁵ See Section 95 of the Norwegian Marriage Act.

²⁶ See www.ssb.no/ekteskap.

²⁷ The grounds for the reform were laid down in a report by a government commissioned investigation, under the leadership of a specially appointed Commissioner, see Government Committee Report on *Ätenskap för par med samma kön, Vigselsfrågor* (“Same-sex marriage, the marriage ceremony”), *SOU* 2007:17. See in more detail JÄNTERA-JAREBORG, Sweden: The Same-Sex Marriage Reform with special Regard to Concerns of Religion, *FamRZ* 2010, Vol. 18, pp. 1505–1508 and SINGER, Equal Treatment of Same-Sex Couples in Sweden, in: ATKIN (ed.), *The International Survey of Family Law*, 2010, pp. 397–399.

Previously registered partnerships may be converted into a marriage. For this the partners have to apply jointly to the Swedish Tax Agency.²⁸ Instead of applying to convert a registered partnership into a marriage, a couple can choose to be married under Chapter 4 of the Marriage Code. No examination of the impediments to a marriage is required for marriage for this special ceremony. There is no period of limitation for converting a registered partnership into a marriage. In Sweden, 774 same-sex couples – more women (445 couples) than men (329 couples) – married in the first year, and 455 couples converted their registered partnership into a marriage.

The attitude in Iceland is pragmatic, and marriage between two persons of the same sex has not been seen as controversial. On 27 June 2010, the Icelandic Parliament unanimously passed a bill on gender-neutral marriage, and Iceland thus became the ninth country in the world to legalise same-sex marriage. The Act came into effect immediately.²⁹ On the same day the Icelandic Prime Minister, Jóhanna Sigurðardóttir, married her female partner.³⁰ The couple had entered into a registered partnership in 2002, and now they transformed their partnership into a marriage. As with Norway and Sweden, the Registered Partnership Act was repealed with the passing of the gender-neutral Marriage Act.

In the last two Nordic countries, Finland and Denmark, the legal status of same-sex couples is still regulated by the respective Registered Partnership Acts.

The Finnish Ministry of Justice has taken preparatory steps to reform the Marriage Act in order to legalise gender-neutral marriage and to introduce full adoption rights for homosexual couples. In 2010, the Ministry prepared a short report on this topic³¹ analysing the technical implications of the possible changes. The main conclusion was that if Finland were to accept the marriage of same-sex couples, there would only be major implications in principle, but in practice the legal implications for same-sex couples would be minor.³² Presently, the only differences between married couples and registered partners are that a registered partner cannot take his/her partner's family name directly according to the law, the *pater est* principle of the presumption of paternity does not apply, and

²⁸ See Family Law, Information on the rules, *Regeringskansliet*, 2009, p. 25.

²⁹ The Icelandic Registered Partnership Act also came into force on 27 June, which is Christopher Street Day. This day is an annual European LGBT celebration where demonstrations are held against discrimination and exclusion.

³⁰ Jóhanna Sigurðardóttir is the leader of a coalition of Social Democrats and the Left-Green Movement.

³¹ *Reglering av parförhållanden mellan personer av samma kön* ("Report on the Regulation of Relationships between Persons of the Same Sex"), *Utredningar och anvisningar* 83/2010, Ministry of Justice, Finland, 7 December 2010. The report is in Finnish only.

³² Information by a Senior Legal Adviser, Salla Silola, Ministry of Justice, Finland.

registered partners cannot adopt jointly. If a political decision to accept gender-neutral marriage were taken, the change would be quite easy to implement.

However, in the spring of 2011, there was a parliamentary election. A broad coalition government was formed, with a conservative Prime Minister. It is not known whether gender-neutral marriage is on the political agenda of this new government.

With regard to Denmark, there have been several proposals by non-government political parties favouring the extension of marriage to same-sex partners, but so far none has been approved by the majority of the Danish Parliament.³³ The main reason for this is that the introduction of gender-neutral marriage will change the institution of marriage forever. Since 2001, centre-right parties have had a majority in Parliament.

2.3. CHURCH CEREMONY

The Nordic countries have a twin-track system of celebrating marriage. Thus, a couple can choose either to be married in a civil ceremony, or to be married in a religious ceremony that has been authorised by the State for marriages.

In Norway, the Lutheran Church and other recognised faith communities have the right, but not an obligation, to consecrate a marriage between two persons of the same sex. About 80 per cent of the population belong to the Lutheran Church. In May 2009, the board of the Lutheran Church asked the bishops to appoint a committee to examine the question of introducing a marriage ritual for homosexual marriage. This work is due to be finished in October 2011.

In Sweden, the Lutheran Church (the Church of Sweden) split from the state in 2000, but remains the country's largest faith community. On 22 October 2009, the governing board of the Church of Sweden voted by 176–62 in favour of allowing its priests to marry same-sex couples in new gender-neutral church ceremonies, including using of the term 'marriage', and excluding the terms 'man', 'woman' and references to children of the marriage. Same-sex marriages have been performed by the Church since 1 November 2009.

The board of the Lutheran Church in Iceland is to decide on the possibility of a church marriage ceremony for same-sex couples. A committee has drawn up three alternatives for use in both heterosexual and homosexual marriages. Priests will not be obliged to perform a same-sex marriage ceremony. A few same-sex

³³ The latest proposal L 123 of 5 February 2010 was rejected on 3 June 2010.

couples have been married in church using a new trial gender-neutral marriage ritual which was ratified at the annual Church Assembly in the autumn of 2010.

In Denmark, priests of the National Church – which is Lutheran – are permitted to bless civil registered partnerships. This possibility did not require a new authorised ritual, and it is up to the individual priest whether he or she wishes to bless a homosexual couple.³⁴ In the spring of 2010, the Minister for Ecclesiastical Affairs set up a committee to discuss, among other things, whether or not it should be possible to enter into a registered partnership in the National Church. The committee published its report on 15 September 2010. The majority stated that the church wedding ceremony of a man and a woman should not be extended to same-sex couples. However, most of the members of the committee found that an authorised ritual should be introduced for church blessings of registered partnerships. In May 2011 the Minister of Ecclesiastical Affairs announced that he will follow up on the statement of the majority of the committee, and that in the autumn he will present a proposal for an authorised church ritual for homosexual couples.³⁵ So far the Minister has experienced a good dialogue with the bishops and other relevant persons, such as politicians. It is possible that the proposal will include provisions for contracting a registered partnership in church.

In Finland, the Lutheran Church does not bless same-sex partnerships. The topic has been widely debated within the National Church, and in November 2010 the General Synod of the Church decided that, in performing their 'pastoral tasks', priests may pray with and for couples who have registered their partnership. On 9 February 2011, the Bishops' Conference issued a directive on how such prayers may take place. Such prayers are freely formulated and are not a blessing.

2.4. RECOGNITION OF FORMALISED RELATIONSHIPS OF SAME-SEX COUPLES ENTERED INTO ABROAD

A registered partnership between two persons of the same sex that has been registered in a foreign state will be valid in Finland if it is valid in the state where it was registered.³⁶ The legal situation is generally the same in Denmark,³⁷

³⁴ For more on the considerations in Denmark, see LUND-ANDERSEN, The Danish Registered Partnership Act, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 21–22.

³⁵ See VINCENTS, The Minister of Ecclesiastical Affairs will present a proposal of rituals for homosexuals, in the newspaper *Kristelig Dagblad* of 28 May 2011.

³⁶ See Section 12 of the Finnish Registered Partnership Act.

³⁷ See the principle in the Danish Registered Partnership Act, Section 2(3). It is a condition that the foreign country has legislation on registered partnerships corresponding to that of Denmark. In Denmark same-sex registered partnerships from the other Nordic countries,

Sweden³⁸, Norway³⁹ and Iceland.⁴⁰ However, the registration of a partnership will not be recognised if it would obviously be offensive to public policy (*ordre public*). It is up to the authorities or the courts to decide in each case what status is to be given to a foreign registered partnership. It is not possible to convert a foreign registered partnership into a marriage.⁴¹ Further, as the Nordic Registered Partnership Acts are limited to persons of the same sex, opposite-sex foreign registered partnerships would not be recognised in any of the Nordic countries.

With regard to the recognition of same-sex marriages contracted abroad, the legal situation depends on whether the Nordic country has introduced same-sex marriage or not. Here the focus will be on the rules in Sweden and Denmark.

In Sweden, the recognition of the validity of same-sex marriages celebrated abroad is governed by the same autonomous rules of Swedish private international law as the validity of opposite-sex marriages.⁴² The main principle is that a foreign marriage is recognised as to its form if it is valid in the country where it was concluded or in the country or countries of nationality or habitual residence of both spouses. A marriage can be refused recognition if it suffers from formal defects, or if it is probable that it was entered into under unlawful coercion.

In Denmark, according to a ministerial circular, a same-sex marriage contracted in Norway will be recognised as a registered partnership.⁴³ Although the circular only refers to Norwegian same-sex marriages, it may be extended to same-sex marriages contracted elsewhere (e.g. in Sweden, Iceland, the Netherlands, Belgium and Spain). It is left to the Department of Family Affairs to decide in each case.

3. UNMARRIED COHABITATION

If a homosexual couple do not marry or register their partnership, their legal status is the same as that of unmarried heterosexual couples. There is special

the Netherlands, Belgium and Spain are recognised. See also ARNT NIELSEN, *International privat- og procesret*, 1997, p. 396.

³⁸ See JÄNTERA-JAREBORG, Sweden: The Same-Sex Marriage Reform with special Regard to Concerns of Religion, *FamRZ* 2010, Vol. 18, p. 1505.

³⁹ See Section 95 of the Norwegian Marriage Act.

⁴⁰ Information by Associate Professor Hrefna Friðriksdóttir, Faculty of Law, University of Iceland.

⁴¹ See JÄNTERA-JAREBORG, Sweden: The Same-Sex Marriage Reform with special Regard to Concerns of Religion, *FamRZ* 2010, Vol. 18, p. 1505.

⁴² See BOGDAN, Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden, *Nordic Journal of International Law* 2009, pp. 259 f.

⁴³ See circular letter No. 25 August 2009 on marriage between two persons of the same sex in Norway.

family law legislation on cohabitation and the joint home in Sweden, Norway and Finland.

In 1987, Sweden became the first of the Nordic countries to introduce provisions for cohabitees when the Cohabitees (Joint Homes) Act was implemented.⁴⁴ This Act was replaced in 2003 by the new Cohabitees Act.⁴⁵ ‘Cohabitees’ means two people who live together on a permanent basis as a couple and have a joint household.⁴⁶ The aim of the Act is to give the financially weaker party certain minimum rights as regards property and taking over a dwelling. When a cohabitee relationship ends, the net value of the cohabitees’ dwelling and household goods is divided if the property has been acquired for joint use.⁴⁷

The Norwegian Joint Household Act was enacted in 1991.⁴⁸ A household community is assumed to exist between two or more adults who, without being married, live under the same roof and jointly contribute towards the necessities of life.⁴⁹ The Act does not regulate the division of property, but gives a member of a household the right – under certain conditions – to take over the dwelling and household goods when the community dissolves. The market value of the property has to be paid.

The latest legislation is the Finnish Act on the Dissolution of the Household of Cohabiting Partners, adopted in Helsinki on 14 January 2011.⁵⁰ The Act applies to the dissolution of the household of cohabiting partners when their relationship ends. ‘Cohabiting partners’ refers to partners who have lived in a shared household for at least five years or who have, or have had, a joint child or joint parental responsibility for a child. The Act concerns the division of property, co-ownership and compensation for contributions for the benefit of a shared household.

⁴⁴ Law 1987:232 entered into force on 1 January 1988. Law 1987:813 on Homosexual Cohabitants refers to the Cohabitees (Joint Homes) Act and puts homosexual couples on the same footing as heterosexual couples in many respects.

⁴⁵ Law 2003:376 Cohabitees Act (*Sambolagen*).

⁴⁶ Homosexual couples are included in this definition.

⁴⁷ For more detail on this Act see RYRSTEDT, Legal Status of Cohabitants in Sweden, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften, The Legal Status of Cohabitants*, 2005, pp. 418 f. and BRATTSTRÖM, The Protection of a Vulnerable Party when a Cohabitee Relationship Ends – An Evaluation of the Swedish Cohabitees Act, in: VERSCHAGEN (ed.), *Family Finances*, 2009, pp. 345 f.

⁴⁸ Law No. 45 of 4 July 1991.

⁴⁹ See RYRSTEDT, Legal Status of Cohabitants in Norway, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften, The Legal Status of Cohabitants*, 2005, p. 442.

⁵⁰ Law 26/2011. The Act came into force on 1 April 2011.

In Denmark, the division of property in an unmarried relationship is based on case law. Upon the termination of cohabitation the financially weaker party can make a claim for compensation if the financially stronger party has obtained unjust enrichment.⁵¹ This includes both a property law assessment and a family law assessment. It is a requirement that the cohabitation has lasted no less than 2¾ years.

According to the case law in Norway, a cohabitee can be regarded as a co-owner when the relationship ends.⁵² On the grounds of having worked in the home or as a result of payment towards joint expenses, a person who is not the formal owner of the family home and household property can obtain joint ownership, especially if there are children. Alternatively, the person who is not the formal owner can bring a claim for compensation before a court, based on the principles of unjust enrichment, restitution and equity.

In Iceland, cohabitees own the assets they are registered as owning. If a cohabitee claims that he or she owns a share in an asset that is registered in the name of the other cohabitee, he or she must prove how much he or she has contributed to the value of the asset. In the first instance the courts assess monetary contributions, but they can also take into consideration how the couple have divided the work within the family and other forms of contribution.⁵³

4. CONCLUSION

What was persuasive in the adoption of the Registered Partnership Act in Denmark was consideration for equality and a desire to avoid discrimination. The introduction of the Registered Partnership Act in Denmark in 1989 has been shown to have been the right step, which has both been very important for the acceptance of same-sex partnerships in Denmark and has inspired similar solutions in the other Nordic countries and elsewhere in the world. Since then, developments have moved more rapidly in countries other than Denmark.

The Nordic countries have a long tradition of harmonising their family laws. This is also the case with regard to the regulation of same-sex relationships. The reforms in this area have been staggered, but they have been moving in the same

⁵¹ The leading case is from 1980, *Ugeskrift for Retsvæsen* 1980.480 H. See LUND-ANDERSEN, The Legal Status of Cohabitants in Denmark, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften, the Legal Status of Cohabitants*, 2005, pp. 459 f.

⁵² RYHRSTEDT, Legal Status of Cohabitants in Norway, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften, The Legal Status of Cohabitants*, 2005, pp. 443 f.

⁵³ See SNÆVARR, *Hjúskapar- og sambúðarréttur* ("Cohabitation Law"), 2008.

direction. Most conservative and liberal politicians find that marriage should be kept as an institution for a man and a woman, and that homosexual couples should not have legal rights concerning children. Therefore, the introduction of stepchild adoption was a major step, as it signified acceptance that a child can have two mothers or two fathers. This step prepared the way for lesbians' access to artificial procreation and for homosexual couples to have access to joint adoption.

In the three Nordic countries – Norway, Sweden and Iceland – that have introduced gender-neutral marriage, the legal change has not amounted to much more than a change in terminology. However, gender-neutral marriage has been important as a symbol of full equality. It has been the least problematic in Iceland, and where there is great openness about and the acceptance of homosexual relations. This can be seen by the fact that the Icelandic Prime Minister, Jóhanna Sigurðardóttir, is the first openly lesbian parliamentary leader in modern history.

It is probable that within a few years there will be political majorities in Finland and Denmark that allow for the introduction of legislation on opposite-sex and same-sex marriage, and that in the end there will be uniform Nordic legislation in this area.

In Denmark, there is to be an election for a new Parliament this autumn. The opinion polls point towards a shift in political power, and that the centre-right parties will lose their majority. If this happens, the new prime minister will probably be a Social Democrat, and the Social Democratic Party is in favour of introducing gender-neutral marriage. By following in the wake of Norway and Sweden, Denmark will be able to benefit from the experiences of those two countries, and from how the new rules function in practice, including the introduction of a church ritual for same-sex couples – in the same way as Norway and Sweden were inspired by the Danish solution when it introduced its Registered Partnership Act.



SAME-SEX COUPLES IN CENTRAL EUROPE: HOP, STEP AND JUMP

Frederik SWENNEN and Sven EGGERMONT

1. INTRODUCTION

This contribution aims to offer an overview of the current (and forthcoming) legal recognition of same-sex couples in Central Europe, and is limited to the national civil laws regarding the “horizontal” (the legal status of the partners) aspects of same-sex relations. The “vertical” (the parent-child relationship) aspects of such relations, private international law and public international law will be dealt with in other contributions.

For the purposes of this contribution, Central Europe is considered to include (in alphabetical order): Austria, Belgium, France, Germany, Ireland, Luxembourg, the Netherlands, Switzerland and the United Kingdom.

Rather than discussing each country’s legislation in turn, we have opted for a comparative approach concerning the *conditions*, the *legal effects* and the *dissolution* of same-sex relations. However, the main division in this contribution however reflects the possible legislative strategies in recognising same-sex relations:¹

- *Opening up marriage* to same-sex couples;
- *Separate but equal*: a dualistic system where marriage is exclusively accessible for opposite-sex couples and a registered partnership with (almost) identical legal effects is (exclusively) accessible for same-sex couples;
- *Separate and unequal*: marriage is exclusively accessible for opposite-sex couples and a registered partnership is (exclusively) accessible for same-sex couples. This registered partnership, however, is not equal to marriage and is limited to some effects, either regarding the existence of a household, or with

¹ Comp. SCHWENZER, Convergence and divergence in the law on same-sex partnerships, in: ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 146. She distinguishes a fifth category of countries, in which some form of recognition is under discussion.

broader applicability in inheritance law or parent-child relations. The design of the partnership may exclude the applicability of some marital rights and duties, or explicitly enumerate the applicable rights and duties.²

- *No formal recognition* of same-sex couples: all of the Central European countries have now abandoned such a strategy.

In most countries, the legal recognition of same-sex couples constitutes a *Via dolorosa* with multiple stations. When making their way to a next station, the former is not abolished, meaning that different strategies may co-exist in some countries, in a so-called pluralistic model.³

2. SAME-SEX MARRIAGES

Currently, marriage has already been opened up to same-sex couples in the Netherlands (2001) and Belgium (2003), with Luxembourg⁴ on its way. In Dutch, Belgian and Luxembourg law, the Civil Code thus explicitly provides⁵ that marriage can be contracted by two persons of the opposite or the same sex.

In the Netherlands and Belgium there has been some discussion concerning the question of whether the Acts of 2001 and 2003 respectively had created a “same-sex marriage”, separate from and *almost* equal to “opposite-sex marriage”.⁶ As is the case in Luxembourg, the presumption of paternity indeed does not apply to same-sex marriages.⁷ Moreover, the Dutch Act of 2001 and the Belgian Act of 2003 initially did not open adoption to same-sex couples. Finally, a separate private international law regime exists for same-sex marriages in the Netherlands and in Belgium.

² BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, pp. 160–161.

³ BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, pp. 155–158.

⁴ *Projet de loi portant réforme du mariage et de l'adoption*, Chambre des députés 2009–2010, No. 6172.

⁵ Belgium: Art. 143 CC. Luxembourg (future law): Art. 144 CC. The Netherlands: Art. 1:30 (1) CC.

⁶ Belgium: SWENNEN, Het ‘homohuwelijk’ bestaat niet in België anno 2005, *EJ* 2005, p. 66 and SWENNEN/LELEU, Les mariages homosexuels. Rapport belge, in: DIRIX/LELEU, *Rapports belges au Congrès de l'Académie Internationale de Droit comparé à Washington*, 2010, p. 177, No. 14. The Netherlands: See the conclusions of the Kortmann Commission in ASSER/DE BOER, *Asser I* Personen- en familierecht*, 2010, p. 129, No. 110.

⁷ Belgium: Art. 143(2) CC. Luxembourg (future law): Art. 144(2) CC. The Netherlands: Art. 1:199 CC.

The differences mentioned above, however, do not concern the substance of marriage, which has been (re)defined as the enduring *consortium* between two persons.⁸ Therefore, one must conclude that there is one marriage institution, open to both opposite-sex and same-sex couples.⁹

In all three countries, the purely legal rationale of the prohibition of discrimination has been used as justification for the opening up of marriage to same-sex couples.

In (legal) history, tradition and religious beliefs, marriage has been (and still is) considered to be an institutional framework for procreation, indeed: a *matri-monium*. The legal institution has however evolved to a purely horizontal one, since the recognition of the legitimate procreation and education of children outside marriage.¹⁰ Thus, as stated by the Belgian Constitutional Court, with regard to this horizontal function of marriage, same-sex couples are not pertinently different from opposite-sex couples.¹¹ The traditional arguments therefore no longer outweigh the duty to treat all relations equally. It must be said that such rational considerations were made beforehand in the Netherlands and Luxembourg,¹² whereas a political compromise was made in Belgium that had to be subsequently rationally justified by the Constitutional Court.¹³

Besides, the symbolic and emotional value of marriage, and the emancipatory effect of opening it up, was also manifestly relevant.¹⁴ This symbolic value is also forwarded by proponents of the opening of marriage in other countries.¹⁵

⁸ Belgium: Const. Court 20 October 2004, No. 159/2004, www.const-court.be.

⁹ Belgium: SWENNEN, O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage, in: ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 139. Luxembourg: *Projet de loi portant réforme du mariage et de l'adoption, Exposé des Motifs*, pp. 16–17, *Chambre des députés* 2009–2010, No. 6172. The Netherlands: BOELE-WOELKI, Registered Partnership and Same-Sex Marriage in the Netherlands, in: BOELE-WOELKI/FUCHS (eds.), *Legal recognition of Same-Sex Couples in Europe*, 2003, pp. 43–44.

¹⁰ See in general ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006, pp. 292–296.

¹¹ Belgium: Const. Court 20 October 2004, No. 159/2004, www.const-court.be.

¹² Luxembourg: *Projet de loi portant réforme du mariage et de l'adoption, Exposé des Motifs*, pp. 16–17, *Chambre des députés* 2009–2010, No. 6172. The Netherlands: See the conclusions of the Kortmann Commission in ASSER/DE BOER, *Asser I* Personen- en familierecht*, 2010, pp. 128–130, No. 110 and in VLAARDINGERBROEK et al., *Het hedendaagse personen- en familierecht*, 2008, pp. 103–108.

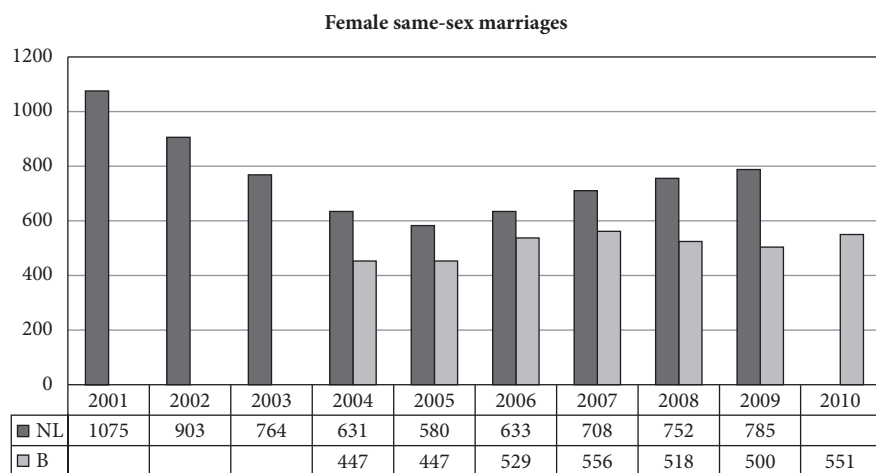
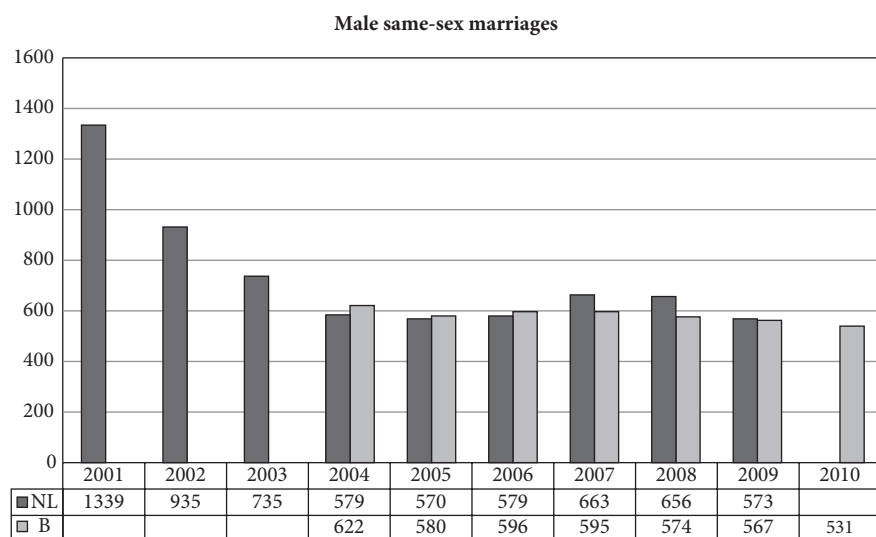
¹³ SWENNEN, O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage, in: ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 139.

¹⁴ BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, pp. 280–281.

¹⁵ E.g. United Kingdom: CHOUDHRY/HERRING, *European Human Rights and Family Law*, 2010, p. 148.

Also relevant is that marriage is not explicitly protected in the Constitutions of the three countries and that religious marriages have no civil effects.¹⁶

The number of same-sex marriages has evolved as follows:¹⁷



¹⁶ BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, pp. 155–158.

¹⁷ Belgium: Directorate-General Statistics and Economic Information, <http://statbel.fgov.be>. The Netherlands: Statistics Netherlands, www.cbs.nl.

3. SEPARATE BUT EQUAL

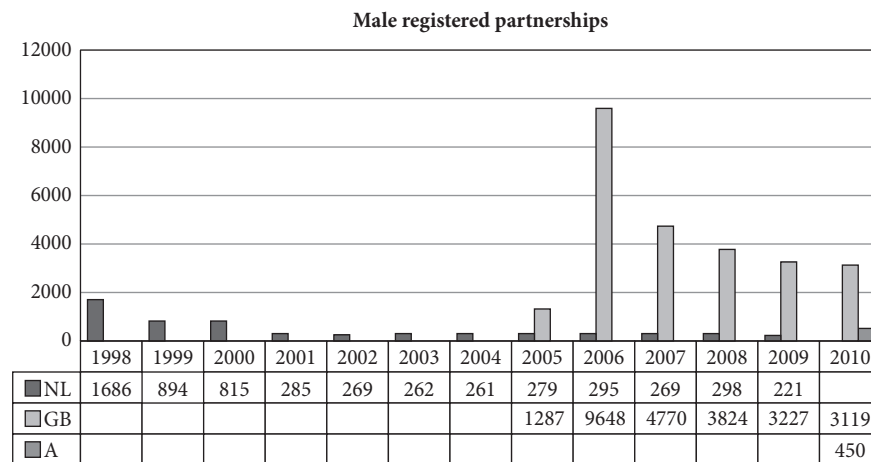
3.1. INTRODUCTION

In four Central European countries, an exclusively same-sex registered partnership with (almost) equal protection as marriage has been introduced alongside marriage, which remains reserved for opposite-sex couples:

- the German *eingetragene Lebenspartnerschaft* (first version in 2001);¹⁸
- the UK civil partnership (2004, entered into force 2005);¹⁹
- the Austrian *eingetragene Partnerschaft* (2010);²⁰
- the Irish civil partnership (2010).²¹

A fifth country, the Netherlands, has created a pluralistic system in which an equal registered partnership was created for both opposite-sex and same-sex couples in 1998,²² which was maintained after the opening of marriage to same-sex couples in 2001.

Only statistics from the Netherlands, the UK and Austria are currently available.²³ Remarkably, only British civil partnerships seem to be *decreasing* in numbers generally.



¹⁸ Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften of 16 February 2001, which brings the Gesetz über die eingetragene Lebenspartnerschaft into force.

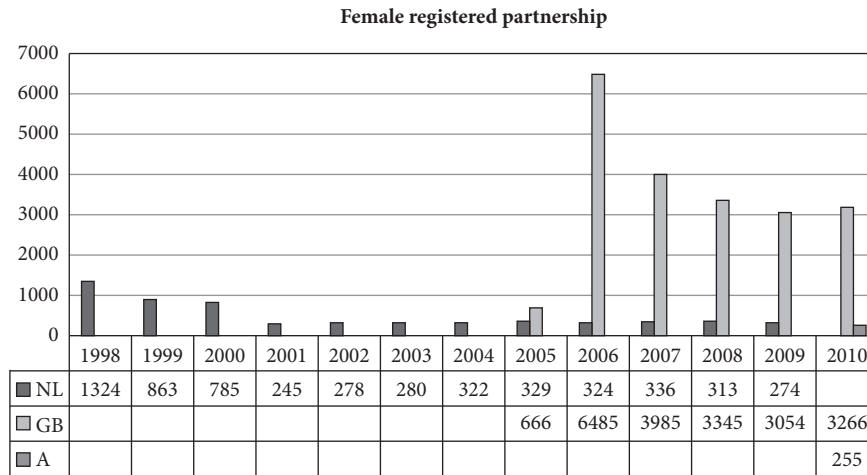
¹⁹ Civil Partnership Act 2004.

²⁰ Bundesgesetz über die eingetragene Partnerschaft of 18 December 2009.

²¹ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

²² Wet tot wijziging van Boek 1 van het Burgerlijk Wetboek (...) in verband met opnemings daarin van bepalingen voor het geregistreerd partnerschap of 5 July 1997.

²³ Austria: Statistik Austria, www.statistik.at. The Netherlands: Statistics Netherlands, www.cbs.nl. United Kingdom: National Statistics Online, www.statistics.gov.uk.



We consider the registered partnerships mentioned above to be equal to marriage on two grounds.

On the one hand, the Belgian government has carried out research into conditions for and the legal effects of foreign-registered partnerships, with a view of assimilating them (or not) to marriage in the light of residence rights. The German and UK partnerships are found to be assimilated.²⁴ The Dutch registered partnership is not assimilated because marriage is open to same-sex couples, meaning that the registration of a partnership represents a choice not to be assimilated with a married couple.²⁵

On the other hand, some national legislators have explicitly stated that the registered partnership is equal to a marriage. For instance, the Austrian government has emphasised that the *eingetragene Partnerschaft* is not just an “*Ehe light*” or a “*Schmalspurehe*”.²⁶ In *Wilkinson v. Kitzinger*, before the English High Court of Justice, it was considered that “abiding single sex relationships are in no way inferior” and that Parliament has not called them marriage “not because they are considered inferior but, because as a matter of objective fact and understanding (...) they are indeed different”.²⁷

We will shortly explain why the separate but equal doctrine has been followed in the countries mentioned above, before highlighting the differences between marriage and registered partnerships with regard to their conditions, legal effects and dissolution. Such differences are mainly symbolic,²⁸ but constitute clear

²⁴ Royal Decree of 7 May 2008, *Moniteur belge*, 13 May 2008.

²⁵ Ministerial Circular of 29 May 2007, *Moniteur belge*, 31 May 2007.

²⁶ *Eingetragene Partnerschaft-Gesetz, Erläuterungen*, 485 der Beilagen – XXIV, p. 3.

²⁷ *Wilkinson v. Kitzinger* [2006] EWHC 2022 (Fam), paragraph 121.

²⁸ SAEZ, Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” is so Different, *American University Journal of Gender, Social Policy & the Law* 2011, Vol. 19, p. 121.

evidence that only marriage is considered to be the basis of a family.²⁹ Particularly vertical effects – regarding children – have been deliberately excluded.³⁰ This will be highlighted in other contributions.

3.2. WHY SEPARATE BUT EQUAL

Some Central European countries have deliberately chosen to create a separate institution because they fear constitutional issues arising, if marriage would be opened up to same-sex partners. Even though Constitutions are “living instruments”, they are not considered to protect a right to marry for same-sex couples. More importantly, they are considered to (implicitly) prohibit the opening up of marriage to same-sex couples, because particular opposite-sex couples deserve state protection. The *German Bundesverfassungsgericht* has considered that the *Institutsgarantie* of marriage encompasses its opposite-sex character, given its conjunction with the family.³¹ The *Austrian Verfassungsgerichtshof* decided in 2003 that §44 ABGB, which since 1812 had referred to marriage as a contract between “*zwei Personen verschiedenen Geschlechtes*”, is not contrary to the Constitution.³² In *Ireland*, the High Court in 2006 found that only opposite-sex marriage is protected under the Constitution, which resulted in the opening up of marriage being refused in 2010.³³ The *French Conseil constitutionnel* finally decided in 2011 that neither the right to respect for family life (Constitution 1946), nor the prohibition of discrimination (Declaration of 1789) encompass a right to marry for same-sex couples.³⁴

One reason for the conception of marriage as heterosexual is related to its procreational function,³⁵ which is still legally relevant in the legislation of some Central European countries.³⁶

²⁹ E.g. for Ireland: sections 172(6) and 173(5) Civil Partnership Act.

³⁰ E.g. Austria: *Eingetragene Partnerschaft-Gesetz, Erläuterungen*, 485 der Beilagen – XXIV, p. 3.

³¹ Art. 6(1) *Grundgesetz*: “*Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung*”, see: *BVerfG*, NJW 1993, 3058; *BVerfG*, NJW 2002, 2543; *BVerwG*, NVwZ 1997, 189. See however: Entwurf eines Gesetzes zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, *Deutscher Bundestag* 16/13596.

³² VfGH 12 December 2003, No. 777/03.

³³ *Zappone & Anor v. Revenue Commissioners & Ors*, [2006] IEHC 404 and before: Options paper Presented by the Working Group on Domestic Partnerships, November 2006, p. 26.

³⁴ *Conseil Constitutionnel*, Decision No. 2010–92 QPC of 28 January 2011.

³⁵ United Kingdom: *Wilkinson v. Kitzinger* [2006] EWHC 2022 (Fam), paragraph 121.

³⁶ SWENNEN, O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage, in: ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 139.

Another reason is probably that religious marriages have civil effects and that a homosexual conception of marriage is irreconcilable with the religious conception.³⁷

Notwithstanding the foregoing, the national legislators of the five countries mentioned above did consider an equal (but different) protection of same-sex couples to be necessary on the grounds of the prohibition of discrimination.

In the *Netherlands* in 1990, the *Hoge Raad* considered that there was not sufficient justification for not extending some legal consequences of civil marriage to an enduring same-sex couple.³⁸ A registered partnership with the same effects as marriage was therefore created.³⁹

An important shift took place in *Germany* regarding the interpretation of the so-called duty of distance, which obliges the state to privilege marriage vis-à-vis unmarried couples.⁴⁰ The *Bundesverfassungsgericht* confirmed⁴¹ in 2009 that such a duty does not compel the state to disadvantage relationships that are comparable to marriage. In other words, the mere reference to the duty of distance does not justify a differentiation between married and unmarried couples.⁴² The *eingetragene Lebenspartnerschaft* could thus be further aligned with marriage.⁴³

For the *UK*, it was emphasised that by introducing a registered partnership with almost identical rights as marriage, the government could forestall challenges under the ECHR. The registered partnership was thus described as permitting same-sex couples to marry “in everything but name”⁴⁴ or that the act “arguably failed to accord the most important right of all, that is the right to marry”.⁴⁵

³⁷ E.g. for Scotland: SUTHERLAND, What has a Decade of Devolution Done for Scots Family Law, in: ATKIN (ed.), *The International Survey of Family Law. 2009 Edition*, 2009, pp. 414–415. See, however, for England and Wales: section 202 Equality Act 2010 regarding the registration of civil partnerships on religious premises.

³⁸ *Hoge Raad* 19 October 1990, *NJ* 1992, 129.

³⁹ BOELE-WOELKI, Registered Partnership and Same-Sex Marriage in the Netherlands, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 45–46; CURRY-SUMNER, *All’s Well that Ends Registered?*, 2005, pp. 118–121.

⁴⁰ THORN, The German Law on Same-Sex Partnerships, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 85; ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006, p. 419.

⁴¹ Also see *BVerfG* 17 July 2002, 1 BvF 1, 2/01, paragraph 98.

⁴² *BVerfG* 7 July 2009, 1 BvR 1164/07, paragraph 105.

⁴³ LÜDERLITZ/DETHLOFF, *Familienrecht*, 2007, pp. 201–202, No. 2–3; BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, p. 115.

⁴⁴ WELSTEAD, Reshaping Marriage and the Family – the Gender Recognition Act 2004 and the Civil Partnership Act 2004, in: BAINHAM (ed.), *The International Survey of Family Law. 2006 Edition*, 2006, pp. 195–197.

⁴⁵ CHOUDHRY/HERRING, *European Human Rights and Family Law*, 2010, p. 148.

3.3. CONDITIONS FOR A REGISTERED PARTNERSHIP

The conditions for a registered partnership are almost identical to marriage in all five countries mentioned above.⁴⁶

With regard to the *substantive conditions*, in all countries except the Netherlands, the registered partners must be of the same sex. In the Netherlands, from 1998 onwards the registered partnership was deliberately opened up to opposite-sex couples for symbolic reasons, with a view to avoiding the stigmatisation of same-sex couples, exclusively ‘condemned’ to a second-class marriage. To open up the registered partnership to opposite-sex couples would emphasise the equal value of same-sex relationships.⁴⁷ Besides this, opposite-sex couples were offered the possibility to receive formal recognition of their relationship in a manner other than marriage.⁴⁸

In Austria, Germany and Ireland, in contrast with marriage no dispensation is possible from the minimum age required for entering into a registered partnership. Apparently, dispensation from the marriageable age is mostly requested when the wife is pregnant and with a view to ensuring the future child’s legal position. This need does not exist for registered partners.⁴⁹

Regarding the *procedure*, it is remarkable that some ceremonial aspects of the registration of marriages have not been adopted for the registration of partnerships in the Netherlands⁵⁰ and in the UK.⁵¹

3.4. LEGAL EFFECTS OF A REGISTERED PARTNERSHIP

The most remarkable difference between most registered partnerships and marriage is the smaller number of *personal* marital rights and duties associated with the former. German *eingetragene Lebenspartner*, contrary to married couples, have no duty to form a *häusliche Gemeinschaft*, including sexual intercourse.⁵² In Austria, *eingetragene Partner*, contrary to married couples, have

⁴⁶ An accidental divergence regarding the impediments to marriage exists in England and Wales due to subsequent changes: The Marriage Act 1949 (Remedial) Order 2007.

⁴⁷ ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006, pp. 413–415.

⁴⁸ BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, pp. 5–9.

⁴⁹ Austria: *Eingetragene Partnerschaft-Gesetz, Erläuterungen*, 485 der Beilagen – XXIV, p. 3. Germany: LÜDERLITZ/DETHLOFF, *Familienrecht*, 2007, p. 203, No. 9.

⁵⁰ ASSER/DE BOER, *Asser I* Personen- en familierecht*, 2010, p. 446, No. 558.

⁵¹ England and Wales: MASSON/BAILEY-HARRIS/PROBERT, *Cretney Principles of Family Law*, 2008, p. 39, No. 1–049. Scotland: SUTHERLAND, *What has a Decade of Devolution Done for Scots Family Law*, in: ATKIN (ed.), *The International Survey of Family Law. 2009 Edition*, 2009, pp. 414–415.

⁵² § 1353 BGB and § 2 LPartG. LÜDERLITZ/DETHLOFF, *Familienrecht*, 2007, p. 206, No. 20.

no duty of sexual fidelity.⁵³ In Austria, England and Wales and Scotland, adultery is a ground for divorce but not a ground for the dissolution of a registered partnership.⁵⁴ Furthermore, in Ireland, a specific rule on the consequences of adultery only applies to married couples.⁵⁵

In England and Wales, only marriage is voidable on the explicit ground that it has not been consummated, or in case one of the spouses suffers from a venereal disease of a communicable form;⁵⁶ in Scotland only marriage is voidable on the ground of incurable impotency.⁵⁷

Differences also exist regarding the *family name* of the same-sex couple. Whereas German married couples *must* determine a family name (*Ehename*), *eingetragene Lebenspartner* may determine a *Lebenspartnerschaftsname*.⁵⁸ The same more or less applies to Austria: *eingetragene Partner* may change their *Nachname* whereas married couples *must* adopt a *Familiennamen*.⁵⁹

The differences mentioned above appear to be a consequence of the conception of only marriage as the basis of the family, including the attached stereotypes (e.g. the wife as the housekeeper).⁶⁰ For instance, in Austria the required organisation of the marital household with regard to the best interest of the children⁶¹ was not copied in the *eingetragene Partnerschaft*. In England and Wales, a marriage-specific regime regarding the housekeeping allowance existed until 2010.⁶²

Most *financial marital duties* are almost equivalent to those of married couples, including in the case of separation. In Ireland, the courts may exceptionally

⁵³ § 90 ABGB and § 8 EPG.

⁵⁴ Austria: § 49 ABGB and § 13 EPG. England and Wales: Section 1(2) Matrimonial Causes Act 1973. Scotland: Section 1(2) Divorce (Scotland) Act 1976 and Section 117 CPA. Hereto: SUTHERLAND, What has a Decade of Devolution Done for Scots Family Law, in: ATKIN (ed.), *The International Survey of Family Law. 2009 Edition*, 2009, pp. 416–417.

⁵⁵ Ireland: Section 5(3) Family Law (Maintenance of Spouses and Children) Act 1976. In Austria § 19(2)2 EPG also provides for the voidability of a partnership in the case of impotence.

⁵⁶ Section 12 Matrimonial Causes Act 1973 and MASSON/BAILEY-HARRIS/PROBERT, *Cretney Principles of Family Law*, 2008, p. 83, No. 2–060. Comp. Austria: § 52 ABGB: illness as a ground for divorce.

⁵⁷ SUTHERLAND, What has a Decade of Devolution Done for Scots Family Law, in: ATKIN (ed.), *The International Survey of Family Law. 2009 Edition*, 2009, p. 415.

⁵⁸ § 1355 BGB and § 3 LPartG.

⁵⁹ § 93 ABGB and § 7 EPG.

⁶⁰ SAEZ, Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” is so Different, *American University Journal of Gender, Social Policy & the Law* 2011, Vol. 19, p. 122.

⁶¹ § 91 ABGB.

⁶² Section 1 Married Women’s Property Act 1964, which was made gender-neutral by Section 200 Equality Act 2010 and since then also applies to civil partners under Section 70A CPA. See MASSON/BAILEY-HARRIS/PROBERT, *Cretney Principles of Family Law*, 2008, p. 93, No. 3–007 with regard to the situation before 2010.

grant maintenance to a partner who has deserted the other, whereas such a possibility does not exist in the case of marriage.⁶³

The same is true regarding the *property* regime between the partners and vis-à-vis third parties, and regarding *inheritance* rights.⁶⁴

3.5. JUDICIAL OR ADMINISTRATIVE DISSOLUTION OF A REGISTERED PARTNERSHIP

In general, the grounds for the dissolution of a registered partnership are fairly comparable to the grounds for the nullification of a marriage or for divorce, except with regard to adultery (see above). The same applies to the consequences of dissolution. Some of the remaining differences seem accidental.

The stability of marriage is, however, better protected in some countries than that of a registered partnership.

Such is the case in Germany, where some “consummated” and registered marriages may not be nullified,⁶⁵ whereas such protection is not available for *eingetragene Lebenspartner*.

In Austria, only the public prosecutor may sue with a view to nullifying a sham marriage, whereas the partners may also do so themselves in the case of a sham partnership.⁶⁶ Thus, the court *must* dissolve a registered partnership if the partners have been separated for more than three years, whereas it may refuse to pronounce the divorce after a three-year separation if it is convinced that the marriage has not irretrievably broken down. Only in the case of a separation of more than six years *must* the divorce be pronounced.⁶⁷

A comparable difference exists under Irish law. Moreover, only in the case of a potential divorce is the solicitor obliged to discuss the possibility of a reconciliation or an amicable solution with his/her client.⁶⁸

⁶³ Section 5(2) Family Law (Maintenance of Spouses and Children) Act 1976 and Section 45 CPA.

⁶⁴ Germany: § 1931 f. BGB and § 10 LPartG. Ireland: some differences exist, see Sections 67A(3)-(7), 116 and 117(3)A Succession Act 1965. United Kingdom: DE CRUZ, *Family Law, Sex and Society. A Comparative Study of Family Law*, 2010, p. 266 and for England and Wales in particular: MASSON/BAILEY-HARRIS/PROBERT, *Cretney Principles of Family Law*, 2008, pp. 325–326, No. 13–001, with reference to *Wilkinson v. Kitzinger* [2006] EWHC 2022 (Fam). §§ 1313(3) and 1315 BGB.

⁶⁵ § 28(1) Ehegesetz and § 19(3) EPG.

⁶⁶ § 55(1) Ehegesetz and § 15(3) EPG.

⁶⁷ Section 5 Family (Divorce) Act 1996 and Section 110 CPA. Comp. England and Wales, where reconciliation must be sought in the case of a civil partnership too: Section 42 CPA.

Finally, in the Netherlands, only a childless registered partnership may be dissolved by mutual agreement before the civil registrar, whereas even childless marriages must always be dissolved by a court.⁶⁹

4. SEPARATE AND UNEQUAL

4.1. INTRODUCTION

In four Central European countries, a ‘light’ registered partnership is open to same-sex couples:

- the Belgian *cohabitation légale* was created in 1998 (entered into force 2000);⁷⁰
- the French *pacte civil de solidarité* (PaCS) was introduced in 1999;⁷¹
- in Luxembourg a *partenariat* was enacted in 2004 (modified in 2010);⁷²
- the Swiss *partenariat enregistré* was adopted by referendum in 2005 (entered into force 2007).⁷³

In Belgium and in Luxembourg, the introduction of a registered partnership at a firm distance from marriage has proved to be the first Station on the way to opening up marriage to same-sex couples. A pluralistic system now exists in those countries, since the partnership was not (and will not be) abolished. It remains to be seen whether the creation of a registered partnership in France and Switzerland is only a first step too.⁷⁴ We are confident that it is,⁷⁵ at the least on the way to creating a separate but equal status.

Statistics are available for Belgium, France and Switzerland.⁷⁶ However, a comparison is difficult. For Belgium, it is only registered whether a partnership is concluded between opposite-sex or same-sex persons. These persons are not

⁶⁹ Artt. 1:151 and 1:80c CC.

⁷⁰ *Loi instaurant la cohabitation légale* of 23 November 1998.

⁷¹ *Loi n° 99/944 relative au pacte civil de solidarité* of 15 November 1999.

⁷² *Loi relative aux effets légaux de certains partenariats* of 9 July 2004.

⁷³ *Loi fédérale sur le partenariat enregistré entre personnes du même sexe* of 18 June 2004 – Referendum of 5 June 2005.

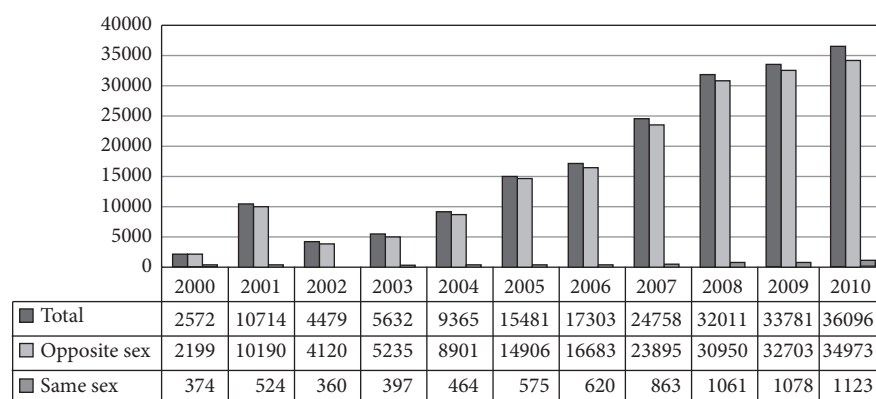
⁷⁴ Also see ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006, pp. 400–401.

⁷⁵ E.g. for France: *Proposition de loi visant à ouvrir le mariage aux couples de même sexe*, Assemblée nationale No. 13/586; *Proposition de loi permettant l'accès au mariage des couples de personnes de même sexe*, Assemblée nationale No. 13/1286; *Proposition de loi visant à ouvrir le droit au mariage à tous les couples sans distinction de sexe ni de genre*, Assemblée nationale No. 13/2290.

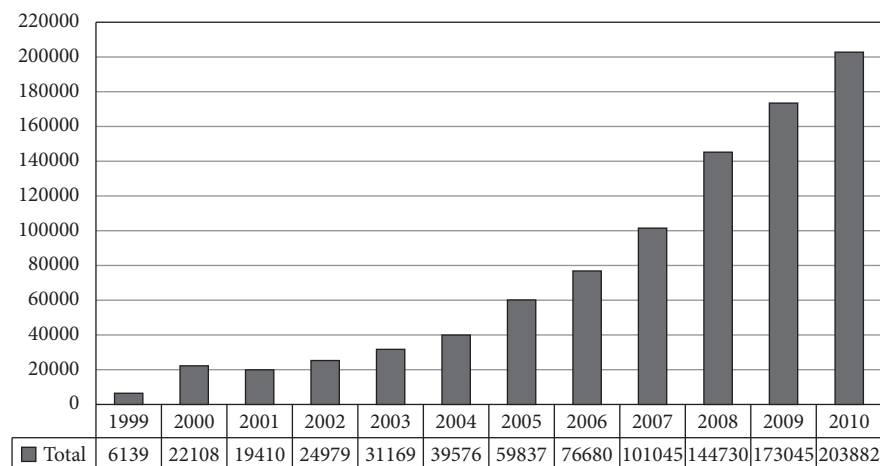
⁷⁶ Belgium: Directorate-General Statistics and Economic Information, <http://statbel.fgov.be>. Switzerland: *Bundesamt für Statistik*, www.bfs.admin.ch; France: *Institut national d'études*

necessarily partners, since a *cohabitation légale* may also be concluded between relatives. Statistics moreover reflect the number of persons involved, and not the number of registrations; we have divided that number by two. Only since 2007 have the French authorities specifically registered whether a PaCS is concluded between opposite-sex or same-sex partners. For Switzerland statistics are available from 2007.

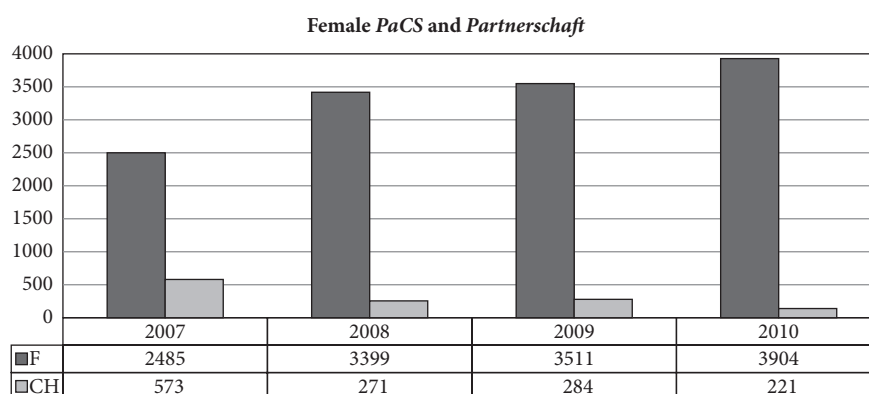
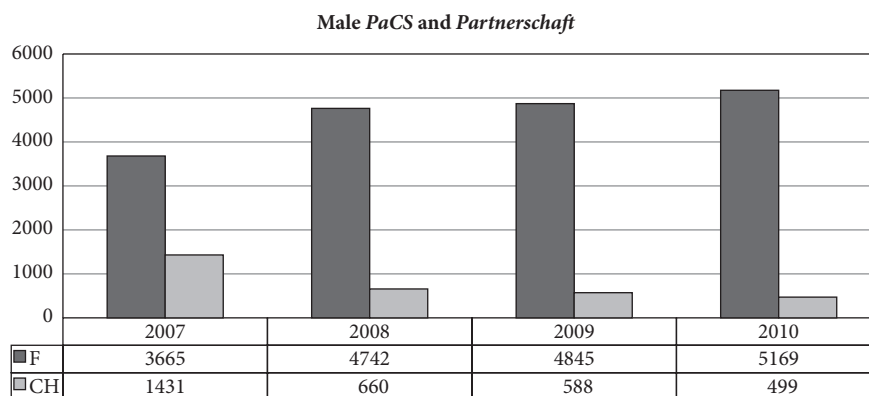
Belgian *cohabitation légale*



French *PaCS*



démographiques, www.ined.fr. With regard to Luxembourg: *Bulletin du Statec* No. 2–2010, p. 81–82 and 106, <http://statec.publique.lu>.



The legislative strategy in the four countries concerned has been to create some legal protection for same-sex couples,⁷⁷ without ‘endangering’ marriage as the sole basis of the family.⁷⁸ The legal and symbolic differences⁷⁹ vis-à-vis marriages are therefore more prominent than is the case with the partnerships described under section III, particularly with regard to the vertical aspects.⁸⁰ The light

⁷⁷ E.g. France: BOSSE-PLATIERE, Le pacte civil de solidarité, in: MURAT (ed.), *Droit de la famille*, 2007, pp. 467–468, No. 150.11.

⁷⁸ E.g. France: FERRAND, Die Rechtsstellung nichtehelicher Lebensgemeinschaften in Frankreich, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, 2005, pp. 218–220. Also see ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006, pp. 390–391.

⁷⁹ SAEZ, Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” is so Different, *American University Journal of Gender, Social Policy & the Law* 2011, Vol. 19, p. 122.

⁸⁰ E.g. Switzerland: *Votation populaire du 5 juin 2005, explications du Conseil fédéral*, www.admin.ch/ch/f/pore/va/20050605/explic/f-pp0100_pp8000.pdf, 17. See however Art. 27 *Loi 2004*.

registered partnerships seem to be limited to the protection of a household as long as it exists. The differences with marriage with regard to the conditions, the legal effects and the dissolution thereof are manifold.

In Belgium, France and Luxembourg doubts have existed for some years as to the question of whether or not the partnership concerned the civil status (*état civil*) of the persons involved at all, as the registration was organised differently. In particular, the Belgian *cohabitation légale* and the Luxembourg *partenariat* – contrary to the French *PaCS* – were not introduced in Book 1 (Persons) of the Civil Code.⁸¹ The question is no longer disputed in Belgium.⁸² In France and Luxembourg, the legislator intervened in 2007 and 2010, respectively, with a view to clarifying whether the partnership does indeed change one's civil status.⁸³ In Switzerland, the act expressly refers to the civil status of the partners.⁸⁴

Except in Switzerland, the partnerships are also open to opposite-sex couples, as a 'light marriage'. The legislators have deliberately created a gender-neutral institution.⁸⁵ This strategy, however, emphasises the difference in treatment between opposite-sex and same-sex couples, since only the former has the choice between a strong and a weak protection.⁸⁶ Concerns over discrimination may therefore arise, in which regard two legislative strategies may be followed: opening up marriage, as is the case in Belgium, or adding substance to the partnership so as to create an equal protection – again Belgium also followed this path.

⁸¹ See also CURRY-SUMNER, *All's Well that Ends Registered?*, 2005, p. 41 and pp. 47–48.

⁸² SWENNEN, Bedenkingen bij het rechtsbegrip 'staat van de persoon', in: DEBEUCKELAERE/MEEUSEN/WILLEKENS (eds.), *Met rede ontleed, de rede ontkleed. Opstellen aangeboden aan Fons Heyvaert ter gelegenheid van zijn vijfenzestigste verjaardag*, 2002, pp. 59–76.

⁸³ France: Art. 515–3–1 CC and BOSSE-PLATIÈRE, Le pacte civil de solidarité, in: MURAT (ed.), *Droit de la famille*, 2007, p. 470, No. 150.24. On the situation before 2007: CURRY-SUMNER, *All's Well that Ends Registered?*, 2005, p. 82 and pp. 89–91. Luxembourg: *Loi portant modification de la loi du 9 juillet 2004 (...) of 3 August 2010*, Art. 1.

⁸⁴ Art. 2(3) *Loi 2004* and CURRY-SUMNER, *All's Well that Ends Registered?*, 2005, p. 174.

⁸⁵ E.g. France: FERRAND, Die Rechtsstellung nichtehelicher Lebensgemeinschaften in Frankreich, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, 2005, p. 213. Also see ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, Antwerp, Intersentia, 2006, pp. 389–390.

⁸⁶ Cf. also ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006, pp. 387–388.

4.2. CONDITIONS FOR A REGISTERED PARTNERSHIP

It seems that in all four countries the registered partnership is conceived as a contract between two persons who have reached the age of majority and are not incapacitated.

With regard to the *substantive* conditions, only the Swiss registered partnership is reserved for same-sex couples.⁸⁷ Only in Switzerland is the existence of a registered partnership an impediment to marriage.⁸⁸ Only in Belgium is it the case that the legal impediments to marriage between family members do not apply to registered partners. The legislator wanted to emphasise that the *cohabitation légale* is not only gender-neutral but also sex-neutral. In that regard, it may be discriminatory that it is not open to more than two persons – e.g. two sisters may enter into a partnership, but not three sisters.⁸⁹ In none of the four countries is a dispensation from the required age (which is lower for the marriage of a woman in Luxembourg)⁹⁰ possible.

As mentioned above, the *procedure* for entering into a partnership is quite different from marriage.⁹¹

4.3. LEGAL EFFECTS OF A REGISTERED PARTNERSHIP

In Belgium and in Luxembourg, registered partners have no reciprocal *personal* rights and duties. In France, they only have a duty of mutual assistance during the cohabitation (*vie commune*).⁹² In Switzerland, they have a duty of mutual assistance and respect – whereas spouses must safeguard their *consortium (union conjugale)*, including the education of their children, and they have a duty to sexual fidelity and assistance.⁹³

The registered partnership has no consequences for the *name* of the partners.⁹⁴

⁸⁷ Switzerland: Art. 2(1) *Loi 2004*. Otherwise in Belgium: Art. 1475 CC; France: Art. 515–1 CC; Luxembourg: Art. 2 *Loi 2004*.

⁸⁸ Art. 26 *Loi 2004*.

⁸⁹ See CURRY-SUMNER, *All's Well that Ends Registered?*, 2005, p. 42.

⁹⁰ Art. 144 CC.

⁹¹ E.g. Belgium: no ceremony, Art. 1476(1) CC; Switzerland: no vows and no witnesses, cf. Art. 97 f. CC; France: not in the town hall, cf. DE CRUZ, *Family Law, Sex and Society. A Comparative Study of Family Law*, 2010, pp. 271–272.

⁹² Art. 515–4(1) CC.

⁹³ Art. 12 *Loi 2004* and Art. 159 CC.

⁹⁴ Cf. with regard to Switzerland: BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, p. 151.

The *patrimonial* aspects of the household are regulated in all four countries. The applicable rights and duties are explicitly enumerated (by reference to rules on marriage).⁹⁵

Each of the partners must proportionally contribute to the household expenses, as must married couples.⁹⁶ In Switzerland, neither the provision according to which the spousal contribution may be made through working at home, the devotion of care to the children or helping the other spouse in his business, nor the provision on the housekeeping allowance has been adopted for registered partners.⁹⁷ The rules on the protection of the family home and on debts incurred for the benefit of the household, both between the partners and vis-à-vis third parties, are fairly comparable to that which applies to married couples.⁹⁸

Separation of property is the legal regime that applies between partners, in contrast to marriage. This could be explained by the fact that most registered partners have a “double income and no kids”.⁹⁹ Some particular rules on evidence apply (e.g. presumptions of *indivisum*).¹⁰⁰ The partners may conclude a property agreement.¹⁰¹ In Switzerland the rule on the compensation (in property) of an extraordinary contribution to the household expenses has not been adopted for the partnership.¹⁰² In France settlement is explicitly made possible.¹⁰³

Divergence exists with regard to the inheritance rights of registered partners. The *ex lege* inheritance rights of a registered partner are comparable to those of spouses in Belgium and Switzerland.¹⁰⁴ However, a Belgian registered partner, contrary to a spouse, has no reserved portion. No *ex lege* inheritance rights exist in Luxembourg and France.¹⁰⁵ The partners may, however, provide for each other through gifts or wills, notwithstanding the reserved portions for family

⁹⁵ Cf. BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, pp. 160–161.

⁹⁶ Belgium: Art. 1477 CC; Switzerland: Art. 13 *Loi 2004*; France: Art. 515–4 CC; Luxembourg: Art. 7 *Loi 2004*.

⁹⁷ Art. 13 *Loi 2004* and Artt. 163 and 164 CC.

⁹⁸ Belgium: Art. 1477 CC; Switzerland: Artt. 14–16 *Loi 2004* and Artt. 166, 169 and 170 CC; France: Art. 515–4 CC; Luxembourg: Artt. 7 and 9 *Loi 2004*. Also see Art. 13 *Loi sur le bail à usage d’habitation et modifiant certaines dispositions du Code civil* of 21 September 2006.

⁹⁹ BOELE-WOELKI/CURRY-SUMNER/JANSEN/SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, p. 152; BOSSE-PLATIÈRE, *Le pacte civil de solidarité*, in: MURAT (ed.), *Droit de la famille*, 2007, p. 491, No. 152.23.

¹⁰⁰ In general Belgium: Art. 1478 CC; Switzerland: Artt. 19–20 *Loi 2004*; France: Art. 515–5 CC; Luxembourg: Art. 10 *Loi 2004*.

¹⁰¹ Belgium: Art. 1478 CC; Switzerland: Art. 25 *Loi 2004*; Luxembourg: Artt. 5–6 *Loi 2004*.

¹⁰² Art. 165 CC.

¹⁰³ Art. 515–7, final paragraph CC.

¹⁰⁴ Belgium: Art. 755octies CC; Switzerland: Artt. 462, 471 and 612a CC.

¹⁰⁵ France: CURRY-SUMNER, *All’s Well that Ends Registered?*, 2005, pp. 102–104.

members.¹⁰⁶ A presumption that a gift has been made applies to half of the *indivisium* in Belgium and Luxembourg, when the surviving registered partner was an heir of the deceased partner.¹⁰⁷

In Belgium and Switzerland, the parties may petition for an interim court order regarding their mutual rights and duties following a specific procedure. The competence of the court is, however, limited vis-à-vis marriage (e.g. with regard to the validity of the order¹⁰⁸ or the circumstances in which the parties may petition).¹⁰⁹

4.4. JUDICIAL OR ADMINISTRATIVE DISSOLUTION OF A REGISTERED PARTNERSHIP

Only in Switzerland are the rules on the dissolution of a partnership comparable to those for a divorce. Both in the case of a partnership and a marriage the partners may jointly apply for dissolution, which must be granted if the court is convinced that the application has been made voluntarily and after careful consideration. Only in the case of a divorce must the court hear the spouses jointly and separately, in some cases on more than one session.¹¹⁰ A unilateral application is possible after one year's separation in the case of a partnership and two years' separation in the case of marriage, although a hardship clause does apply which may justify an early application.¹¹¹ The consequences of a dissolution regarding the household and support are fairly comparable. However, the expectation of self-sufficiency is stronger in the case of the dissolution of a partnership. The partner must demonstrate that a right to support is justified on the grounds of the organisation of the partnership or the dissolution thereof, whereas a divorced spouse may claim that the expectation of self-sufficiency is unreasonable.¹¹²

In Belgium, France and Luxembourg, a registered partnership is dissolved administratively, upon a joint or even a unilateral declaration at the civil (Belgium, Luxembourg) or court (France) registrar's office. In the case of a unilateral declaration, that declaration must be served on the other partner.¹¹³ In France, the *PaCS* has no further effects. In Belgium and Luxembourg, the partners may file for an interim court order within three months, which will

¹⁰⁶ Luxembourg: Art. 11 *Loi 2004*.

¹⁰⁷ Belgium: Art. 1478 CC; Luxembourg: Art. 11 *Loi 2004*.

¹⁰⁸ Belgium: Art. 1479 CC.

¹⁰⁹ Switzerland: No general competence of the court, comp. Artt. 172–179 CC with regard to marriage.

¹¹⁰ Art. 29 *Loi 2004* and Artt. 111–112 CC.

¹¹¹ Art. 30 *Loi 2004* and art. 114 CC.

¹¹² Art. 34 *Loi 2004* and art. 125 CC.

¹¹³ Belgium: Art. 1476 CC; France: Art. 515–7 CC; Luxembourg: Art. 13 *Loi 2004*.

remain valid for a maximum of one year.¹¹⁴ Only in Luxembourg may the court exceptionally grant support to a partner, with no time limit but subject to revision. The support obligation automatically ends with a new marriage or partnership.¹¹⁵

5. COHABITATION

In all Central European countries, cohabitants receive some legal protection in different areas of the law. Such protection is generally not offered on the basis of civil status, of which the legal consequences are organised in one act or chapter in the civil code. Moreover, some discussion has arisen as to whether or not same-sex couples may qualify as cohabitants. In our opinion, it can currently be assumed that they do – or at the least they should do.¹¹⁶

In France, Ireland and Scotland, cohabitation has been legally defined so as to include same-sex couples. The French Article 515–8 CC defines *concubinage* as a union in fact, characterized by a life in common offering a character of stability and continuity, between two persons, of different sex or of the same sex, who live as a couple. Such a legal definition was necessary since the French *Cour de cassation* had excluded same-sex couples from the definition of cohabitation.¹¹⁷ The Scottish legal definition of cohabitants in 2006 had the same objective.¹¹⁸ A cohabitant is now defined as either member of a couple consisting of (1) a man and a woman who are (or were) living together as if they were husband and wife or (2) two persons of the same sex who are (or were) living together as if they

¹¹⁴ Belgium: Art. 1479 CC; Luxembourg: Art. 13 *Loi 2004*.

¹¹⁵ Art. 12 *Loi 2004*.

¹¹⁶ E.g. Belgium: SWENNEN, *Het personen- en familierecht*, 2010, p. 501, No. 859; England and Wales: Law Commission, *Cohabitation: the Financial Consequences of Relationship Breakdown*, Law Com No. 307, p. 48; Germany: MARTINY, *Rechtsprobleme der nichtehelichen Lebensgemeinschaft während ihres Bestehens nach deutschem Recht*, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, 2005, pp. 82–83; The Netherlands: BOELE-WOELKI/SCHRAMA, *Die nichteheliche Lebensgemeinschaft im niederländischen Recht*, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, 2005, p. 313.

Comp. Austria: FERRARI, *Rechtsregeln für nichteheliches Zusammenleben in Österreich*, in: KROPFENBERG/SCHWAB/HENRICH/GOTTWALD/SPICKHOFF (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, 2009, pp. 169–170.

¹¹⁷ Hereto FAVIER, *Le concubinage*, in: MURAT (ed.), *Droit de la famille*, 2007, p. 427, No. 140.11 and CURRY-SUMNER, *All's Well that Ends Registered?*, 2005, pp. 74–75.

¹¹⁸ SUTHERLAND, *What has a Decade of Devolution Done for Scots Family Law*, in: ATKIN (ed.), *The International Survey of Family Law. 2009 Edition*, 2009, p. 419 and on the situation before 2006: CARRUTHERS, *Domestic and Conflict Difficulties Inherent in Regulating the New Order*, in: BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, 2003, pp. 328–329.

were civil partners.¹¹⁹ Since 2010, a cohabitant is legally defined under Irish law as one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of consanguinity or married to each other or civil partners of each other, taking into account particular circumstances. A cohabitant qualifies for enhanced legal protection if (1) the cohabitation has existed for more than two years and the cohabitants have dependent children, or (2) the cohabitation has existed for more than five years.¹²⁰

Only in Scotland¹²¹ and Ireland have the rights and duties of cohabitants been co-ordinated in one act.

6. CONCLUSION

Same-sex couples are formally recognised in all Central European countries. Out of the nine countries:

- two have opened up marriage to same-sex couples (a third is on its way);
- four have created a separate but equal institution (a fifth has an equal and inclusive institution);
- four have created a separate and unequal institution, which in three (soon: two) countries is the only possible legal recognition.

Only two out of the nine countries therefore treat same-sex couples unequally (France and Switzerland – marriage will soon be opened up in Luxembourg). In all Central European countries, same-sex couples may qualify as *de facto* cohabitants. In three countries, same-sex couples are explicitly included in a legal definition thereof.

Both the “separate but equal” and the “separate and unequal” doctrines rely on the legal procreational (vertical) function of marriage with a view to justifying the separate solution.

In the “separate but equal” countries some differences – symbolic at least, but disturbing nonetheless – still exist between marriage and registered partnership that do not concern its vertical function. In the “separate and unequal” countries, a piecemeal approach to defining the legal status of registered partners exists. The

¹¹⁹ Section 25 Family Law (Scotland) Act 2006.

¹²⁰ Section 172 Civil Partnership Act.

¹²¹ Hereto BISSETT-JOHNSON, Cases from the Trenches but only Modest Legislative Responses, in: BAINHAM (ed.), *The International Survey of Family Law. 2006 Edition*, 2006, pp. 345–348.

probable discriminatory nature of such an approach seems clear in the light of the fact that such a light partnership is also accessible for opposite-sex couples: only these couples can choose between strong or weak protection (except in Switzerland).

Two arguments may be raised against the justification mentioned above. On the one hand, in most European countries the legal vertical function of marriage is largely abandoned – on the ground of the prohibition of discrimination against children and parents on the basis of the marital status of the parents. On the other hand, same-sex couples increasingly have access to parent-child relations. On this ground, the stability of their relationship would deserve equal protection to that of married couples.

A cautious conclusion is therefore that the *Via dolorosa* most certainly has not come to an end in France and Switzerland. It remains to be seen whether marriage will be opened up in those countries that have currently opted for the “separate but equal” approach. The ECHR *Schalk & Kopf* judgment seems to justify a negative answer to that question – at least for now.



ALL OR NOTHING: THE DILEMMA OF SOUTHERN JURISDICTIONS

Cristina GONZÁLEZ BEILFUSS

1. INTRODUCTION

The situation in the four Southern European jurisdictions that will be dealt with in this report, namely in Portugal, Spain, Italy and Greece is characterised by a sharp contrast between the two more Western legal systems (Portugal and Spain) that afford full recognition to same-sex couples, allow them to marry and also recognise same-sex partnerships outside the institution of marriage, and that of the two more Eastern jurisdictions (Italy and Greece), that do not afford any kind of legal recognition to couples of the same sex.

Viewed from the perspective of this report, these two groups of jurisdictions appear to have little in common, except geographical location. It therefore seems appropriate to analyse them separately, and then try to provide a potential explanation for such a radical diversity between the Southern East and West.

2. MARRIAGE AND OTHER FORMS OF LEGAL RECOGNITION OF SAME-SEX COUPLES: SPAIN AND PORTUGAL

Both Spain and Portugal have opened up marriage to same-sex couples and belong to the growing minority of European countries that have departed from the traditional heterosexual concept of marriage. The opening up of marriage was contested by significant sectors of society and challenged on grounds of compatibility with the respective Constitutions in both jurisdictions. The opening up of marriage was not the result of consensus but a victory for left-wing parties that happened to be in power when this step was taken.

A further common characteristic of the two Iberian countries is that marriage is not the only legal institution available to same-sex partners. Both countries have

enacted legislation on unmarried couples that is applicable to same-sex and different-sex partnerships without distinction. It should, however, be stressed that this legislation departs from the registered partnership model that prevails in other European jurisdictions. Portuguese and some Spanish statutes on unmarried couples do not require couples to perform any kind of formal act but become applicable on the basis of a factual element (i.e. cohabitation). The regime applies to all couples that fall under the scope of application of such special legislation, and not only to those that have voluntarily opted for it.

While there is significant convergence between Spanish and Portuguese law in the aforementioned areas, Spanish law goes significantly beyond Portuguese law when it comes to the relationship between same-sex couples and children.

2.1 MARRIAGE

The first Southern jurisdiction and the third European country after the Netherlands and Belgium to allow same-sex couples to marry was Spain, which thus became the first predominantly Roman Catholic country where marriage was opened up to such couples. This happened in 2005¹ through a bill that reformed the Spanish Civil Code and basically only added a second paragraph to Article 44 of the Civil Code. The first paragraph of Article 44 of the Spanish CC provides that men and women can enter into a marriage. The new second paragraph adds that marriage has the same effect regardless of whether it is between persons of a different sex or the same sex. It is thereby excluded that the first paragraph can be interpreted to mean that men can only marry women, and vice versa. The remainder of the bill contains some terminological changes that substitute concepts like husband, wife, mother and father with gender-neutral expressions that do not implicitly exclude the possibility that the spouses are of the same sex.²

Like in all other legal systems that are dealt with in this report, the requirement of heterosexuality was not clearly established in Spanish law. Nothing indicates that the drafters of the Civil Code or those of the 1978 Spanish Constitution³ even considered the possibility that marriage could be entered into by persons of

¹ *Ley 13/2005, de 1 de julio, de modificación del Código civil en materia de derecho a contraer el matrimonio* (BOE No. 157, 2 July 2005).

² The articles that were modified were quite numerous. They are: Art. 66, 67, 154, 160, 164(2), 175, 178, 637, 1323, 1344, 1348, 1351, 1361, 1365.2, 1404 and 1458 of the Spanish Civil Code. To this were added some modifications to the Bill on the Civil Register.

³ Art. 32 of the Spanish Constitution is phrased in the same terms as Art. 44 of the Civil Code. It establishes that men and women have a right to contract a marriage subject to equal conditions, which literally does not exclude same-sex relationships.

the same sex. It was therefore open to debate whether same-sex marriage was compatible with the constitutional concept of marriage. The majority in Parliament took the view that the Constitution did not impede same-sex marriage, which was therefore an option which was open to Parliament. The Preamble to the 2005 Bill, moreover, directly connects the opening up of marriage with several constitutional principles such as the principle that the State should promote the conditions which are necessary for citizens to enjoy equal treatment and freedom (Article 9 of the Constitution), the principle of self-determination (Article 10(1) of the Constitution) and the principle of non-discrimination (Article 14 of the Constitution). It further justifies the step taken by reference to societal change and the Resolution of the European Parliament of 8 February 1994 on equal rights for homosexuals and lesbians.⁴ The recognition of same-sex marriage was also presented as compensation for the prosecution of homosexuality during the dictatorship of General Franco.⁵

Although this view was the one that ultimately triumphed, it was heavily contested both inside and outside Parliament. While the text was approved on 21 April 2005 in the first chamber of Parliament (*Congreso de los Diputados*), where the Socialist Party had a majority of the vote, the Second Chamber (*Senado*), where the Conservative “Partido Popular” was in control, vetoed it on 22 June 2005. This meant that the bill had to be sent back to the First Chamber where it was finally approved by 187 votes in favour, 147 votes against, with four abstentions. The opening up of marriage was thus not the result of consensus in Parliament but, on the contrary, was clearly connected to the fact that the Socialist party dominated.

Of special relevance is the fact that the bill was subsequently challenged on constitutional grounds by a number of Members of Parliament belonging to the *Partido Popular*. The main arguments of the constitutional claim are that the statute violates the constitutional concept of marriage as the union between a man and a woman (Article 32 of the Constitution) and also goes against the principle of the protection of the family and of children as enshrined in Article 39 of the Constitution. At the time of writing, nearly six years after the opening up of marriage, the constitutional claim is still pending. The leader of the *Partido Popular*, the party that lodged the appeal, has not clarified what his position will be if he wins the next elections and becomes Spain’s new Prime Minister, as is highly probable in the elections that will take place in November 2011. While at first he had said that he did not exclude the possibility of repealing the same-sex

⁴ Resolution on equal rights for homosexuals and lesbians in the EC (*Official Journal of the European Communities* No. C 61, 28 February 1994).

⁵ SÖRGJERD, *Reconstructing Marriage in a changing Legal and Societal Landscape*, 2011, pp. 269–270 with further references.

marriage bill, his position is now more nuanced. In a press interview he indicated that he would wait for the judgment of the Constitutional Court and then respond according to the view prevailing in Spanish society.⁶

According to different opinion polls, 56% of Spanish citizens agree that same-sex marriages should be allowed throughout Europe.⁷ There are, however, important groups of society, notably those influenced by the Catholic Church, that oppose this view. The actual numbers of same-sex marriages are relatively low. Some 2.5% of marriages contracted in Spain during the first semester of 2010 were same-sex marriages. This means that out of 76,381 marriages, 1,899 were same sex-marriages (62.9% male and 37.1% female). In total, approximately 15,000 same-sex couples have married since 2005.⁸

Five years after Spain the other Iberian country, Portugal, also decided to open up marriage.⁹ The new Portuguese Marriage Bill is also relatively simple and consists of only five provisions. Article 1 of the Portuguese Bill merely states that same-sex partners can contract a civil marriage. Articles 2 and 4, respectively, modify¹⁰ and derogate¹¹ from the provisions of the Civil Code in order to ensure that same-sex marriage is included. All marriage-related legal provisions should be interpreted according to the fact that persons of the same sex can contract a valid civil marriage (Article 5). Article 3 of the bill, however, establishes an exception to this general principle, because it provides that only different-sex married couples can jointly adopt children.

The debate about the constitutionality of the statute occurred in Portugal as well, but was resolved by a Judgment of the Constitutional Court on 9 April 2010, prior to the enactment of the bill. The Portuguese Constitutional Court decided that while the Constitution does not require the opening up of marriage, it also does not impede such reform, which can be decided by Parliament as part of the ordinary exercise of its legislative powers.¹² Remarkably, the position sustained by the Portuguese Constitutional Court largely coincides with the view taken by Spain's Parliament in 2005. It remains to be seen whether this ruling will influence the Spanish Constitutional Court, when it finally decides on the constitutional concept of marriage.

⁶ www.elpais.com/articulo/deportes/Rajoy/asegura/escuchara/gente/derogar/matrimonio/homosexual/elpepudep/20101221elpepudep_1/Tes.

⁷ Eurobarometer 2006.

⁸ Source: *Instituto Nacional de Estadística*.

⁹ *Lei n.º 9/2010 de 31 de Maio Permite o casamento civil entre pessoas do mesmo sexo (Diário da República, 1st Series, No. 105, 31 May 2010)*.

¹⁰ Art. 1577, 1591 and 1690 of the Portuguese Civil Code.

¹¹ Art. 1628 of the Portuguese Civil Code.

¹² The decision can be retrieved at www.tribunalconstitucional.pt.

2.2. OTHER FORMS OF LEGAL RECOGNITION

Both Spain and Portugal did afford some form of legal recognition to same-sex relationships prior to the opening up of marriage. The reform of marriage was preceded by legislation on unmarried couples that applies to both same-sex and different-sex couples. Regardless of their sexual orientation, couples have a choice between marriage and being recognised as an unmarried union.

In Spain the legislation on unmarried couples that paved the way towards same-sex marriage is legislation of the Autonomous Communities. It should in this context be recalled that Spain is a country with a non-unified legal system. A further factor of complexity is that only seven of the seventeen Autonomous Communities have legislating powers in the area of Private law. These are Galicia, the Basque country, Navarra, Aragón, Catalonia, the Balearic Islands and Valencia¹³ (the so-called “historical” territories or *territorios forales*).¹⁴ All these Communities have special legislation on unmarried couples that deals with Private law matters.¹⁵

Surprisingly, however, legislation on unmarried couples has also been enacted by other Autonomous Communities such as Madrid,¹⁶ Asturias,¹⁷ Andalusia,¹⁸ the Canary Islands,¹⁹ Extremadura²⁰ and Cantabria,²¹ although these regions

¹³ Traditionally, Valencia did not belong to this group. The Community has, however, been rather successful in claiming that it does have competence in certain areas of Private law and has, for example, enacted Statutes on matrimonial property law or shared custody. These bills have been questioned on constitutionality grounds.

¹⁴ MARTIN CASALS, Family law of Spanish Autonomies: Following a Similar Pattern?, in: ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, pp. 63–64.

¹⁵ Catalonia (*Llei 10/1998, de 15 de juliol, d'unions estables de parella* [BOE No. 198, 19 August 1998]), Aragón (*Ley 6/1999, de 26 de marzo, de las Cortes de Aragón, relativa a Parejas estables no casadas* [BOE No. 95, 21 April 1999]), Navarra (*Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables* [BOE No. 214, 6 September 2000]), Valencia (*Ley 1/2001, de 6 de abril, por la que se regulan las uniones de hecho* [BOE No. 112, 10 May 2001]), Balearic Islands (*Ley 18/2001, de 19 de diciembre, de Parejas Estables* [BOE No. 14, 16 January 2002]), Basque Country (*Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho* [BOPV No. 100, 23 May 2003]), Galicia (provision in *Ley 2/2006, de 14 de junio, de derecho civil de Galicia* [BOE No. 191, 11 August 2006]).

¹⁶ *Ley 11/2001, de 19 de diciembre, de Uniones de Hecho de la Comunidad de Madrid* [BOE No. 55, 5 March 2002].

¹⁷ *Ley del Principado de Asturias 4/2002, de 23 de mayo, de Parejas Estables* [BOE No. 157, 2 July 2002].

¹⁸ *Ley 5/2002, de 16 de diciembre, de Parejas de Hecho* [BOE No. 11, 13 January 2003].

¹⁹ *Ley 5/2003, de 6 de marzo, para la regulación de las Parejas de Hecho en la Comunidad Autónoma de Canarias* [BOC No. 54, 19 March 2003].

²⁰ *Ley 5/2003, de 20 de marzo, de Parejas de Hecho de la Comunidad Autónoma de Extremadura* [DOE núm. 42, 8 April 2003].

²¹ *Ley de Cantabria 1/2005, de 16 de mayo, de Parejas de Hecho de la Comunidad Autónoma de Cantabria* [BO Cantabria No. 98, 16 May 2005].

cannot legislate on matters belonging to Private law. Such legislation is very often rather thin in substance, since it deals with very limited areas of Public law that are open to intervention by the Autonomous Community, such as public housing, the benefits based on the family situation of civil servants and parts of tax law.

In legal literature this legislation²² is very often criticised for being deficient from a technical point of view and constituting an infringement of the Spanish Constitution.²³ However, from a political point of view, it is unquestionable that these regional statutes have played a major role in the process of the legal recognition of same-sex couples, because it very quickly became accepted that there is no justification for the different treatment of same-sex and different-sex couples. The first Autonomous Community that enacted legislation on the so-called “stable unions” was Catalonia, which already dealt with the matter in 1998. Catalan legislation provided for different treatment between same-sex and opposite-sex couples, which was dealt with in different chapters of the bill. This was heavily criticised.²⁴ The second Autonomous Community that followed, namely Aragón, already treated same-sex and opposite-sex couples alike. The idea that there is no justification for discrimination has likely permeated into the concept of marriage, and has been decisive in taking the step of opening marriage up to same-sex couples. Catalonia has recently reformed its legislation on unmarried couples, and treats same-sex and different-sex unions equally.²⁵

There are significant differences between the legislation of the different Autonomous Communities. As stated above, the biggest difference is that between the statutes of the Autonomous Communities that can deal with Private law matters, and those of the other Autonomous Communities that have to

²² On the legislation of the Autonomous Communities see ROCA TRIAS, Same-sex partnerships in Spain: Family, Marriage or Contract?, *European Journal of Law Reform* 2001, pp. 365–382; GONZÁLEZ BEILFUSS, Länderbericht Spanien und Portugal, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften/The legal status of cohabitants*, 2005, pp. 249–275; MARTÍN CASALS, Same-Sex Partnerships in the Legislation of the Autonomous Communities, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples*, 2003, pp. 54–67.

²³ RODRÍGUEZ MARTÍNEZ, *La legislación autonómica sobre uniones de hecho. Revisión desde la Constitución*, 2003.

²⁴ MARTÍN CASALS, Comentari al art. 1 de la LUEP in: EGEA-FERRER (ed.), *Comentaris al codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, 2000, p. 1144.

²⁵ Catalonia, which was the first Autonomous Community to enact legislation in this area, was also the first Autonomous Community to reform this legislation after the opening up of marriage. The reform was undertaken in connection with a general revision of the Family law Code that has now become Book II of the Catalan Civil Code. The first relevant innovation is that legislation on unmarried couples is now part of the Family Law Book of the Code, while it was contained in a separate statute before the reform. Chapter IV of Title III of Book II of the Code now deals with unmarried cohabitants. Book II entered into force on 1 January 2011.

confine themselves to matters connected with social protection. Even within these two groups there are also significant divergences. Legislation on unmarried partnerships in the *Derechos forales*, that cover Private law, tends to be inspired by the rules applying to married spouses. Since this legislation differs greatly, it does not come as a surprise that the legal effects of unmarried partnerships are also widely divergent.²⁶

A further source of divergence is that some of these Spanish institutions do not follow the registered partnership model that prevails in other European jurisdictions, or at least do not follow it fully, while others adhere to it. Autonomous Communities like Catalonia, Aragon, Navarra and Asturias follow the so-called double-track model as regards the ways of entering into the relationship. Legislation on unmarried couples applies, first, on the basis of a factual circumstance, such as having lived together for a period of two or three years depending on the legislation, or having a common child. It is also possible, however, to enter into the institution through a private contract recorded in a public deed. In these Communities there is no possibility to opt out of the statute, which applies even to those couples that do not wish to be protected. Although Catalan law, for example, leaves considerable room for party autonomy, there are some core provisions that cannot be derogated from. The main purpose of such core provisions is the protection of the weaker party. In other Autonomous Communities, like the Basque country or Galicia, it is, on the contrary, imperative to register if a couple seeks legal recognition. If such formality is not complied with, the partners do not fall under the Statute and do not enjoy the protection that it offers. It therefore seems that the purpose of these institutions is to provide an alternative to marriage. Since the statutes were all enacted, except that of the Autonomous Community of Galicia, before same-sex couples were allowed to marry, at the time of enactment the new institutions were the only ones which were open to homosexual couples who wished to formalize their union. Since the opening up of marriage, all couples, different-sex and same-sex, can opt for a marriage or a registered partnership.

In spite of these far-reaching divergences, there are, however, also common elements. In my opinion, the most important is that these institutions are subordinate to marriage, first because their effects are never as far-reaching as those of marriage, and second because contracting a marriage either with the same partner or with another partner is a cause of the *ex lege* dissolution of such partnerships, while the fact of being a partner in one of these institutions does not constitute an impediment to marriage. A married spouse cannot, moreover, be a partner in an unmarried union under most systems. Catalan law, which was

²⁶ MARTIN CASALS, Family law of Spanish Autonomies: Following a similar pattern? in ANTOKOLSKAIA, *Convergence and Divergence of Family Law in Europe*, 2007 p. 73.

very recently reformed, provides an exception.²⁷ The fact that one or both partners are still married to another person does not constitute an impediment to constituting a “stable partnership” under the new legislation if such persons have factually separated from their spouse. This step was considered to be necessary, since the former requirement left almost one third of *de facto* partnerships outside the regime.

One of the key questions at present, after the opening up of marriage, is the role of such legislation. Although few data are available, it appears that the number of couples that register is very low.²⁸ Research undertaken in Galicia, one of the Autonomous Communities where it is imperative to register, indicates that the existence of an institution that affords legal recognition and grants some rights that do not go so far as those attached to marriage might particularly appeal to different-sex couples, but is not an option that is seriously considered by same-sex couples.²⁹ In Autonomous Communities such as Catalonia, Aragón, Navarra and Asturias, where the statute does not only apply on the basis of a formal act, most couples falling under this legislation are those that simply cohabit.

Portugal already recognised same-sex couples in Act 7/2001 of 11 May 2001 that applies to any union between two people, regardless of their gender and who have lived together in a *de facto union* for more than two years. According to Article 2 of the bill, the parties must be above the age of sixteen and, if married, judicially separated. The impediments to marriage such as kinship in the direct line, or in the second degree of the collateral line, or affinity in the direct line, or the previous conviction of one partner for the murder or attempted murder of the other partner’s spouse, have been extended to unmarried couples. Those that do not qualify form a third category besides married and *de facto* unions.

The main effect of the 2001 statute is that it renders a former statute, which dealt with cohabitation, applicable to same-sex cohabitants who were previously excluded.³⁰ All rights enjoyed by different-sex unmarried cohabitants, except the

²⁷ Art. 234.2 Catalan Civil Code allows married individuals who have factually separated from their spouses to be partners in an unmarried cohabitation. See LLEBARIA SAMPER, *Comentario al art. 234–2* in ORTUÑO MUÑOZ (ed), *Libro Segundo del Código Civil de Cataluña*, 2011, p. 934.

²⁸ Only around 2.5% of such couples bother to register in Catalonia where the statute also only applies on the basis of a two-year period of cohabitation or if there are common children. See MARTIN CASALS, *Family law of Spanish Autonomies: Following a Similar Pattern?*, in: ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 75.

²⁹ In Coruña, which is part of the Autonomous Community of Galicia, 1,910 couples have registered since the creation of the register in 2006. Only 30 of them were of the same sex. Data provided by Jose M^a Lorenzo Villaverde, PhD student at the University of Copenhagen (on file with the author).

³⁰ MARTINS, *Same sex partnerships in Portugal. From de facto to de iure*, in: BOELE-WOELKI (ed.), *Debates in Family Law around the globe at the Dawn of the 21st Century*, 2009, p. 288.

right to jointly adopt a child, have also been granted to homosexual partners. These rights do not appear to be very far-reaching. The *de facto* union has, for example, no effect on property relations between partners that are subject to the general law of obligations.³¹ The statute also does not grant any succession rights to the surviving partner in the case of death. Unless there is special provision in a will, partners are treated as if there was no relationship between them.³²

The statute concentrates very much on issues connected to the break-up of the relationship, such as the attribution of the joint home, which is dealt with in Article 3 (a) of the bill. If, for example, the home is leased, the court can assign the lease to one of the partners taking into account the needs of each partner, the interests of the children and other factors. Other issues that are dealt with belong to the area of social protection and concern, for example, holidays, absences, leave and preferential placement enjoyed by employees and civil servants. In these areas unmarried partners tend to be assimilated to married spouses.³³

2.3. CHILDREN

In the area of Children's law, Spanish law appears to go much further than its Portuguese equivalent. While in Portugal neither married nor unmarried same-sex couples have the right to jointly adopt children, this possibility exists for married couples, and some unmarried couples that fall under certain of the Autonomous Statutes under Spanish law. Spanish law does not distinguish between domestic and cross-border adoption in this regard. In practice, however, it should be noted that inter-country adoption is very often not possible, because countries of origin refuse to assign children to married homosexual couples. It is therefore not uncommon for same-sex couples to resort to individual adoption abroad, and then to regularize the situation in Spain through step-parent adoption. Individual adoption is recognised in Article 1979(2) of the Portuguese Civil Code.

The presumption of paternity according to which the husband of a married woman is deemed to be the legal father of the child, thereby acquiring parental responsibility, does not apply under Spanish law if the mother is married to another woman. Discrimination in this area was however partially removed in 2007. Article 7 of the Act on techniques of assisted fertilization³⁴ now establishes that if the mother is married to another woman, and the child is conceived through sperm donation carried out in a Spanish hospital, the mother's wife can

³¹ *Ibidem*, p. 290.

³² *Ibidem*, p. 293.

³³ *Ibidem*, p. 290.

³⁴ See *Disposición Adicional 1ª* of *Ley 3/2007* of 15 March 2007 that introduces a new third paragraph to Art. 7 of the *Ley de reproducción asistida* [BOE No. 65, 16 March 2007].

declare before the birth of the child that she wishes to be considered as the co-mother of the child, thereby acquiring parental responsibility.

Under Spanish law, it is therefore possible for two women or two men to become the legal parents of a child. This requires, however, that the persons involved take action and go through a specific legal procedure. An interesting issue is the position of a same-sex partner who has not gone through such a procedure, although in practice he or she has played the role of a parent. These situations do not appear to be uncommon, since legal status only becomes relevant in a situation of conflict, from which human beings have a tendency to think that they will be spared.

Recently, the Spanish Supreme Court has dealt with such a case.³⁵ Two women cohabited in Talavera de la Reina (Toledo). One of them gave birth to a child that was conceived through sperm donation during a period when the aforementioned 2007 legislation was not in force. Whether having a child was the result of a common decision could not be proved, although it was likely to be the case, since the child was raised by both women jointly. When the couple broke up, the biological and legal mother blocked contact between her former partner and the child, arguing that her former partner had no legal title granting her a right to maintain a personal relationship with the child. In a ruling led by Supreme Court Judge Encarnación Roca Trias, the Supreme Court decided that the two women and the child had formed a *de facto* family, which is covered by Article 8 of the European Convention on Human Rights (protection of family life). This, together with the consideration of the child's best interests as the paramount factor and some additional arguments derived from Spanish domestic law, led to the result that the petitioner was granted the same rights as she would have received if she had had the legal status of a mother.

3. MARRIAGE AND OTHER FORMS OF LEGAL RECOGNITION OF SAME-SEX COUPLES: ITALY³⁶ AND GREECE

There are no partnership institutions open to same-sex couples who wish to formalize their relationship in Italy or Greece. Neither is it possible for same-sex

³⁵ STS 2676/2011 (*Sala de lo Civil*), decision of 12 May 2011.

³⁶ The author would like to acknowledge the assistance of Maria Federica Moscati (Queen Mary School of Law and SOAS School of Law, University of London, *Avvocatura per I Diritti LGBT-Rete Lenford*) and Francesco Bilotta (University of Udine, *Avvocatura per I Diritti LGBT-Rete Lenford*) who have provided valuable information on Italy. All errors are, however, those of the author.

couples to enter into a marriage. In both countries there have been proposals to introduce a registered partnership for both same-sex and different-sex couples. Same-sex couples have also challenged the prohibition on marriage in the Courts.

3.1. LEGISLATION ON UNMARRIED COUPLES

Greece introduced the institution of registered partnership in 2008 (Act 3719/2008).³⁷ It is only open, however, to different-sex couples. Article 1 of the bill defines it as a solemn contract between persons of a different sex that has the goal of organizing their cohabitation. There are no mandatory rules regulating the personal and economic effects of the union between the partners, which they are therefore free to regulate as they wish. The bill contains some binding rules as regards children born out of such a union; for example, a presumption of paternity applies according to which a child born to a woman who has concluded such a contract is deemed to be the child of the man with whom she has contracted. The bill also contains mandatory rules on the succession rights of the surviving partner. These rights are not equivalent, however, to the rights granted to a surviving spouse, but are more limited.

Greek legal literature has questioned the compatibility of this legislation with Articles 8 and 14 of the European Convention on Human Rights, since the institution is not open to same-sex couples.³⁸ At present, two cases that have been joined are pending before the European Court of Human Rights.³⁹ Several same-sex couples who are cohabiting in Athens claim that the bill infringes upon their right to private life and discriminates against them on grounds of sexual orientation.

There have been some attempts to open up the concept of registered partnership and to make it also available to same-sex couples. The Panhellenic Socialist Movement (PASOK) presented in April 2006, and again in 2008, legislative proposals for the recognition of unmarried couples, homosexual and heterosexual, following the French example of the *Pacte civil de solidarité*.⁴⁰ On 17 September 2010, the Minister of Justice announced that a special committee had been set up to prepare a registered partnership law that would include both

³⁷ TSOUCA, Le partenariat enregistré en droit grec, *Revue critique de droit international privé* 2010, pp. 615 f.

³⁸ *Ibidem*.

³⁹ *Vallianatos & Mylonas v. Greece* (Application No. 29381/09) and *C.S. & Others v. Greece* (Application No. 32684/09).

⁴⁰ www.pinknews.co.uk/news/articles/2005-7284.html.

same-sex and different-sex couples. The committee was formed on 29 July 2010. No results have as yet been reported.⁴¹

In Italy there have been different legislative proposals attempting to regulate unmarried couples. The proposal on a *Patto civile de solidarietà*, which was inspired by the French PACS, was presented prior to the elections that took place in 2006. It was an institution open to same-sex and different-sex couples that sought to attract the support of larger groups of society by providing protection on the basis of contract law.⁴² The *Patto* was defined as “an agreement between two people, also of the same sex, concluded in order to regulate the personal and patrimonial relations concerning their life together”.

After the elections, the coalition led by Romano Prodi presented a new proposal, the so-called DICO project (*Diritti e Doveri delle Persone stabilmente Conviventi*),⁴³ which was fiercely opposed by the Catholic Church and conservative sectors of society, and deeply divided the Coalition in government. The crisis was resolved by presenting the so-called CUS project (*Contratto de unione solidale*), which aimed at inserting a new Title at the end of the Family Law Book of the Italian Civil Code. In 2008, after the centre right-wing coalition won the elections, a new bill on mutual rights and duties for cohabiting partners (*Diritti e Doveri di REciprocità dei conviventi* known as DIDORE) was presented to the Italian Parliament, but has never been debated.

3.2. SAME-SEX MARRIAGE

In April 2010 the Italian Constitutional Court delivered a judgment on the constitutionality of same-sex marriage. The question had been brought before the Court by the Appellate Court of Trento and the tribunal of Venice in connection with appeals lodged by same-sex couples who had been denied a marriage licence. These cases were part of a campaign called *Affermazione civile*, which was supported by two organizations, the *Avvocatura per I Diritti LGBT-Rete Lenford* and *Certi Diritti*. The main arguments by the plaintiffs were based on the fact that there is no definition of marriage in Italian law. As a consequence, refusing the possibility for a same-sex couple to marry would violate the principle

⁴¹ ILGA EUROPE's contribution to the *Green Paper Less Bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil documents* that can be retrieved at www.statewatch.org/news/2011/may/ilga-europe-green-paper-submission.pdf.

⁴² BONINI BARALDI, Family v. solidarity. Recent epiphanies of the Italian reductionist anomaly in the debate on *de facto* couples, in: BOELE-WOELKI (ed.), *Debates in Family Law around the globe at the Dawn of the 21st Century*, 2009, pp. 263–265.

⁴³ *Ibidem*, pp. 267–270.

of equality enshrined in Article 3 of the Italian Constitution.⁴⁴ This was denied by the Constitutional Court which pointed out that marriage is the union between a man and a woman. In the same decision the Court however affirmed the need for legislation to protect the rights of same-sex couples.⁴⁵

On 3 June 2008, the mayor of the Aegean island of Tilos in Greece officiated over two marriage ceremonies between two homosexual couples, citing a legal loophole in the law on civil weddings that does not specify that marriages can only be contracted by different-sex couples. The government filed a court motion to annul the two same-sex marriages. On 5 May 2009, a court ruled that the marriages were invalid. The hearing of the case at the Court of Appeal took place on 14 January 2011, and a decision is expected by the end of the summer of 2011.⁴⁶

4. CONCLUDING REMARKS

It is either all or nothing in the Southern European jurisdictions that are dealt with in this report. The two more Western systems provide for two institutions – marriage and “unmarried cohabitation” – which legally recognize same-sex couples, while the more Eastern Countries do not afford any kind of recognition.

A common trend, however, is that the issue of the recognition of same-sex relationships divides society in all southern countries. The fact that marriage was opened up in Spain and Portugal is clearly connected to the fact that both countries were controlled by the Socialist party when this step was taken while the weakness of left-wing parties accounts for the fact that there is no legal recognition of same-sex partnerships in Italy and Greece. The role of the Church may also be different in the two groups of countries. As Moscati has convincingly explained, the Catholic Church is no longer influential in left-wing sectors of Spain and Portugal because of the central role it played in supporting the military regimes that dominated the two Iberian countries between the 1940s and the 1970s. In Italy the links between the Vatican and the State permeate through the whole of the political spectrum.⁴⁷ In Greece the Orthodox Church is still highly influential. Only 15 years ago, for example, did it become possible to contract a civil marriage.

⁴⁴ MOSCATI, Individual Autonomy, Public wrongs and Sexual orientation: The Italian Case in Comparative Perspective, *Journal of Comparative Law* 2009, p. 37.

⁴⁵ Decision No. 138/2010. This decision is available at www.cortecostituzionale.it.

⁴⁶ See ILGA EUROPE's contribution to the *Green Paper Less Bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil documents*, p. 10.

⁴⁷ MOSCATI, Trajectory of Reform: Catholicism, the State and the Civil Society in the Developments of LGBT Rights, *Liverpool Law Review* 2010, pp. 31–51.



EASTERN EUROPEAN COUNTRIES: FROM PENALISATION TO COHABITATION OR FURTHER?

Monika JAGIELSKA

1. GENERAL OVERVIEW

The notion of “East European countries” dealt with in this contribution¹ covers only the former “Eastern Bloc” countries which are now part of the European Union. These are (in alphabetical order): Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. The legal status of same-sex couples in these countries is rather vague, and the issue of legitimising same-sex relations is amongst the most difficult. As mentioned in the literature, these countries “generally lag behind their European Union counterparts with regard to same-sex marriage”.² The legal recognition of same-sex relations is only found in three jurisdictions: the Czech, Hungarian and Slovenian (described as “mild partnership law”³); the other countries try to regulate the matter,⁴ but usually experience significant obstacles and reluctance.⁵

¹ This publication was prepared with the assistance of Ms Paulina Twardoch from the University of Silesia in Katowice. The author is grateful for the help and comments of Prof. Velina Todorova from Plovdiv University, Dr Orsolya Szeibert from the University of Eötvös Loránd in Budapest, Dr Kamila Bubelova from the University of Olomouc and Mr Gregor Dugar from the University of Ljubljana.

² ALONI, Incrementalism, civil unions, and the possibility of predicting legal recognition of same-sex marriage, *Duke Journal of Gender Law & Policy* 2010, Vol. 18, p. 123; see also WEYEMBERGH/CARSTOCEA (eds.), *The gays' and lesbians' rights in an enlarged European Union*, 2006, mainly pp. 223 f.

³ BARALDI, EU family policies between domestic ‘good old values’ and fundamental rights: the case of same-sex families, *Maastricht Journal of European and Comparative Law*, 2008, Vol. 15, p. 521.

⁴ ALONI, Incrementalism, civil unions, and the possibility of predicting legal recognition of same-sex marriage, *Duke Journal of Gender Law & Policy* 2010, Vol. 18, p. 126.

⁵ See also BOELE-WOELKI, The Legal Recognition of Same-Sex Relationships within the European Union, *Tulane Law Review* 2008, Vol. 82, p. 1960.

2. SOCIAL ATTITUDE

The social attitude towards same-sex relations in the former socialist countries is generally not very affirmative. Comparing the results of the Eurobarometer 2006 survey, only the Czech Republic shows a higher acceptance of same-sex marriages (52%) than the EU average (44%) and all the other countries fall significantly much below the average (from 31% in Slovenia to 11% in Romania).⁶

Consent for the adoption of same-sex partnerships according to Eurobarometer 2006 is below the EU average of 32% in all East European countries, and is the highest in the Czech Republic (24%) and the lowest in Poland (7%).⁷

Polls show the growing acceptance of same-sex couples in these countries, but the process is rather slow.

Czech support for gay rights (CVVM poll) ⁸	2005		2007		2008		2009		2010	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
“registered partnerships”	62%	30%	69%	24%	75%	19%	73%	23%	72%	23%
“same-sex marriages”	42%	58%	36%	57%	38%	55%	47%	46%	49%	45%
“adoption rights”	28%	72%	22%	67%	23%	65%	27%	63%	29%	60%

Slovakian support for gay rights ⁹	2008		2009	
	YES	NO	YES	NO
“same-sex partnership”	42%	44.8%	45%	41%

Polish support for gay rights ¹⁰ (CBOS/TNS OBOP poll)	2002		2003		2005		2008		2010		2011	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
“registered partnerships”	15%	76%	34%	58%	46%	44%	41%	48%	45%	47%	54%	41%

⁶ EU: attitudes towards same-sex marriage & adoption significantly vary, www.ilga-europe.org/home/news/latest_news/eu_attitudes_towards_same_sex_marriage_adoption_significantly_vary; Estonia 21%, Slovakia 19%, Hungary 18%, Lithuania 17%, Poland 17%, Bulgaria 15%, Latvia 12%.

⁷ www.ilga-europe.org/home/news/latest_news/eu_attitudes_towards_same_sex_marriage_adoption_significantly_vary; Slovenia 17%; Estonia 14%; Hungary 13%; Bulgaria and Slovakia 12%; Lithuania 12%; Romania and Latvia 8%.

⁸ *Centrum pro výzkum veřejného mínění Sociologický ústav AV ČR, v.v.i., Názory české veřejnosti na práva lidí s homosexuální orientací*, available at www.cvvm.cas.cz/upl/zpravy/101046s_ov100712.pdf.

⁹ www.inakost.sk/clanky_foto/file/annual-report-2008.pdf;
http://www.inakost.sk/clanky_foto/file/Vyrocnna%20sprava%202009_EN.pdf.

¹⁰ www.cbos.pl/SPISKOM.POL/2002/K_049_02.PDF;
www.cbos.pl/SPISKOM.POL/2003/K_189_03.PDF;

A poll taken in July 2009 found that 14% of Poles supported same-sex marriage, while 75% were opposed and 11% were unsure.¹¹

In Hungary, a poll conducted in July 2007 showed a 30–35% acceptance of same-sex marriage and a poll from September 2009 revealed that 58% supported the newly introduced registered partnership for same-sex couples.¹² In Estonia, a poll from June 2009 showed that, according to 32% of the population, same-sex couples should have the same legal rights as opposite-sex couples.¹³ In a 2003 poll conducted in Romania by Gallup for the Institute for Public Policies, 45% of respondents stated that homosexuals should not be treated in the same way as others in society; 37% thought that homosexuality should be criminalised; and 40% thought that homosexuals should not be allowed to live in Romania.¹⁴ Another study, conducted in Lithuania in 2009, showed that 42% of respondents would agree to a same-sex civil partnership law, 12% to same-sex marriage, and 13% to a right to adopt.¹⁵

3. SOCIAL AND POLITICAL BACKGROUND

The main source of people's reluctance to accept same-sex relations can be traced back to the socialist inheritance in all of these countries.¹⁶ In the 'real socialism countries', all 'pathologies' (not only homosexuality but also prostitution, transgenderism, sexual perversions, alcoholism etc.) were perceived as the remains of Western culture and capitalism, referred to as the 'rotten West'.¹⁷ The laxity of the bourgeoisie distracted them from the main socialist values like the 'class struggle'. These issues were discarded because accepting their existence would mean either a mistake in the ideology of the system or its malfunctioning. In a 'healthy socialist society' with 'working people', LGBT problems should not appear. Therefore, there was no point in paying any attention to them because, as

www.cbos.pl/SPISKOM.POL/2005/K_127_05.PDF;
www.cbos.pl/SPISKOM.POL/2008/K_088_08.PDF;
<http://wiadomosci.onet.pl/kraj/cbos-prawie-jedna-czwarta-polakow-zna-geja-lub-les,1,3546078,wiadomosc.html>;

http://m.wyborcza.pl/wyborcza/1,105226,9696907,Gej_przestraszyl_Platforme.html.

¹¹ www.angus-reid.com/polls/36772/poles_overwhelmingly_reject_same_sex_marriage.

¹² www.median.hu/object.893a4438-c74b-4a32-9f9a-eca01a7e5425.ivy; www.nol.hu/archivum/archiv-475350.

¹³ [http://translate.google.com/translate?prev=hp&hl=en&js=y&u=http%3A%2F%2Fwww.uudised.err.ee%2Findex.php%3F06166967&sl=auto&tl=en&history_state0=\\$](http://translate.google.com/translate?prev=hp&hl=en&js=y&u=http%3A%2F%2Fwww.uudised.err.ee%2Findex.php%3F06166967&sl=auto&tl=en&history_state0=$).

¹⁴ www.ipp.ro/pagini/index.php.

¹⁵ www.delfi.lt/news/daily/lithuania/article.php?id=23338407.

¹⁶ See also TORRA, *Gay rights after the iron curtain*, *Fletcher Forum of World Affairs* 1998, Vol. 22, pp. 74 f.

¹⁷ See also KADYSZEWSKA, *Homofobia jako dyskurs społeczny*, 2007, available at: <http://files.gildia.pl/reklama/abiekt/kadyszewska.pdf>.

time goes by and socialism grows, the situation should improve by itself, with all pathologies dying out. This approach led to a situation where there was no public discussion on the topic – not in the media, in schools, or anywhere else. Same-sex issues did not appear in public, and references in books or art can be counted on the fingers of one hand. So any ideas among people about same-sex relationships were based on old stereotypes preserved over the years. There was no real knowledge or discussion of LGBTB issues.¹⁸

The “gay attitude” was also used by the socialist authorities as a tool for blackmail. In 1985–1987, Poland saw the “Action Hyacinth” in which 10–12,000 homosexuals were arrested by the militia in Poland. They were forced to confess their orientation, and “pink portfolios” were collected to serve as an instrument for possible blackmail and investigation.¹⁹

The other important factor is the role of the Church, mainly the Catholic and Orthodox, whose attitude in official documents remains rather balanced, but certainly lends no support to such relations.²⁰ This position based on old stereotypes supports the view of the common people. All these factors find support in some legal doctrine. The main reasons behind this non-acceptance which are raised by legal doctrine include: the discrimination of marriage,²¹ inconsistency with the social order,²² the insensibility of sexual preferences being the sole reason behind the creation a new legal instrument; the role of procreation within marriage;²³ and the lack of social aims for the acceptance of same-sex relations when the main criterion for distinction is merely sexual relations aimed at partners only.

4. EXISTING REGULATIONS

The statutory recognition of same-sex relations can be found in Czech, Hungarian and Slovenian law. None of these pieces of legislation provides for the

¹⁸ See also the in-depth study on the situation of homosexual persons in socialism by KURPIOS, *Poszukiwani, poszukiwane. Geje i lesbijki a rzeczywistość PRL*, available at: www.dk.uni.wroc.pl/texty/prl_02.pdf.

¹⁹ KURPIOS, *Poszukiwani, poszukiwane. Geje i lesbijki a rzeczywistość PRL*, available at: www.dk.uni.wroc.pl/texty/prl_02.pdf.

²⁰ See SOBAŃSKI, *Związki partnerskie*, *Forum iuridicum* 2003, No. 2, pp. 223–231.

²¹ See also BOUCKOVA, *Francie: Je odmitani adopce homosexualnim jednotlivcum diskriminacni?*, *Jurisprudence* 2008, No. 2, p. 46.

²² SMYCYŃSKI, *Czy potrzebna jest regulacja prawna pożycia konkubenckiego (heteroseksualnego i homoseksualnego)*, in: KASPRZYK, *Prawo rodzinne w Polsce i w Europie: zagadnienia wybrane*, 2005, p. 467.

²³ SZŁĘZAK, *Konkubinat w świetle prawa państw socjalistycznych*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1988, No. 1, p. 115.

possibility of same-sex marriages. Same-sex relations take the form of registered partnerships in each jurisdiction involved, but the scope of the rights granted differs in each system.

4.1. HUNGARY

4.1.1. General Overview

Unlike many other EU countries, the Hungarian model of regulation was not a statutory model from the very beginning, but was initially based on judicial acts (namely Hungarian Constitutional Court rulings²⁴) which provoked legislative changes.²⁵ In 1995, the Hungarian Constitutional Court ruled that the regulation recognising only heterosexual but not homosexual common law marriages was unconstitutional.²⁶ It must be noted that common law marriages have been acknowledged by the Hungarian Civil Code since 1997 (Article 578 CC). It mainly regulates the financial consequences of cohabitation.²⁷ The “decision” came as a complete surprise” and was “mainly a product of Hungary’s wish to be a part of the ‘New Europe’”.²⁸ On the other hand, the Court emphasised that the institution of marriage is limited to only heterosexual couples, as Article 15 of the Hungarian Constitution guarantees that “The Republic of Hungary protects the institution of marriage and the family.” Following the CC judgment, in 1996 the Hungarian legislator changed the pertinent provision of the Civil Code,²⁹ defining common law spouses as “two people living together without marriage in a common household, in emotional and economic community,” and allowing for common law spouses to acquire “common property in proportion to their participation in acquisition”.³⁰

²⁴ On the Hungarian Constitutional Court’s ruling on the unconstitutionality of homosexual sodomy provisions in the Hungarian Criminal Code see URTZ, Hungary: Mixed prospects for the constitutionalisation of gay rights, *International Journal of Constitutional Law* 2004, No. 2, pp. 705 f.

²⁵ CURCI, The evolution of the legal concepts of “family” and “marriage” in the EU legal system and its impact on society, *St. Thomas Law Review* 2006, Vol. 18, pp. 253–254.

²⁶ Ptk 6785/G, see also AMES, Beyond gay Paree: what does the enlargement of the European Union mean for same-sex partners, *Emory University School of Law* 2004, Vol. 18, pp. 515–516.

²⁷ More SZŁĘZAK, Konkubinat w świetle prawa państw socjalistycznych, *Ruch Prawniczy, Ekonomiczny I Socjologiczny* 1988, No. 1, n. 22.

²⁸ CURCI, The evolution of the legal concepts of “family” and “marriage” in the EU legal system and its impact on society, *St. Thomas Law Review* 2006, Vol. 18, p. 254.

²⁹ Act XLII amending Act IV of the 1959 Civil Code.

³⁰ SANCHEZ-OSARIO, The road to recognition and application of the fundamental constitutional right to marry of sexual minorities in the United States, the Netherlands, and Hungary: a comparative legal study, *ILSA Journal of International and Comparative Law* 2001, Vol. 8, p. 140.

In its first version, the draft of the current legislation from December 2007 would have introduced registered partnerships for both same-sex and opposite-sex couples, and would have entered into force on 1 January 2009. However, in the meantime, in 2008 the Hungarian Constitutional Court declared that the bill was unconstitutional. The main reason was that the alternative provided for different-sex couples duplicated the institution of marriage. Therefore, the meaning of marriage and its supremacy, as laid down in Article 15 of the Hungarian Constitution, was undermined.³¹ The Court found that a registered partnership law that only applied to same-sex couples would be constitutional. The new Registered Partnership Act took effect on 1 July 2009. In 2010, the Hungarian Constitutional Court confirmed the constitutionality of the new law.

4.1.2. Current Legislation

The law on registered partnerships (2009. évi XXIX. Törvény a bejegyzett élettársi kapcsolatokról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról) introduces “registered cohabitation”, which is equivalent to the European concept of “registered partnership”.³²

The act does not provide any definition of a registered partnership. The institution is only open to same-sex couples. It can be created by two adults if they declare their consent to entering into a union with one another. The main conditions for its establishment are: the partners fulfil the age requirement (18 years old), they are of the same sex, and they make a common declaration before a registrar (§1). In a ceremony there should be two witnesses. If there is a danger of death, the law provides for some derogations in the procedure. A person who has no citizenship, is a refugee or a citizen of another country, can also enter into a Hungarian registered partnership (§2).

If two parties have the same foreign citizenship, and if an international convention, the principle of mutuality and the law of the foreign country so allow, they can register their union in a proper diplomatic agency situated in Hungary.

4.1.3. Legal Consequences

The legal consequences of entering into a partnership are, as a rule, the same as in a marriage, as the bill states that in questions not regulated by the act, the provisions concerning marriage and spouses are respectively applied (§3.1). The

³¹ BARALDI, EU family policies between domestic ‘good old values’ and fundamental rights: the case of same-sex families, *Maastricht Journal of European and Comparative Law*, 2008, Vol. 15, p. 520.

³² See also the very detailed publication on same-sex partnerships in Hungary by SZEIBERT-ERDOS, Same-sex partners in Hungary. Cohabitation and registered partnership, *Utrecht Law Review* 2008, Vol. 4, pp. 212 f.

same rules apply to maintenance, property issues, and the use of the common household as for married partners. The surviving partner inherits in the same manner as a surviving spouse. The other rights granted to same-sex couples are: refusal to testify, access to medical information, tax allowances and the possibility to obtain citizenship. However, a registered partnership also has some differences from marriage. First of all, the couple do not have the right to adopt (§3.2) or the right to artificial insemination (§3.4). The rules on relations between parents and children do not apply to registered partners. There is no presumption of fatherhood (§3.2). The partners do not have the possibility to take the same surname (§3.3). The relationship ends in the event of the death of one of the partners, a termination pronounced by a court, or by a public notary (§4).

4.2. THE CZECH REPUBLIC

Although, even in 2002, it was being stated in the literature that the Czech Republic is “not likely to recognize same-sex couples soon,”³³ this country was the first of the Eastern Bloc countries to introduce a bill on same-sex partnerships.³⁴ The Czech Civil Partnership Act (*ZÁKON ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů*) was passed in March 2006 and came into force on 1 July 2006. According to this act, a registered partnership is a community of two people of the same sex who have declared their consent to entering into a registered union with one another. The registration takes place in the presence of an employee of the Registry Office. The partners must be at least 18 years old and at least one of the partners must have Czech citizenship.

A partnership cannot be registered when the partners are within the prohibited degrees of consanguinity; if one of the partners does not have legal capacity; when a partner is already in a registered partnership, or is married, or is in an analogous union concluded abroad; or when there are defects in a statement of intent.

The relationship is closer to a contract than to a marriage,³⁵ as it deals mainly with the property consequences of a partnership.³⁶ It contains the right to represent each other (Article 9), maintenance obligations (Articles 10–12) and

³³ MERIN, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States*, 2002, p. 331.

³⁴ More on the institution of cohabitation (both heterosexual and homosexual) in ELISCHER, *Nekolik uvah nad kohabitaci*, *Pravi Forum* 2009, No. 7, pp. 258 f.

³⁵ More on the equal treatment of spouses and registered partners within the sphere of labour law in STEFKO, *Za zrovnoprávnění manželství a registrovaného partnerství v pracovním právu*, *Prace a nízda* 2010, No. 9, pp. 49 f.

³⁶ ELISCHER, *Nekolik uvah nad kohabitaci*, *Pravi Forum* 2009, No. 7, p. 270.

inheritance rights (achieved through the suitable amendments of Article 474 f. CC).³⁷ There is no community of goods between partners, but each partner can represent the other in everyday matters. The surviving partner belongs to the first inheritance group. Registered partnerships do not allow for adoption or for a widow's pension. There is no duty of fidelity and no possibility to change one's name after entering into such a partnership.³⁸ The union terminates when one of the partners dies, one of the partners is declared dead, or its dissolution is pronounced by a court.

As of January 2010, 917 registered partnerships had been conducted in the Czech Republic, 34 of which had since been annulled.³⁹

4.3. SLOVENIA

4.3.1. General Overview

Registered partnerships for same-sex couples have been acknowledged in Slovenia since 23 July 2006 (*Zakon o registraciji istospolne partnerske skupnosti* (ZRIPS)). The bill dealt mainly with property issues as opposed to inheritance rights. For this reason, in 2009 the Constitutional Court of Slovenia found that it was unconstitutional not to allow registered partners to inherit each other's property. It held that treating registered partners differently from married partners constituted discrimination on the basis of sexual orientation, thereby breaching Article 14 of the Slovenian Constitution. In 2009, initial steps were taken to legalise same-sex marriages. After fierce debates, a draft regulation in 2010 failed to introduce same-sex marriages, instead proposing that the effects of a registered same-sex partnership should have the same legal implications as a marriage in all respects except for adoption.

It seems that there are no constitutional obstacles to introducing same-sex marriages in Slovenia, as, according to Article 53 of the Slovenian Constitution, "Marriage is based on the equality of spouses. Marriages are solemnised before an empowered state authority. Marriage and the legal relations within it and the family, as well as those within an extramarital union, are regulated by law."

³⁷ More on property issues in registered partnerships in CEC, Nekolik poznamek k majekovemu společenstvu registrovaných partnerů, *Právní fórum* 2009, No. 7, p. 268.

³⁸ More on registered partnerships in Czech law in LUŽNA, Právi vztahy mezi mužem a ženou, kteří nejsou manžely, *Právo a rodina* 2007, No. 2, pp. 1 f.

³⁹ www.colourplanet.cz/74151-cesko-ma-1111-registrovaných-partnerství.

4.3.2. *The Existing Law*

Slovenia has recognised registered partnerships for same-sex couples since 23 July 2006. The act entitled *Zakon o registraciji istospolne partnerske skupnosti* (ZRIPS) provides a definition of a registered union, described as a relationship between two women or two men registered by the relevant authority, whereby at least one of the partners must have Slovenian citizenship. The main conditions for its establishment are: that the partners fulfil the age requirement (18 years old); are of the same sex; and at least one partner has Slovenian citizenship. The partnership will not be registered if one of the parties is a minor, is seriously mentally handicapped or insane, or if one of the partners is already in a registered partnership, or is married. It cannot be entered into by kin in the direct line, brothers and sisters, stepbrothers and stepsisters, cousins, nephews and nieces and their uncles or aunts; between a guardian and a person under his/her care – during the period of tutelage; and between an adopting parent and an adoptee. The partnership is void if there are defects in a statement of intent.

By virtue of the civil partnership registration, civil partners have the right to subsistence and maintenance, the right to jointly owned property and the regulation of property relations within the civil partnership, the right of occupancy, the right to inherit a part of jointly owned property from the deceased partner and the right to obtain information about the health of a sick partner and to visit him or her in the relevant healthcare institution. Civil partners are bound by mutual respect, trust and assistance (Article 8). The property obtained by civil partners as a result of work during a civil partnership will be their jointly owned property, which will be managed and disposed of jointly and by agreement.

An agreement in respect of managing the jointly owned property must be made by means of a notarial protocol.

The Act deals with the problem of liability for obligations (Article 14), the right to subsistence (Article 19), occupancy rights and tenancies (Article 20), rights in the case of illness (to be kept informed and to visit) and to inheritance (Article 22). The last-mentioned provision was challenged as being contrary to the Slovenian Constitution. In its ruling on 2 July 2009, the Constitutional Court stated that Article 22 of the Registration of a Same-Sex Civil Partnership Act is inconsistent with the Constitution. The same rules apply to inheritance between partners in registered same-sex partnerships as apply to inheritance between spouses in accordance with the Inheritance Act (Official Gazette SRS, Nos. 15/76 and 23/78 and Official Gazette RS, No. 67/01).

The relationship terminates when one of the partners dies, one of the partners is declared dead, or when the same authority that registered the partnership pronounces the end of the union.

Most same-sex partnerships were registered in 2009: 11 same-sex civil partnerships were registered; 7 between men and 4 between women.⁴⁰

5. OTHER COUNTRIES

In the other countries: Slovakia, Poland, Romania and the Baltic states, there are no special rules for same-sex couples. Sometimes they may rely on legal provisions granting rights to people “in a close relationship”, which is not limited to relatives only.

5.1. BULGARIA

Bulgaria does not recognise any type of same-sex partnership. Bulgarian family law does not provide any consequences for such a relationship; this also concerns heterosexual relations. Same-sex marriages are not possible in this country as according to Article 46(1) of the Bulgarian Constitution “Matrimony is a free union between a man and a woman.” In 2009, discussions on same-sex regulations were provoked by the draft Family Code. Political parties, predominantly the right-wing parties, expressed strong opposition to such ideas. There were also views expressed by civil organisations close to the Orthodox Church and the Church itself against such regulations. The new Family Code, which was finally accepted in 2009, does not contain provisions on registered partnerships either for same-sex or for opposite-sex couples.

5.2. ESTONIA

Following a fierce debate on the law concerning registered partnerships for same-sex couples during the drafting of a new family code (2008-2010), the new family law passed in 2010 contains no provisions on same-sex partnership, and defines marriage as a union between a man and a woman, whilst at the same time declaring unions between members of the same sex “invalid”.

On 23 May 2011, Estonia’s Chancellor of Justice, Indrek Teder, expressed his opinion that “the current legal framework does not ensure adequate protection

⁴⁰ Statistical Office of the Republic of Slovenia, www.stat.si/eng/novica_prikazi.aspx?id=3245).

of the rights of de-facto cohabitation partners, and is thus contrary to the constitution”.

In his view, the law needs to be changed to cover areas such as property ownership and legal succession.⁴¹

5.3. LATVIA

Latvia does not recognise any type of same-sex partnership. Same-sex marriages are not possible in this country as, according to Article 110 of the Latvian Constitution (amended in 2005), the State will protect and support marriage as a union between a man and a woman, the family, the rights of parents and the rights of the child. The only draft of the same-sex regulation was introduced in 1999, but did not gain support.

5.4. LITHUANIA

Lithuania does not recognise any type of same-sex partnership. Same-sex marriages are not possible in this country as, according to Article 38.3 of the Lithuanian Constitution, a “Marriage is entered into upon the free consent of a man and woman.” The Civil Code defines marriage as a voluntary agreement between a man and a woman. Same-sex marriage is also explicitly prohibited in Article 3.12 of the country’s Civil Code, which states that a “Marriage is concluded with a person of the opposite sex only.” On the other hand, the Lithuanian Civil Code is among the rare post-Soviet regulations that deal with the property rights of cohabiting, but not legally married couples (Chapter XV) who “have been cohabiting at least for a year with the aim of creating family relations” and have registered their cohabitation “in a procedure laid down by the law” (Article 3.229). If the parties have registered their cohabitation, their property rights are similar to those that married couples enjoy. Special protection is given to the shared dwelling of the cohabitees. If the assets are to be divided, a dwelling may be awarded to the cohabitee who is in greater need; all circumstances are taken into account (age, health, the interests of minor children, etc.).⁴²

⁴¹ <http://news.err.ee/politics/fb95bc86-cd40-4d9f-b341-8d842e8d014a>.

⁴² KHAZOVA, Family Law on Post-Soviet European Territory: A Comparative Overview of Some Recent Trends, *Electronic Journal of Comparative Law* 2010, Vol. 14.1, available at: www.ejcl.org/141/art141-3.pdf.

5.5. POLAND

Poland does not recognise any type of same-sex partnership. Same-sex marriages are not possible in this country as, according to Article 18 of the Constitution of the Republic of Poland from 1997, a “marriage” is a union between a man and a woman and is placed under the protection and care of the Republic of Poland. In Poland there is no current legislation on registered partnerships, either heterosexual or homosexual, but the existing law does grant some rights to non-registered couples.⁴³ It must be noted that the respective provisions typically use the notion of “persons in close relationships” which cannot be limited only to persons who cohabit (except for the semi-inheritance right to a rented flat – Article 691 CC which uses the notion of “persons in a common cohabitation”). The granted rights include: maintenance rights in the case of the death of a close person (Article 446 CC), a refusal to testify against one’s partner (Article 115 Criminal Code), the right to possess household equipment in the event of the death of a partner and the right to tenancy. Other issues (like inheritance or the right to a bank account) should be dealt with by partners themselves, for example via their last will and testament or in appropriate contracts.

In 2010, Poland lost a case at the Strasbourg Tribunal (the ECHR) for not granting the right to semi-inherit a tenancy right in the case of a same-sex factual relationship, while allowing this right for unmarried heterosexual couples. The European Court of Human Rights held that Poland had violated Articles 8 and 14 of the European Convention on Human Rights by denying a man living in a homosexual relationship the right to succeed to a tenancy after the death of his partner.⁴⁴

In Poland there was also a problem concerning the issuing of a certificate on the ability to enter into a (homosexual) relationship, demanded by people wanting to enter into such a relationship abroad. Local registrar’s offices did not want to issue them for same-sex relations, but this position was rejected by the administrative courts in 2008.⁴⁵

In Poland, two pieces of draft legislation allowing for same-sex registered partnerships were presented. The first, which was prepared by the Senate (the

⁴³ See also NAZAR, *Rozliczenia majątkowe konkubentów*, 1993; SZŁĘZAK, *Stosunki majątkowe między konkubentami. Zagadnienia wybrane*, 1992; DYMEK, *Konkubinaty. Czy istnieje potrzeba prawnego uregulowania stosunków osobistych i majątkowych związków pozamałżeńskich*, in: CZECH (ed.) *Czy potrzebna jest w Polsce zmiana prawa rodzinnego i opiekuńczego*, 1997, pp. 333–349; NAZAR, *Cywilnoprawne zagadnienia konkubinatu de lege ferenda*, *Panstwo i Prawo* 1989, No. 12, pp. 103 f.; ZIELINSKI, *Zarys instytucji konkubinatu*, *Palestra* 1983, No. 12, pp. 11 f.

⁴⁴ *A. Kozak v. Poland* [2010] ECHR 280 (2 March 2010), available at: www.hrlrc.org.au/court-tribunal/european-court-of-human-rights/kozak-v-poland-2010-echr-280-2-march-2010.

⁴⁵ http://wyborcza.pl/1,76842,5623999,Lesbijka_wygrala_z_urzedem.html#ixzz1IibXL2dM.

Upper Chamber of Parliament) in 2004, was initially accepted, but was later rejected in the Lower Chamber. The second draft was prepared by Prof. M. Szyszkowska. Both were based on the idea of a registered partnership granting basic rights (inheritance, tax allowances, medical rights) and allowing the adoption of children. For the time being – before the Parliamentary elections in 2011 – one left-wing party, the SLD, intends to introduce new legislation on same-sex partnerships (with no possibility for adoption). The other parties are rather “afraid” of this topic. During a debate on the new Private International Law Bill, it was clearly shown that the idea is not popular amongst politicians (also not amongst the governing party, *Platforma Obywatelska*), who distance themselves from the possibility of legitimatising same-sex relationships.

5.6. ROMANIA

Romania does not recognise any type of same-sex partnership. According to Article 48 of the Romanian Constitution: “The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.” This provision does not outright preclude same-sex marriages, as does, for example, the Bulgarian Constitution, but as it refers to the procreational function of the family, it implicitly contains such a prohibition. To avoid any possible “problems” with same-sex marriages, appropriate changes were introduced to the text of the new Civil Code adopted on 22 June 2009. According to Article 277, same-sex marriage is forbidden. Same-sex marriages entered into abroad, whether between Romanian citizens or by foreign citizens, are not recognised in Romania. Civil partnerships between persons of the opposite or same sex, whether they are Romanian or foreign citizens, are not recognised in Romania. The term ‘spouses’ refers to a man and a woman united through marriage (Article 258 CC). A marriage is the freely consented union between one man and one woman according to the law (Article 259 CC). Two people of the same sex cannot adopt together (Article 462.3 CC).

Proposals to regulate same-sex partnerships were introduced in 2008 and 2011, but the work on the former was halted because of the 2008 Romanian elections, while the latter was opposed by the government.

5.7. SLOVAKIA

There is no legal recognition of same-sex couples in Slovakia. Bills to recognise same-sex partnerships were introduced on two occasions, in 1997 and in 2000, but both were rejected.

6. RECOGNITION

According to the Hungarian Act on Private International Law, the registration, validity, legal effects and the termination of a registered partnership are to be submitted to the law which is determined by the conflict rules concerning the creation, validity and dissolution of marriage. The same applies to personal and property relations between spouses.

Czech law does not contain any conflict rules concerning registered partnerships. Definitive decisions of foreign authorities regarding the dissolution of registered unions concluded by a Czech citizen will be recognised in the Czech Republic only after a special decision of the High Court. The Czech Republic, Romania and Sweden recognise the entry and residence rights of a same-sex married spouse of a EU citizen.⁴⁶ Same-sex couples “enjoy full rights of free movement and residence in Bulgaria and the Czech Republic, which consider registered partners as family members”.⁴⁷

7. SUMMARY

As stated above, East European countries are reluctant to deal with the recognition of same-sex relations. These countries can be grouped in three categories: countries with existing regulations, countries where serious attempts are constantly being made towards this end, and, finally, countries that are not ready for such changes. Even the existing regulations deal mainly with property issues and do not deal with same-sex partnerships as marriages. This rather conservative approach by all East European countries can be explained primarily by their historical, post-Soviet heritage and its approach towards homosexuals. It is also the result of the regained liberty of these countries, which can at least decide for themselves now. This can be clearly seen by their reference to the Church, for example on the issue of religious marriages, which was introduced, for example, in the Baltic States and Poland after the collapse of the Soviet Bloc and after the period of oppression. Same-sex issues entered on to the agenda during the first wave of freedom in the post-Soviet countries, but were met with opposition, mainly from people brought up with the socialist mentality, and who were sometimes also influenced by the Church. It must be kept in mind that,

⁴⁶ BARALDI, EU family policies between domestic ‘good old values’ and fundamental rights: the case of same-sex families, *Maastricht Journal of European and Comparative Law*, 2008, Vol. 15, p. 524.

⁴⁷ Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2008) 840/3, available at: http://ec.europa.eu/romania/documents/information/raport_directiva_38-2004_en.pdf.

during the socialist period, old traditional values were ignored and the regained freedom allowed people to return to such values. Just as the 1990s were a period of homosexual advancement (with many legislative attempts in different countries), at the turn of the new century we observed a decrease in the popularity of the idea of recognising same-sex partnerships (most significantly changes in constitutions or family/civil codes not allowing for same-sex marriages). It seems that at the moment, the idea is regaining support in some former socialist countries and will probably take legal shape in the years to come, though in a rather restricted way. Nevertheless, no one can assume that same-sex adoption or marriages will be allowed *sensu stricto*.



A PATCHWORK OF PARTNERSHIPS: COMPARATIVE OVERVIEW OF REGISTRATION SCHEMES IN EUROPE

Ian CURRY-SUMNER

*“Change is a funny thing.
We are never quite sure what we are becoming or even why.
Then one day we look at ourselves and
wonder who we are and how we got that way.”¹*

1. INTRODUCTION

In 1990, who would ever have thought that there would come a time when a generation of new law students starting university would not even question the reason why same-sex couples should be entitled to marry? And yet, that time has already arrived. The majority of students embarking upon a legal education at a **Dutch** university in September 2011 were 8 years old when Job Cohen, the Mayor of Amsterdam, celebrated the first-ever State endorsed same-sex marriage in Amsterdam, **The Netherlands**. For these students, the existence of same-sex marriage is oftentimes as much a given as the need to criminalize murderers or the need for a National Parliament. Yet, the road to this point in time has not been one without its trials and tribulations.

In this contribution, an attempt will be made to briefly outline the current state of the law as regards the legal recognition of same-sex relationships in Europe (§2). In doing so, use will be made of the general comparative overviews provided in this book. This comparative synopsis will form the basis upon which a more theoretical framework will be discussed (§3). Such a theoretical framework will provide academics and legislatures alike with a template to discuss the issues related to these new phenomena in a structured and purposeful manner. Although this contribution is limited to the European context, where relevant footnote references will be made to the legal situation outside of Europe.

¹ JODI PICOULT, American author (1966-present).

2. SUBSTANTIVE LAW COMPARISON

2.1. INTRODUCTION

22 years since the first same-sex partnership registration ceremonies took place in Copenhagen, **Denmark**, the world has seen a remarkable and swift wave of legislative and judicial change with regard to the legal recognition of same-sex relationships. The debate has raged, is raging and will continue to rage on every continent of the planet. Currently, at least one country on every continent apart from Asia permits same-sex couples to register their relationship in a formal public ceremony, or celebrate their marriage.²

Yet it should not be forgotten that this trend towards increased recognition must be placed against the status quo of many other countries in the world, where homosexuals risk imprisonment for their actions or even fear for their lives.³ This section will address the different relationship forms that have been used by legislatures across the European continent, namely same-sex marriage (§2.2), registered relationship forms (§2.3) and non-registered cohabitation (§2.4).

2.2. SAME-SEX MARRIAGE

On the 1st April 2001, **The Netherlands** became the first country in the world to open civil marriage to couples of the same-sex. This monumental occasion heralded the start of a slow trend towards increasing acceptance of same-sex marriage, not just in Europe, but around the globe. As of today, ten years after same-sex couples were allowed to start celebrating marriages ceremony from Amsterdam to Zwolle, seven countries in Europe currently allow for same-sex couples to get married (**Belgium** (2003), **Iceland** (2010), **The Netherlands** (2001), **Norway** (2008), **Portugal** (2010), **Spain** (2005) and **Sweden** (2009)) with a further three countries outside of Europe (**Argentina** (2010), **Canada** (2005) and **South Africa** (2006), as well as numerous US states (**Connecticut** (2008), **Iowa** (2009), **Massachusetts** (2003), **New Hampshire** (2010), **New York** (2011), **Vermont** (2009)

² South America: **Uruguay** (civil union since 2007, same-sex marriage proposed in 2011) and **Argentina** (same-sex marriage since 2010); North America: **Canada** (same-sex marriage since 2005) and various states in the USA; Africa: **South Africa** (same-sex marriage since 2006); Oceania: **New Zealand** (civil unions since 2004) and various schemes in various states in **Australia**; Asia: a proposal to introduce same-sex marriage has been put forward in **Nepal** in 2011 and the suggestion has been raised that this will be introduced in the new Constitution due to be promulgated on 28th August 2011.

³ **Iran**, **Mauritania**, **Saudi-Arabia**, **Sudan**, **United Arab Emirates**, **Yemen** and **Nigeria** (12 northern provinces that apply Shari'a law).

and Washington DC (2010)).⁴ Furthermore a proposal is also under consideration in Luxembourg.⁵

Although in some jurisdictions the road towards opening same-sex or gender-neutral marriage was particularly straightforward,⁶ in many jurisdictions, a long journey preceded the final jubilant celebrations. On the 31st July 2009, for example, the **Portuguese** Constitutional Court rejected the argument that the **Portuguese** Constitution demanded the recognition of same-sex relationships (although at the same time the Court also stated that the Constitution did not oppose it).⁷ Nonetheless, the Court left the issue to the legislature; a decision that has been echoed in many jurisdictions around the world (e.g. **The Netherlands** and **Vermont**). Whether such decisions can be seen as precursors to legislative change is difficult to determine. Perhaps the litmus test will be the **French** situation after the **French** Constitutional Court ruling of the 28th January 2011, in which it was held that the ban on same-sex marriage in **France** was not unconstitutional.⁸ A similar case is, for example, expected to come before the **Greek** Supreme Court (*Areios Pagos*) after the Court of Appeals held on the 14th April 2011 that a same-sex marriage concluded by the Mayor of Telos was non-existent.⁹

At the same time, it is important to notice an opposing trend towards prohibition. In 2011 constitutional bans to same-sex marriage have already been proposed in four jurisdictions around the world (**Chile**, **Hungary**, **Jamaica** and **Zambia**). Currently at least 25 jurisdictions worldwide provide for the constitutional limitation of marriage to one man and one woman.¹⁰ This restrictive approach is also noticeable in the Eastern European context.¹¹

⁴ At the same time there are currently no fewer than 28 states that have constitutional bans on same-sex marriages. See CURRY-SUMNER and CURRY-SUMNER, Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA, *Utrecht Law Review* 2008, Vol 4.2, p. 236–278, available at www.utrechtlawreview.org.

⁵ See SWENNEN and EGGERMONT, in this book at p. 20 (§II).

⁶ With respect to Iceland, see LUND-ANDERSEN, in this book at p. 11 (§2.2).

⁷ See further GONZALEZ-BEILFUSS, in this book at p. 44 (§II.1).

⁸ Decision 2010–92. The same could also be said of the Italian Constitutional Court rejection in April 2010. See further SWENNEN and EGGERMONT, in this book at pp. 25–26 (§III.2) and GONZALEZ-BEILFUSS, in this book at pp. 52–53 (§III.2).

⁹ Judgment 114/2008, *ChriD*, 2009, 617 *et seq* and Judgment 115/2009 *EfAD* 2009, 690 *et seq*. See further, FESSASS, 18th Annual Congress of International Academy of Comparative Law, Washington DC. National Report: Greece, *American University Journal of Gender, Social Policy and the Law*, Volume 19, 2011, p. 187, at §V.

¹⁰ Cuba (1976), Burkina Faso (1991), Bulgaria (1991), Vietnam (1992), Paraguay (1992), Lithuania (1992), Cambodia (1993), Belarus (1994), Moldova (1994), Ukraine (1996), Poland (1997), Venezuela (1999), Rwanda (2003), Burundi (2005), Honduras (2005), Uganda (2005), Latvia (2005), Democratic Republic of Congo (2005), Serbia (2006), Montenegro (2007), Ecuador (2008), Bolivia (2009), Cayman Islands (2009), Dominican Republic (2010) and Kenya (2010).

¹¹ Article 110, Latvian Constitution; Article 38.3 Lithuanian Constitution and Art. 18, Polish Constitution. See further JAGIELSKA, in this book at p. 65 (§5.3).

2.3. REGISTERED PARTNERSHIPS

In 1989, **Denmark** became the first country in the world to provide same-sex couples with a public registration service, enabling them to gain virtually all the rights and responsibilities of different-sex married couples. This decision paved the way for the worldwide movement towards increasing recognition for same-sex relationships.¹² At present, no fewer than 16 jurisdictions have introduced forms of formalised relationship registration.

The first wave of jurisdictions centred in the North, with **Norway**,¹³ **Sweden**,¹⁴ **Greenland**¹⁵ and **Iceland**¹⁶ becoming the second, third, fourth and fifth jurisdictions in the world to introduce forms of registered partnership. All four Scandinavian registered partnership schemes were very similar in form, being restricted to couples of the same-sex and creating an institution that, with a few exceptions, mirrored marriage. Although there were small internal differences (i.e. differences between the domestic form of registered partnership and the domestic form of marriage¹⁷) and external differences (i.e. differences between the various domestic forms of registered partnership¹⁸), these were minor compared to the general extension of marital rights to same-sex couples. One important difference that deserves mention here, however, concerned the rights of same-sex couples with respect to children. None of four Scandinavian jurisdictions extended the presumption of paternity to same-sex couples. As a result, the woman married to the birth mother did not automatically become the legal parent of the child. Initially, adoption rights were also not extended to same-sex registered partners.¹⁹ Nonetheless, as of 2011, stepchild adoption is now permitted in all five Nordic countries,²⁰ with joint adoption also being permitted in all jurisdictions apart from **Finland**.

¹² LUND-ANDERSEN, in this book at p. 4 (§ 2.1).

¹³ Lov om registreret partnerskab nr. 40 av 30 April 1993.

¹⁴ Lag om registrerat partnerskap, SFS 1994:1117.

¹⁵ The registered partnership law was extended to Greenland on 26 April 1996 and is called *Inooqatigiittut nalunaarsorsimasut* in Greenlandic.

¹⁶ Lög um stadfeste samvist, nr. 87 12 June 1996.

¹⁷ For example in all four jurisdictions, registered partners were not permitted to register their partnership along similar lines to the State sanctioned church weddings. See further, LUND-ANDERSEN, in this book at pp. 13–14 (§ 2.4).

¹⁸ In Denmark, for example, registered partners were initially not permitted to take each other's surname. See further LUND-ANDERSEN, in this book at p. 1 (§ 1).

¹⁹ LUND-ANDERSEN, The Danish Registered Partnership Act, in: BOELE-WOELKI/FUCHS, *Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 17; SAVOLAINEN, The Finnish and Swedish Partnership Acts – Similarities and Divergencies, in: BOELE-WOELKI/FUCHS (eds), *Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 33–34.

²⁰ In Denmark and Norway step-child adoption is, however, not permitted if the child has been adopted from abroad.

The Netherlands was the next to follow suit in 1998 with the introduction of a form of registered partnership. However, the Dutch model was fundamentally different to the Scandinavian model, since the Dutch registered partnership was also open to couples of different sex. As already stated here above, the Dutch Government had sought to combine the claims from the homosexual community to be granted the rights and benefits of marriage, with the claims from the heterosexual community for a purely secular State recognized institution other than marriage.²¹ However, along similar lines to the Scandinavian model, registered partnership granted partners virtually all the rights and benefits of marriage. The resulting institution of registered partnership is to this day a rather isolated institution in Europe.

The calls for recognition of same-sex relationships in France and Belgium were also beginning to become more strident. Calls for the improvement of same-sex couples' rights started as early as 1989 in France, after two important decisions of the French Supreme Court.²² In the first case, *Secher v. Air France*, a male flight attendant sought a reduced-price plane ticket for his same-sex partner, as would have been available if his partner had been of different sex. The Court of Appeal in Paris held that expressions such as *conjoint en union libre*, *agent et sa concubine* and *vie maritale* could only be interpreted so as to cover the exclusive situation of one man and one woman living together as though they were husband and wife. The expressions were intended to be based upon marriage, and as such could not be extended to same-sex couples.²³ In the second case, *Ladijka v. Caisse primaire d'assurance maladie de Nantes*,²⁴ a woman was denied the benefit of her female partner's public health and maternity insurance cover, again coverage which would have been granted had her partner been of a different sex. The Court of Appeal in Rennes once again held that the concept of *vie maritale*, used in the applicable social security legislation, could only be applied to unmarried different-sex couples. The French Supreme Court affirmed both decisions.²⁵

At the same time as the French Supreme Court's decisions, a perceptible movement was taking shape in France aimed at reforming conjugal life and eliminating the discrimination faced by non-married couples. Despite the generality of its stated aim, the primary goal was legal recognition of the union

²¹ See SWENNEN and EGGERMONT, in this book at p. 26 (§ III.2).

²² Fr. Cass., Soc. Ch. 11 July 1989, *Bull. Civ.*, Vol. 311, No. 514 and *Bull. Civ.*, Vol. 312, No. 515.

²³ Cour d'Appel Paris, 1 Civ. Ch., 11th October 1995, on appeal from Conseil de prud'hommes de Paris, 14th November 1984, Case No. 8546.008/R (1986) *D* 380.

²⁴ Cour d'Appel Rennes, 27th November 1985, on appeal from Commission de première instance de sécurité sociale de Nantes, 19th January 1984 (1986) *D* 380.

²⁵ For discussion of the decisions, see annotated case by N. MARCEL DORWLING-CARTER, *Gaz. Pal.* 1990, p. 216–228.

between two persons of the same sex.²⁶ Indeed, it was mainly groups concerned with defending the rights of homosexuals and those active in the ever continuing and increasing fight against AIDS who advocated law reform and rallied around the various parliamentary initiatives. Prior to the enactment of the infamous *pacte civil de solidarité*, at least five different versions were submitted to the French legislature for debate (each proposal was known by the abbreviation of the institution it aimed to create, namely the CPC (*contrat de partenariat civil*),²⁷ the CUC (*contrat d'union civile*),²⁸ the CUS (*contrat d'union sociale*),²⁹ the CUCS (*contrat d'union civile et sociale*)³⁰ and the PIC (*pacte d'intérêt commun*)³¹).

These intense debates ultimately lead to the introduction of a highly contentious form of partnership recognition in France. The ultimate compromises made by all parties lead to the creation of an institution situated somewhere in the no-man's land between status and contract. Although the PACS pretended to have no impact on the civil status of the parties involved, persons joined in a PACS were not permitted to enter a PACS with anyone else, and if they subsequently married (either each other or a third party), then the PACS was automatically brought terminated. As a result, many – including the present author – argued that the PACS ultimately should be regarded as a civil status affecting institution, regardless of whether this was the original intent of the legislature.

The new millennium saw a return to the 'traditional' Scandinavian registered partnership schemes. Jurisdiction after jurisdiction began to introduce same-sex registered partnership, albeit each with their own unique national twist. The year 2000 saw Germany introduce a form of life partnership,³² followed shortly by Finland with registered partnership in 2001,³³ Switzerland with registered partnership in 2005,³⁴ the three jurisdictions of the United Kingdom with civil

²⁶ BORRILLO, The pacte civil de solidarité in France, in: WINTEMUTE and ANDENÆS (eds.), *Legal recognition of same-sex partnerships*, 2001, p. 476.

²⁷ French Senate, 25 June 1990 (Socialist), Act. No. 422.

²⁸ French National Assembly, 25 November 1992 (Socialist), Act. No. 3066.

²⁹ French Senate, 19 March 1997 (Socialist), Act. No. 274. Reintroduced in 1997: French Senate, 23 July 1997 (Socialist), Act No. 94.

³⁰ French National Assembly, 23 July 1997 (Radical./Movement of Citizens), Act. No. 88.

³¹ See CURRY-SUMNER, *All's well that ends registered?*, 2005, p. 79–80.

³² Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, BGBl I 2001, 266. See further SWENNEN and EGGERMONT, in this book at pp. 25–26 (§ III.2).

³³ Laki rekisteröidsystä parisuhteesta, nr. 95/2001. See further LUND-ANDERSEN, in this book at p. 4 (§ 2.1).

³⁴ Loi federale du 18 juni 2004 sur le partenariat enregistré entre personnes du meme sexe.

partnership in 2005,³⁵ **Hungary** with registered partnership in 2009,³⁶ **Ireland** with civil partnership in 2010,³⁷ finally **Austria** with life partnerships in 2010³⁸ and finally **Liechtenstein** with life partnerships in 2011.³⁹ The only exceptions to this general rule are **Luxembourg** and **Andorra**, which introduced a civil partnership form in 2004 and 2005 respectively very similar to that previously created in **France** and **Belgium**.⁴⁰

At the same time as this general trend towards the introduction of same-sex registration schemes across Central and Western Europe was occurring, two other curious trends were taking place in Southern and Eastern Europe. In 1998, **Catalonia** became the first autonomous region of Spain to also introduce a form of registration. This registration system bore similarities to that introduced in **France** and **Belgium**. The rights afforded to same-sex couples were not the same as those afforded different-sex married couples. Furthermore, the *union estable de pareja* scheme provided for three different establishment methods, namely a continuous period of cohabitation of two years, an undefined period of cohabitation and common children, or a public declaration of their desire to be involved in such a union. This trend, therefore, also brought in new complexities to the concept of “registered” partnership in the sense that in **Catalonia**, partners could also be grandfathered into the scheme simply on the basis of a period of unregistered cohabitation. Other autonomous regions in **Spain** began to introduce similar schemes, although once again each with their own idiosyncrasies.⁴¹

At the same time, another trend was taking shape in Eastern Europe. The **Czech Republic** (2006) and **Slovenia** (2006) both introduced forms of registered partnership.⁴² These schemes are both restricted to same-sex couples; however, unlike their Western European counterparts, these schemes are not intended to create an institution equivalent to marriage.⁴³ Instead both schemes enunciate the rights and duties that are extended to same-sex registered partners.

³⁵ England & Wales, Scotland and Northern Ireland.

³⁶ 2009. évi XXIX. Törvény a bejegyzett élettársi kapcsolatról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról.

³⁷ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

³⁸ Bundesgesetz vom 18 Dezember 2009 über die Eingetragene Partnerschaft.

³⁹ A referendum was held on the 17th and 19th June 2011, in which 68.8% of the voters voted for the enactment of the Life Partnership Act. The new Act will enter into force on the 1st September 2011.

⁴⁰ **Luxembourg**: Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats and **Andorra**: Llei qualificada de les unions estables de parella (see further K. BOELE-WOELKI, CURRY-SUMNER, JANSEN and SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, p. 105–107).

⁴¹ See further, CURRY-SUMNER, *All's well that ends registered?*, 2005, p. 354.

⁴² For more information on Slovenia see: BOELE-WOELKI, CURRY-SUMNER, JANSEN and SCHRAMA, *Huwelijk of geregistreerd partnerschap?*, 2007, p. 135–138.

⁴³ See JAGIELSKA, in this book at pp. 61–64 (§§ 4.2 and 4.3).

2.4. UNREGISTERED RELATIONSHIP FORMS

Alongside the abovementioned formal registration forms, many jurisdictions also place same-sex couples on an equal footing with different-sex couples when addressing issues related to unregistered cohabitants.⁴⁴ However, the vast majority of these nations also provide for some form of registration system. This, therefore, means that same-sex couples wishing to access certain rights and benefits are provided with an option of doing so either via registration or via informal cohabitation. Currently, **Croatia** is – as far as this author is aware – the only country in Europe to only provide same-sex couples with an unregistered form of protection, without access to either same-sex marriage or registered partnership.⁴⁵

2.5. SUMMARY

In summary, it would appear that different trends are simultaneously palpable across the European continent. Firstly, there is a distinct and obvious trend across the continent towards increased recognition of same-sex relationships. Currently, more than 21 jurisdictions have introduced some form of relationship registration scheme for same-sex couples. As time progresses, legislatures have a propensity to create institutions akin to marriage (e.g. **Denmark**), or alternatively permit same-sex couples to marry (e.g. **Portugal**). Secondly, another trend is evident, acknowledging that different-sex couples do not all desire to get married, yet many do wish to formalise their relationship. In some countries this has led to the introduction of registration schemes for different-sex couples (e.g. **regions of Spain**). In other countries, different-sex couples have begun to complain that they are not permitted to register their partnership. In the **United Kingdom** and **Austria** different-sex couples have even gone so far as to submit their case to the European Court of Human Rights.⁴⁶ In **The Netherlands**, where different-sex couples are also permitted to register their partnership, 2009 saw slightly less than 9,000 couples register their partnership.⁴⁷ The number of different-sex couples registering their partnership has increased steadily since the introduction of registered partnership in 1998.⁴⁸ A similar trend is also clearly evident with respect to the PACS in **France**.

⁴⁴ With respect to Sweden, Norway, Iceland and Denmark, see LUND-ANDERSEN, in this book at pp. 14–15 (§3) and with respect to France, Ireland and Scotland see SWENNEN and EGGERMONT, in this book at pp. 37–38 (§V).

⁴⁵ Zakon o istospolnim Zajednicama, Act of 14th July 2003.

⁴⁶ www.familylawweek.co.uk/site.aspx?i=ed52091.

⁴⁷ In 2009, only 576 registered partnerships were attributable to the ‘lightning divorce procedure’, which has been abolished since 1st March 2009. This means that the absolute number of partnership registrations in 2009 was 9,497 (of which 9,002 were opposite sex and 8,921 involved new registrations).

⁴⁸ In 1998: 1,500, in 1999: 1,322, in 2000: 1,670, in 2001: 3,044, in 2002: 4,305, in 2003: 4,305, in 2004: 5,148, in 2005: 5,744, in 2006: 6,315, in 2007: 6,804, in 2008: 7,450 and in 2009: 8,434.

A third trend is noticeable namely towards the recognition or acceptance of unmarried, unregistered couples who are (or should be granted) rights and benefits after a certain period of cohabitation. At present this movement would appear only to have gained limited legislative basis in countries (e.g. **Croatia**). Other countries have, however, recognized these rights for a longer time (e.g. **Sweden**).

3. COMMON THREADS AND MODELS

3.1. INTRODUCTION

At first glance, it would appear that there are few elements of commonality between the approaches adopted by the various legislatures across Europe.⁴⁹ However, this should not deter those wishing to compare these various institutions. Instead of looking at the broad picture and focusing on the differences, this section will provide a systematic analysis of the various approaches identifying common features and characteristics. These have enabled the creation of a number of models that can be used when comparing the various systems of formal registration.

3.2. THREE MODELS OF REGISTRATION

On the basis of extensive European research in 2005 and American research in 2008, it has been suggested by this author that three models of formal same-sex relationship recognition can be distinguished, the so-called **PLURALISTIC**, **DUALISTIC** and **MONISTIC** models.⁵⁰ The question which can be posed is whether this theoretical framework can still be applied with the advent of 21 jurisdictions having recognised same-sex relationship forms.

1. **MONISTIC MODEL.** Under this approach, no separate registration scheme for same-sex couples is created. Instead the prohibition on same-sex marriage is removed, in turn creating a single, formalised institution open both to same-sex and opposite-sex couples, namely marriage. This approach has only been followed in a relatively small number of jurisdictions, namely in a number of provinces in Canada and states in the USA. Political resistance and sensitivity to making such a monumental change to existing legislation is part of the reason for the relatively low adoption of this model. As a result, this model was, until recently, restricted to common law jurisdictions where judges have taken the initiative to strike down gender-based marital restrictions, often on the basis of their unconstitutionality. In 2010 Portugal became the first country in Europe to adopt this approach. A decision of the Portuguese

⁴⁹ *Contra*: VERSCHRAEGEN, in this book at p. 256.

⁵⁰ CURRY-SUMNER, *All's well that ends registered?*, 2005, p. 266–278, 286–291 and 307–313.

Constitutional Court held that it was not unconstitutional to deny same-sex couples the right to marry, but that the legislature had to act to ensure that the discrimination in treatment between same-sex and different-sex couples with respect to the rights stemming from marriage was removed. The Portuguese legislature ultimately opted to simply remove the prohibition on same-sex marriage.⁵¹

2. **DUALISTIC MODEL.** Under this approach, a registry which is restricted to same-sex couples is created. Opposite-sex couples wishing to formalise their relationship are able to do so via traditional marriage. In this model, two institutions operate side-by-side; one for opposite-sex couples (i.e. marriage), and one for same-sex couples (i.e. 'registered partnership'). It should be noted that jurisdictions adhering to the dualistic model have also begun to make amendments to their legislation. In these jurisdictions, the distinction between marriage for different-sex couples, on the one hand, and registered partnership for same-sex couples, on the other, has increasingly come under pressure. Ultimately this pressure has led to the repeal of the registered partnership laws in some jurisdictions.

Accordingly, the dualistic model should be divided into two time phases. In time phase 1 jurisdictions operate two systems side-by-side. As time elapses the necessity and justification for running two systems begins to ebb, and the legislature ultimately opts to repeal the registered partnership laws. At this stage, countries adhering to the dualistic model will be deemed to have entered time phase 2. Despite having a different origin, the second time phase of the dualistic model is also equivalent to the monistic model. One could, therefore, also argue that the dualistic model is perhaps also simply to be regarded as time period 1 of the monistic model.

3. **PLURALISTIC MODEL.** In the PLURALISTIC model couples are offered two possibilities to formalise their relationship, irrespective of their gender, namely marriage or a form of non-marital registered relationship. It must, however, be noted that jurisdictions adhering to the PLURALISTIC model tend to attain the end phase of this model by virtue of a two-stage process, thereby necessitating the division of the PLURALISTIC MODEL into two time-periods. The first time-period involves opening non-marital registration to both different and same-sex couples, whilst leaving marriage legislation entirely intact and unaltered. Once this has been achieved, the arguments for opening civil marriage to same-sex couples are strengthened, since the discrimination originally faced by same-sex couples, in not being able to marry, is simply replaced with a new form of discrimination; although different-sex couples are offered a choice of relationship forms, same-sex couples are not.⁵² It is irrefutable that the option for different-sex couples to register their relationship along identical lines to same-sex couples in The Netherlands and

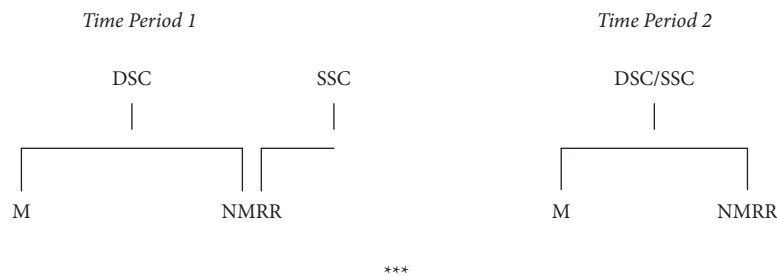
⁵¹ See GONZALEZ-BEILFUSS, in this book at p. 44 (§II.1).

⁵² See, for example, *Dutch Second Chamber*, 1995–1996, 23761, No. 7, p. 10.

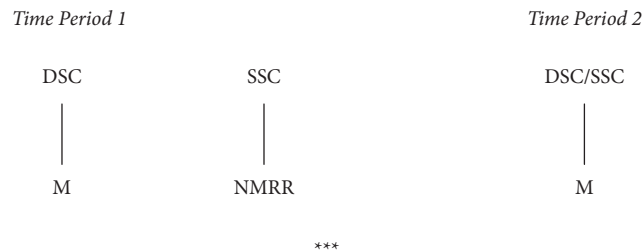
Belgium, for example, played an important role in the pressure placed on these Governments to amend the laws prohibiting same-sex civil marriage.⁵³ This model can be represented diagrammatically. As Luxembourg moves to open up marriage to same-sex couples, it too is beginning to make the transition from stage 1 of the pluralistic model to stage 2. The question is, according to this author, not whether France and Andorra will make the transition, but more a question of when.

All these models can also be represented diagrammatically.

PLURALISTIC MODEL



DUALISTIC MODEL



MONISTIC MODEL



Key: **DSC:** *Different-Sex Couples*, **SSC:** *Same-Sex Couples*
M: *Marriage*, **NMRR:** *Non-Marital Registered Relationship*

⁵³ It is, therefore, argued that over the course of time, France will gradually come to debate the issue of opening civil marriage to same-sex couples. This issue has in fact already been raised in the courts, as well as politically (MINISTRE DE LA JUSTICE (2004) p. 6).

In analyzing the country reports and the research already conducted, the following overview of jurisdictions can be produced.

Table 1: Overview of registration schemes

PLURALISTIC		MONISTIC	
Time period 1	Time period 2	Time period 1 (Dualistic)	Time period 2
Andorra	Belgium	Czech Republic	Iceland
France	The Netherlands	Denmark	Norway
Luxembourg	Spain	Finland	Sweden
		Germany	Portugal
		Greenland	
		Hungary	
		Ireland	
		Liechtenstein	
		Slovenia	
		Switzerland	
		UK	

3.3. RIGHTS AND DUTIES INCUMBENT ON PARTNERS

With respect to the rights and duties incumbent on the same-sex registered partners or spouses, enormous diversity exists. In some countries, the legal effects attributed are similar, if not almost identical, to those attached to the institution of marriage. In other jurisdictions only minimal protection is offered to the parties. Although the models described above are only applicable to the formal aspects of the relationship (i.e. establishment and dissolution), a distinction can nonetheless be made between “strong registration” and “weak registration”. Strong registration involves the near assimilation of the legal effects attributed to registered partners and spouses. Although countries opting for this system often refrain, at least in the beginning, from amending the law relating to children (*i.e.* adoption, parentage and parental responsibility), all the legal effects affecting the partners themselves are generally equalised. In contrast, weak registration entails the enactment of only minimal protective measures. These forms of registration often have no impact on the parties’ personal law (*e.g.* name law, nationality and civil status, or family and inheritance law), but are instead restricted to fiscal and property law issues, as well as the personal obligations that the parties have towards each other.

It would appear that the legal effects attributed to registered partners can be roughly divided into four categories:

- Property law and personal obligations;
- Fiscal law (tax, social security and pensions);

- Family and inheritance law; and
- Rights in relation to children.⁵⁴

It would appear that those countries adopting a system of weak registration confine the effects of such a registration to the first two categories. Hence, the effect of registering a statutory cohabitation in **Belgium** or a PACS in **France** is restricted to fiscal and property law.⁵⁵ Strong registration, on the other hand, also reaches into rights and duties in the third and fourth categories. Hence, in **The Netherlands**, the registration of a partnership also places registered partners in the same position as spouses with respect to inheritance law, name law and parental authority rights.

The rights and duties associated with the first category are generally of a low politically sensitive nature. It is assumed that parties involved in an intimate relationship wish to commit to each other, and by imposing duties such as a duty to cohabit or contribute to the costs of the household, the State is merely indicating its moral stance at little financial burden to itself. Although opinions as to the best or proper matrimonial property regime differ markedly and have resulted in protracted political debates in many countries, the question of whether to enact rules determining the property law effects of registering a non-marital relationship is by and large uncontroversial. Moreover, in the majority of legal systems, parties are, in any case, able to draw up a contract regulating such issues themselves.⁵⁶ The State simply provides for a default system to operate in the absence of such an expression of the parties' will.⁵⁷ In addition, it appears that in any debate concerning the protection that should be offered to cohabitants, discussion centres on this field of law.⁵⁸ It is, therefore, not surprising that this field of law is one of the first to be legislated upon for non-marital registered relationships.

Although rights and duties in the second category are generally of a less sensitive political nature than those in the third or fourth categories, the extension of fiscal benefits in the form of tax breaks, social security benefits and access to

⁵⁴ CURRY-SUMNER, *All's well that ends registered?*, 2005, p. 291–306.

⁵⁵ SWENNEN and EGGERMONT, in this book at pp. 34–36 (§IV.3).

⁵⁶ BOELE-WOELKI *et al*, *Huwelijksvermogensrecht in rechtsvergelijkend perspectief*, 2000, p. 248. The absence of such a system in the United Kingdom can be explained by fear on the part of the common law system that spouses could be bound by a contract which they made many years before. The principle of reasonableness, therefore, outweighs the principle of legal certainty in this system.

⁵⁷ This, of course, does not detract from any disparity in the property regime applicable to spouses and registered partners.

⁵⁸ See, for example, SENAËVE, *Naar de invoering van het homohuwelijk in het Belgische recht?*, *Echtscheidingsjournaal* 1992, p. 50–52; BARLOW, *Cohabitants and the law*, 2001, 3rd edition, PINTENS, VAN DER MEERSCH and VANWINCKELEN, *Inleiding tot het familial vermogensrecht*, 2002 and SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, 2004.

pension schemes, obviously comes at great financial cost to the State. The political will to remove fiscal discrimination is therefore often pitted against the available funds in the financial coffers.⁵⁹

As one moves towards the third category of legal effects, one senses a shift in emphasis. If one accepts the extension of rights in this field, it becomes difficult to make distinctions. Upon extending one right or duty, one must justify the almost unjustifiable in denying the extension of other rights in this category.⁶⁰ Rights and duties in this category also have a long-standing association with the law on marriage in many countries. On the continent the celebration of a marriage has an important impact on those personal law rights associated with one's civil status, name and nationality. This is to some extent also true of common law countries, where according to old authorities the celebration of a marriage for many purposes fuses the legal personalities of husband and wife into one.⁶¹ As a result, the extension of such rights to those outside of the marital bond is a much more sensitive matter than the rights in the first two categories.

The final category, untouched in many jurisdictions, is possibly the most sensitive of all. This sensitivity stems from a multiplicity of dynamic factors: biology, tradition, third party rights and moral values. The law on parentage was originally based on the presumption of biology.⁶² It was and still is simply presumed that the husband of a pregnant woman was the child's father, *pater is est quem nuptiae demonstrant*. The idea of extending such presumptions to same-sex couples involves an enormous excursion from reality. Even if the husband of the legal mother is not the father of the child, there is a biological possibility that he could be, whereas such a biological possibility is completely absent in same-sex couples.⁶³ The controversy surrounding children raised in same-sex families has even prevented gay rights groups from asserting the need for equality in this field.⁶⁴

⁵⁹ See, for example, the Annexes to the English proposal WOMEN AND EQUALITY UNIT, *Civil Partnership: A framework for the legal recognition of same-sex couples*, London: Department of Trade and Industry, p. 75 (Tables 3 and 4, Annex A). In Table 3 it was estimated that introduction of the civil partnership schemes would cost the British Government £23–230 million per year by 2050 (for state pensions and bereavement benefits and public service pensions). In Table 4 it was estimated that the cost to private pension benefit schemes would be between £2.5–20 million.

⁶⁰ The only justification which has been offered (in Switzerland) is that the rules in the field of marriage are discriminatory. See further CURRY-SUMNER, *All's well that ends registered?*, 2005, p. 292–293.

⁶¹ BLACKSTONE, *Commentaries*, i. 442.

⁶² See for example, VONK, *Children and their parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, 2007.

⁶³ KORTMANN COMMISSIE, *Commissie inzake openstelling van het burgerlijk huwelijk voor Personen van hetzelfde geslacht*, The Hague: Ministry of Justice 1997 p. 5, § 2.1.

⁶⁴ See, for example, CURRY-SUMNER, *All's well that ends registered?*, 2005, p. 189–194.

The necessary absence of parentage rights for same-sex couples does not explain a total lack of attention to this field. However, one must also note the State's interest in the raising of children. The State imposes its moral values on the opportunity for same-sex couples to adopt or raise children. In the majority of European countries which have introduced forms of non-marital registered relationship schemes, it has almost universally been accepted that children need to be raised by a mother and a father and that it is therefore undesirable for children to be raised by same-sex couples.⁶⁵ If one joins this with the often prevailing presumption that the marital home is the best place for the child to be raised, then it is not surprising that the rights in this category are the last to be extended to registered partners. It is, in addition, generally noted that a fundamental difference between same-sex and different-sex couples lies in the necessity for third party involvement in the case of same-sex relationships, either by means of sperm, egg or embryo donation or surrogacy. The traditional view that a child should remain in contact, if not be raised by his or her biological parents, is therefore fundamentally besieged should one accept the proposition that same-sex couples are able to raise children. In avoiding the political quagmire associated with the venturing of an opinion in relation to these views, it is submitted that these reasons provide the explanation to the current absence of legislation with respect to children born or raised in non-marital registered relationships. Nonetheless, this initial reticence is gradually being eroded as successive jurisdictions remove the prohibitions on same-sex adoption, stepchild adoption, joint parental authority and even the extension of the presumption of parentage.

Although this division into rough categories of rights is merely illustrative and does not profess to be used for any higher purpose, it is perhaps effective in helping to identify the crucial difference between those countries adhering to a system of strong registration and those adopting a system of weak registration. Of course, any global classification on this superficial basis will be subject to exception and it is admitted that this model is merely an aid in any attempt to discern general uniform trends in this field. In **Switzerland**, for example, despite having adopted a relatively strong registration form, the continued unequal treatment of men and women in the field of family law has led to unequal treatment of spouses and registered partners. This can lead to disagreement as to exact placement of a jurisdiction. For example in the national report of SWENNEN and EGGERMONT, Switzerland was classified as a 'separate but unequal' jurisdiction, whereas in the current classification it is regarded as a strong registration scheme. This difference in opinion is a result of respective weight given to the various rights and duties attributed. The classification is therefore

⁶⁵ See, for example, the Swiss legislature's discussion regarding adoption and artificial reproductive techniques: FF 2003, p. 1192 at 1223.

not to be regarded as an exact science, but instead a guide to how countries relate to each other and how they may possibly develop in the future. On the basis of this classification proposed in this contribution the following division of jurisdictions can be made.

Table 2: Complete overview of registration schemes

	Pluralistic		Monistic	
	Time Period 1	Time Period 2	Time Period 1	Time Period 2
Strong		The Netherlands	Denmark Finland Germany Switzerland	Iceland Norway Sweden Portugal
Weak	Andorra France Luxembourg	Belgium Spain	Czech Republic Slovenia	

4. CONCLUSION

The legal landscape with respect to same-sex couple registration is extremely volatile, with the methods used by legislatures constantly evolving. Nonetheless, it is clear that distinct trends and groupings of legal systems are evident. Although it cannot be said that jurisdictions are all on the same path towards one common solution, it is possible to state that countries do appear to be on similar paths depending, upon their original starting point. A distinction must be drawn between two groups of countries. On the one hand, those countries that have opted to open their initial registration schemes to different-sex couples, such as **France**, **Luxembourg** and **The Netherlands** (*Pluralistic Model*), and on the other, those jurisdictions that have restricted the scheme to same-sex couples (*Dualistic Model* leading to *Monistic Model*). Taking this distinction into account, it would appear that countries are indeed moving along similar paths towards common goals, albeit with two different end results.

For those countries adhering to the pluralistic model, it would appear that the ultimate end result will be a institutional regulatory framework that provides for two formal relationship registration schemes open to both different-sex and same-sex couples. Already, **Belgium** and **Spain** have made the transition from time period 1 to 2, and **Luxembourg** will soon follow suit. For those countries adhering to the dualistic or the monistic systems, it would appear that the ultimate end result will be one single institutional framework (i.e. marriage) open to all, regardless of sexual orientation. It is already clear that countries are beginning to make the transition from dualistic to monistic (e.g. **Iceland** and

Sweden). At the same time it is also clear that jurisdictions that have originally extended only limited rights to same-sex couples (e.g. **Slovenia** and **Czech Republic**) are gradually extending and improving those benefits, and will at a certain point in the future perhaps have to be promoted to the category of ‘strong registration’.

The question that obviously can – and should – be asked is whether one of these paths is more suitable, justifiable, less-discriminatory etc. The answer to that question is: it depends! It depends on the legal, social, economic, political and demographic context in any given country. My personal preference is that offered by the pluralistic system in time period 2, whereby couples are offered the option of different formal relationship forms depending upon their own needs and desires at that moment in their lives. This system is non-discriminatory in all aspects and is therefore favourable over any system in time period 1. In comparison to the monistic system, the pluralistic model also gives the required deference to the pluralistic nature of family forms in today’s society and therefore strikes a good balance between the sometimes-competing interests of legal certainty, non-discrimination and party autonomy. Perhaps, in the end, we might be able to learn valuable lessons from the **South African** approach in which couples are provided with one legal institution, but are given the option of two different nomenclatures. Party autonomy in a straight jacket!



PART TWO
SAME-SEX COUPLES
AND CHILDREN



PARENTHOOD FOR SAME-SEX COUPLES – SCANDINAVIAN DEVELOPMENTS

Maarit JÄNTERÄ-JAREBORG

1. GENERAL REMARKS

1.1. WHO QUALIFY AS A FAMILY – SAME-SEX COUPLES’ CLAIM FOR LEGAL RECOGNITION

Thought-provokingly, the most controversial issue in current family law is how its core concept of the family should be understood.¹ Should this be an alternating, flexible concept, mirroring current societal developments or should it be a fixed concept based on a traditional “given” understanding of the family? Not least the issue whether same-sex couples should be recognised to have a legitimate claim to formalised family life, and to the rights and duties linked to such family life including parenthood, has challenged our understanding of what a family actually entails.² The novelty of this claim, and the resulting uncertainty of its impact on society, if carried out to fruition, explains why even in the most open-minded jurisdictions the inclusion of same-sex couples in a legislative family scheme has only been possible gradually, in bits and pieces. Taking the child’s best interests into account has been a particular concern in this process.

¹ As a whole, this contribution can be regarded as an updated and extended version, with the focus being on parental rights, of my previous articles JÄNTERÄ-JAREBORG, Registered Partnerships in Private International Law: The Scandinavian Approach, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 137–158 and JÄNTERÄ-JAREBORG, Parenthood for Same-Sex Couples: Challenges of Private International Law from a Scandinavian Perspective, in: *Liber memorialis Petar Šarčević*, 2006, pp. 75–91. Special thanks are due to Sweden’s leading child law expert, Professor Anna Singer, also from Uppsala University, for an important input in the preparation of this article.

² The issue of who qualify as a family is by no means limited to same-sex couples and their right to joint parental status and equal parental rights. It has a potential of arising in probably much more complicated forms in multicultural contexts, as a result of migration, and raises issues such as polygamy. However, these extremely important challenges fall outside the scope of this contribution.

Looking back, one can identify two stages of development. The first stage focuses on the legal recognition of a same-sex couple as a couple, with mutual rights and duties. The movement's driving ideological force is to achieve respect for basic human rights. Equal rights should apply irrespective of a person's or a couple's sexual orientation; all differences of treatment in law constitute discrimination.³ It follows that same-sex couples are to be granted the right to formalise their mutual relationship.⁴ The second stage consists of granting same-sex couples the right to acquire a joint legal parental status and joint parental rights. If, namely, same-sex relationships are recognised as equal in value to opposite-sex relationships, then same-sex couples should be able to enjoy equal rights to family life in all spheres of family life. Joint parenthood is seen as a "genuine sign" of being recognised as a family.⁵ Whatever methods are available, they should be within the reach of both couples. Furthermore, if opposite-sex couples can achieve parental rights without formalising their relationship, then this should also apply to same-sex couples.

But can all differences of treatment be deleted without infringing upon the child's best interests as recognised, not least, in the United Nations Convention on the Rights of the Child of 1989? This is a primary concern in all Western jurisdictions, and the states parties to the Convention frequently refer to their international duty to take this obligation into account. Nevertheless, also the concept of the child's best interests is culture-bound and flexible. Once a society recognises the equal worth of same-sex relationships, it becomes artificial to claim that a child's well-being and positive development are dependent on two legal parents of opposite sexes. It becomes natural to conclude that the child's best interests are safeguarded when a child has access to two legal (suitable) parents, irrespective of their sex or sexual orientation.⁶ A parent of one particular sex is replaced by a parent of the other sex. In all other respects, the regulation granting parental

³ See, for example, YTTERBERG, All Human Beings Are Equal, But Some Are More Equal Than Others, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 1–9.

⁴ The reasoning of the Swedish Committee in charge of proposing legislation on registered partnership can be given as a good example: "We wish to accommodate the desire of homosexual couples for a valuable setting for their relations, as a way of manifesting their love. We also wish to accommodate the need of homosexual couples for economic and legal security in their relations. We wish to create a greater awareness of, understanding for and openness concerning homosexuality and homosexual relations. One important way of achieving this, in our belief, is by establishing, as far as possible, legal parity between homosexual and heterosexual cohabitation." See *Committee Report on Partnership SOU 1993:98 (Betänkande av Partnerskapskommittén "Partnerskap")*, Vol. A, p. 21.

⁵ SINGER, Equal Treatment of Same-Sex Couples in Sweden, *The International Survey of Family Law* 2010, p. 395.

⁶ Regarding this shift of perspective, see, for example, LUND-ANDERSEN, The Danish Registered Partnership Act, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 17 f. It should also be noted that the European Convention on the Adoption of Children (2008) permits states parties to extend the scope of the Convention to same-sex

rights to same-sex couples is modelled on that which is applicable to heterosexual parenthood. Most importantly, there can only be two parents.

1.2. FOCUS ON SCANDINAVIAN DEVELOPMENTS

1.2.1. *Pioneer States with Similar Legal Policies*

This contribution focuses on the second stage of development from a primarily Scandinavian (Nordic) perspective. The developments in other jurisdictions will only be touched upon, in a much more general manner. The focus on Scandinavia – i.e., Denmark, Finland, Iceland, Norway and Sweden⁷ – means that we are looking at countries that from a global perspective are at the very forefront of recognising parental rights for same-sex couples. These five countries have long historical ties with each other. All of them qualify as social welfare states and, from a European and global perspective, remain politically, culturally and socially similar to each other. They have shared a joint labour market since 1955 and labour movement across their borders is frequent.⁸ Legislation is the primary source of law. Case law plays a much more subordinate role, often clarifying the scope of existing statutory law on the basis of statements made in the legislation's preparatory works consisting of government bills and committee reports (*travaux préparatoires*).

The Scandinavian countries also have a long tradition of both formal and informal legislative cooperation in family law matters – and a habit of closely following each other's reforms⁹ – with the result that their family legislation tends to reflect similar kinds of ideas concerning legal policy.¹⁰ As regards the regulation of same-sex relationships, no formalised legal cooperation has taken

couples, whether married, registered partners or living together in a stable relationship, Article 7.2.

⁷ As in my previous contributions (see note 1), the term “Scandinavian states” includes all the above-mentioned countries, although in a strict geographic sense not all of these countries belong to “Scandinavia”. The other term “Nordic states” can be given an even broader geographic meaning.

⁸ As a result, inter-Scandinavian families with close links to more than one Scandinavian state are common. This also explains why the Scandinavian states, since the early 1930s, have enacted several inter-Scandinavian family law conventions within the field of private international law.

⁹ Since the early 1990s, a special intergovernmental working party on family law matters (cross-border and domestic) meets twice a year, not only for exchanging information but also for the preparation of joint legislative actions. All the recent reforms of the existing inter-Scandinavian private international law conventions have been prepared by this group, for example the 2006 amendments to the Nordic Marriage Convention in respect of spousal property relations.

¹⁰ See, for example, AGELL, Is There One System of Family Law in the Nordic Countries?, *European Journal of Law Reform* 2001, pp. 313–330.

place which also explains certain initial differences of approach. Yet so far, and within an interval of just a few years, the same solutions have been adopted.¹¹ It appears that in a politically sensitive and engaging area such as the current one, none of the states is willing to be “more discriminating” and “less progressive” than its neighbouring states. The remaining differences of substance are therefore likely to disappear.

1.2.2. *The Introduction of a Registered Partnership for Same-Sex Couples*

Under the lead of Denmark, the Scandinavian states were among the first states in the world to adopt special legislation for the formalisation of same-sex relationships. The new institution of a registered partnership, enabling a same-sex couple to formalise their relationship, was essentially similar to that of a marriage and only available for same-sex couples. Certain exceptions in relation to what applied in respect of marriage were, nevertheless, considered justified, such as the exclusion of all rights of joint parenthood.¹² Gradually, however, most of these exceptions were removed. Since each state has acted on its own, the successive granting of parental rights to same-sex couples has not taken place simultaneously in the Scandinavian countries. At present, there still remain important differences in detail among them.¹³

1.2.3. *The Introduction of a Gender-Neutral Marriage Concept*

Between the years 2008–2010, Norway (2008), Sweden (2009) and Iceland (2010) opened up the institution of marriage to same-sex couples. Since the new enactments came into force, it is no longer possible to register a partnership in these countries. This illustrates the evident lack of interest in retaining multiple forms of formalised relationships, once the conclusion of a marriage becomes available to same-sex couples.¹⁴ Previously celebrated partnerships nevertheless remain valid unless they are dissolved or converted into a marriage. Denmark

¹¹ This development is described from a general Scandinavian perspective, for example, in JÄNTERÄ-JAREBORG, Registered Partnerships in Private International Law: The Scandinavian Approach, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 137–158 and JÄNTERÄ-JAREBORG/SÖRGJERD, The Experiences with Registered Partnership in Scandinavia, *Die Praxis des Familienrechts* 2004, pp. 577–597.

¹² Originally, the Scandinavian regulations on registered partnership made exceptions to the otherwise applicable rules to spouses regarding three types of issues: (a) rules on parenthood, (b) gender-specific provisions, and (c) provisions of international treaties relating to marriage.

¹³ See below, Section 3.

¹⁴ Also in the United States it has been observed that marriage displaces the other forms (in the USA: civil unions and domestic partnerships), once it becomes available. See MEYER, Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships, *The American Journal of Comparative Law*, Vol. 58 (Supplement) 2010: *Welcoming the World: U.S. National Reports to the XVIIIth International Congress of Comparative Law*, pp. 131–133.

and Finland, on the contrary, still adhere to the exclusive nature of a registered partnership for same-sex couples wishing to formalise their relationship,¹⁵ marriage remaining limited to one man and one woman. Nevertheless, also in these countries there are demands for a gender-neutral marriage law and the required political consensus for the reform should be within reach in the near future.¹⁶ The legal distinctions between the two institutions have “thinned” to such an extent that, basically, only the “labels” differ. To remove this difference has become an issue of mainly “symbolic” relevance.¹⁷

Also in the Scandinavian legal milieu, opposition to same-sex marriages is primarily based on religious concerns. In all Scandinavian countries, a double-track system of marriage celebration applies. A legally valid marriage with full civil law effects can be celebrated either in a secular form or in a religious form, by a denomination authorised by the state to officiate at marriages. Keeping this in mind, it appears relevant to point out that the Church of Sweden – Sweden’s formal national State Church to which still approximately 70% of Sweden’s population belong as members – officiates same-sex marriages. The Church has provided theological arguments in support of this position, in particular the message of love in the New Testament, overriding other concerns.¹⁸ The Church of Iceland (= Iceland’s national State Church) has taken a similar decision. In Norway, all religious denominations remain opposed to the celebration of same-sex marriages with the result that such marriages require a secular ceremony to be legally valid.¹⁹

¹⁵ From a private international law perspective, same-sex marriages are in these countries recognised as registered partnerships, also those concluded in Iceland, Norway and Sweden. The inter-Scandinavian Marriage Convention of 1931 has not been amended to cover registered partnerships or same-sex marriages. Instead, these are assessed in each of the states according to the generally applicable rules of private international law.

¹⁶ Regarding the Danish situation and the various proposals for change, see the contribution of LUND-ANDERSEN. Also in Finland, there are increasing demands for a same-sex marriage reform. In December 2010, the Finnish Ministry of Justice presented a memorandum on what changes would be required to the legislation if the reform were to be carried out. The memorandum refrains from taking a position on this issue. See *Oikeusministeriö, Samaa sukupuolta olevien henkilöiden parisuhteiden sääntely, Selvityksiä ja ohjeita* 83/2010. The new coalition government which took office in Finland in 2011 is not expected to present any bill to Parliament on the matter, as a gesture of political compromise.

¹⁷ See SÖRGJERD, *Reconstructing Marriage. The Legal Status of Relationships in a Changing Society*, 2012 – The memorandum of the Finnish Ministry of Justice, on the other hand, concludes that the change would be considerable from the point of view of principle, *Oikeusministeriö, Samaa sukupuolta olevien henkilöiden parisuhteiden sääntely, Selvityksiä ja ohjeita* 83/2010, p. 17.

¹⁸ See JÄNTERÄ-JAREBORG, Sweden: The Same-Sex Marriage Reform with Special Regard to Concerns of Religion, *Zeitschrift für das gesamte Familienrecht* 2010, pp. 1505–1508.

¹⁹ In connection with the Scandinavian same-sex marriage reforms, the position was taken that no religious denomination or its ministers would be under any obligation by law to celebrate same-sex marriages (or other marriages), with regard to the religious freedom of religious denominations and their ministers. See Jänterä-Jareborg, When “marriage” becomes a religious battleground – Swedish and Scandinavian experiences at the dawn of same-sex

1.2.4. *Reasons to Study the Scandinavian Developments*

The still vivid discussions in many other countries on the “pros and cons” as regards the legal recognition of joint parental rights for same-sex couples are, from a Scandinavian perspective, largely “passé”, since law reforms to this effect have already been carried out in these countries. The Scandinavian picture is worth depicting, because the Scandinavian experiences can be expected to be of direct interest to other jurisdictions, either now or in the future.

First, the Scandinavian developments clearly demonstrate how a “rolling stone” will continue to roll until no legal distinction or difference of treatment exists in relation, first, to *couples* of the same-sex and then, to *families* where the parents are of the same-sex. In other words, once it is acknowledged by the legislator that same-sex couples are worthy of legal recognition, nothing other than full legal equality with opposite-sex couples will be sufficient. The child’s best interests will be interpreted accordingly.

Second, the process is a gradual one and it is characterised by small steps, every step leading in the same direction. This caution indicates the political sensitivity of each reform. A certain passage of time between reforms is found necessary. In the meantime, society gets an opportunity to accept each reform and to mature in time for the next one.

Third, the same solutions cannot be expected to be chosen at once by all jurisdictions even if the concerned countries are open to change. Comparisons between the Scandinavian legal systems provide an excellent illustration of this. Differences in detail are often politically important, and the details may be decisive for the passing of a bill in Parliament. These differences tend, nevertheless, to be temporary.

Fourth, it can be expected to be only a matter of time before demands will be made to introduce the “Scandinavian approach” also in those European countries which at present are opposed to permitting, in whole or in part, parental rights to same-sex couples. Therefore, the criticism that has been launched not least in the Swedish legal literature by Professor Anna Singer towards the unimaginative, essentially “copycat” take-over and application of heterosexual parenthood norms to new forms of families appears to be generally relevant.²⁰ Singer does not question granting same-sex couples joint parental

marriages, in: Büchler/Müller-Chen, Private Law: national – global – comparative, Festschrift für Ingeborg Schwenzer 2011, 849-867.

²⁰ See SINGER, En, två, ett par eller flera? Föräldraskap i det 21:a århundradet, *Svensk Juristtidning* 2002, pp. 377–389 and SINGER, Barns rätt till två föräldrar – en överspelad grundregel?, *Juridisk Tidskrift* 2009, pp. 411–429.

status and joint parental rights, but she criticises the law's strait-jacket approach in permitting only two legal parents. As a result, same-sex parenthood necessarily demands replacing a biological parent of the opposite sex by a same-sex parent. Thought-provokingly, Singer questions whether this is necessarily in the best interests of children.

Fifth, as long as joint parental status and joint parental rights for same-sex couples are not universally recognised, or are not recognised in the same form or to the same extent in all the jurisdictions concerned, aspects of private international law remain a serious concern. One important aim of this contribution is to draw attention to the difficulty of safeguarding equal rights of parenthood for same-sex couples through national rules of private international law and to legislative technical problems.²¹ This contribution argues that measures should be taken in international legislative co-operation or through rulings by the European Court of Human Rights or the European Union Court.

Sixth, extending parental rights to same-sex couples encounters not only biological but also factual and societal difficulties. States of origin, for example, may be unwilling to place children for adoption with same-sex couples. Potential sperm or egg donors may refuse to contribute to the artificial fertilisation of homosexual persons, even if the law permits such fertilisation. These factors, which demonstrate the limits of legislation, cannot be disregarded in any discussion on same-sex parenthood.

2. THE IDEOLOGICAL FRAMEWORK TOWARDS SAME-SEX PARENTHOOD

2.1. LEGISLATIVE ENGINEERING TOWARDS SOCIETAL ACCEPTANCE

The present stage of development in the Scandinavian states, described below, is a result of legislative actions during a period of approximately 25–30 years. Step by step various kinds of measures have been taken with the deliberate purpose of achieving increased societal recognition of homosexuality and homosexual persons' right to family life and to remove existing differences in treatment from the law. Since the most thorough investigations on the topic to my knowledge have been carried out in Sweden, in what follows I will devote special attention to the Swedish investigations and their findings. Nevertheless, also Denmark – registered partnership (1989) and stepchild adoption (1999) – and Norway – same-sex

²¹ This applies in respect of all major issues of private international law, namely jurisdiction, choice of the applicable law and recognition of foreign decisions. See below, Section 4.

marriage and *ex lege* co-motherhood for the birth-mother's same-sex spouse (2008) – have at times been first to introduce a crucial novelty. In this field of law, Finland has systematically been the last to take legislative action. Perhaps as a consequence, the Finnish enactments are, generally, of a better legislative quality.²²

Already in 1978, a parliamentary committee was set up by the Swedish government to investigate the living conditions of homosexual persons in Swedish society. The commission included a legal analysis of same-sex couples' mutual relationship and issues of parenthood in same-sex relationships. The Committee's report, presented in 1984, emphasised the need for the recognition and inclusion of homosexual persons in all fields of life.²³ One of the commission's conclusions was that homosexual persons, acting as custodians of children, both single persons and those living in a homosexual relationship, are just as able as heterosexual custodial parents to give children the necessary care and love.²⁴ This gave reason to raise the issue whether homosexual couples should be permitted to adopt children. However, having regard to the fact that under Swedish law only married couples can adopt,²⁵ the Committee was unwilling to propose any general, far-reaching changes to the law which would open up joint adoptions to unmarried couples; marriage for same-sex couples was at this time not an option to be considered. The Committee also expressed concerns that allowing homosexuals to adopt might be contrary to the best interests of children, since society's attitudes towards homosexuality were still negative. In the Committee's opinion, there was a risk of exposing vulnerable²⁶ children to yet another form of alienation, if same-sex couples were granted rights of adoption.

Interestingly enough, considering the later Danish developments, the Committee also concluded that the introduction of marriage-like institutions for homosexual couples would not be in the concerned couples' interests, but would lead to the increasing stigmatisation of homosexuals in society.²⁷ Instead, its recommendations paved the way for an enactment entitled the Homosexual

²² See JÄNTERÄ-JAREBORG, Registered Partnerships in Private International Law: The Scandinavian Approach, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 147 f.

²³ *Committee Report SOU 1984:63, Homosexuals and Society* ("Homosexuella och samhället").

²⁴ *Committee Report SOU 1984:63*, p. 79.

²⁵ This still applies in 2011, see below Sections 3.2 and 3.3. In 2009, a Swedish law commission proposed a reform which would make adoption, both stepchild adoption and joint adoptions, possible for cohabiting couples. See *Committee Report SOU 2009:61, More modern rules on adoption* ("Modernare adoptionsregler").

²⁶ The vulnerability in this case is caused in particular by the child's origin in another country and the change of families/carers to which every child in an inter-country adoption context is exposed.

²⁷ *Committee Report SOU 1984:63*, p. 99.

Cohabitees' Joint Home Act, which was adopted in Sweden in 1987, making Sweden the first country in the world to introduce family law legislation for same-sex relationships.²⁸ A Danish committee – which was set up in 1984 at the time of the finalization of the Swedish inquiry – proposed a bolder approach. As a result, in 1989 Denmark became the first country in the world to launch the institution of a registered partnership for same-sex couples, giving such couples access to a legal formalisation of their relationship and to acquire rights corresponding to those applicable between spouses. In the following years all the Scandinavian countries followed suite, Finland being the last of them to introduce legislation based on the Danish model on registered partnership in 2002.²⁹

Originally, following the Danish model, parental rights were excluded in all the Scandinavian enactments on registered partnership. But, as already mentioned, the possibility of joint parental rights had been raised, in particular in the Swedish debate, and this option continued to engage discussion. In 1999, stimulated by Denmark's example of permitting stepchild adoption within registered partnerships,³⁰ a new committee was set up in Sweden to investigate and analyse the conditions of children living with a homosexual parent and the parent's same-sex partner.³¹ This Committee's mandate included proposing rules on adoption, but only if the Committee came to the conclusion that from the point of view of the child's best interests there is no reason to differentiate between heterosexual and homosexual persons as adoptive parents.

2.2. ARGUMENTS FOR AND AGAINST

To start with, before describing the gradual inclusion of parental rights for same-sex couples in the various Scandinavian jurisdictions, the most commonly raised grounds for and against parental rights to same-sex couples should be enlisted.

²⁸ The Swedish Parliament had already stated in 1973 that "cohabitation between two persons of the same sex is a perfectly acceptable form of family life from society's point of view". See LU 1973:20 *Lagutskottets betänkande i anledning av Kungl. Majt:s proposition 1973:32 med förslag till lag om ändring i giftermålsbalken m.m. jämte motioner*, p. 116. On this enactment, see SINGER, Equal Treatment of Same-Sex Couples in Sweden, *The International Survey of Family Law* 2010, pp. 394 f.

²⁹ This development, from a general Scandinavian perspective, is described, for example, in JÄNTERÄ-JAREBORG, Registered Partnerships in Private International Law: The Scandinavian Approach, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp.137–158 and JÄNTERÄ-JAREBORG/SÖRGJERD, The Experiences with Registered Partnership in Scandinavia, *Die Praxis des Familienrechts* 2004, pp. 577–597.

³⁰ See LUND-ANDERSEN, The Danish Registered Partnership Act, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 17 f.

³¹ The results were published in *Committee Report SOU 2001:10, Children in Homosexual Families*, Vol. A (*Betänkande av Kommittén om barn i homosexuella familjer*, "Barn i homosexuella familjer").

Of particular interest in this contribution is how a balance between the various concerns has been struck in the Scandinavian legal milieu.

Opposition is normally based on the alleged best interests of the child. It is argued that a child needs both a mother and a father who supplement each other by their biological nature. Thus, it would be detrimental for the child's development to be deprived of parents of both sexes and to grow up in a family consisting of parents of the same sex. According to this often religiously motivated line of reasoning, it should not be disregarded that the "natural link to procreation" is absent, since a same-sex couple cannot procreate on their own.³² Conservative forces go so far as to claim that the trend towards same-sex marriage and joint legal parenthood of same-sex couples is an anomaly which threatens society itself and devalues marriage.³³ Marriage is, namely, by its very nature a union between a man and a woman, aimed to provide children with the best possible environment in which to grow up. Based solely on the interests of (certain) adults, the new trend undermines the role of marriage and, thus, society as well. Also, the opening up of parenthood to same-sex couples carries with it unpredictable consequences, at the expense of the children concerned. In the Scandinavian societies, this kind of opposition can be traced in particular to the few political parties with religion on their agenda or to religious denominations or fractions within them. Even if religion's impact on society at large remains limited, in politics it can slow down developments considerably.

Those in favour, on the other hand, refer to the human right of equal treatment and to the existing multitude of families and see no conflict with the child's best interests. Homosexual persons are just as loving and suitable to become parents and to exercise parental rights as are heterosexual persons. Therefore, there is no ground for any difference in treatment. This conclusion was drawn, for example, by the above-mentioned 1999 Committee in Sweden on the basis of approximately 40 international studies concerning children growing up with a homosexual parent and the parent's same-sex partner.³⁴ Also Swedish studies carried out by

³² On these concerns (critically), see for example SANDEL, *Justice, What's the Right Thing to Do?*, 2009, pp. 258–260.

³³ Examples of this kind of reasoning in the United States are given, for example, by MEYER, Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships, *The American Journal of Comparative Law*, Vol. 58 (Supplement) 2010: *Welcoming the World: U.S. National Reports to the XVIIIth International Congress of Comparative Law*, pp. 129–130. Among Scandinavian legal scholars, it found (unique) support by the Norwegian Professor Helge J. Thue. See also SÖRGJERD, *ibid.*, note 17.

³⁴ See *Committee Report SOU 2001:10 on Children in Homosexual Families*, Vol. A, pp. 14 f. These studies focused mainly on children's experiences in growing up in a homosexual family, how this affects their psychological and social development, as well as the child's sexual identity. Another focus was on how a parent's homosexuality affects his or her parenthood and the ability to offer the child good care. Similar conclusions had earlier been drawn in the Swedish 1984 Committee Report (above Section 2.1) and in Denmark. See LUND-ANDERSEN,

experts appointed by the Committee supported this conclusion.³⁵ In this connection it is frequently pointed out that many children have only one parent, and that many children grow up with a parent and his or her same-sex partner. Surely in these cases it is better for the child – and even in the child’s best interests – to have two legal parents instead of only one? To exclude same-sex couples from joint parental rights, the argument goes, means labelling these children as being “less worthy” of society’s legal protection.³⁶ Instead, every society should be developed in a tolerant direction, recognising the equal dignity of all persons.

3. THE GRADUAL DEVELOPMENT TOWARDS ALL-INCLUSIVE PARENTAL RIGHTS

3.1. VARIOUS SYSTEMATISATIONS OF PARENTHOOD

In modern child law, a distinction is often made between legal, social and genetic parenthood.³⁷ These three forms often coincide, but each of them can also exist independently from the others. The partial independence of these forms is very much present in respect of same-sex parenthood, in relation to at least one of the parents.

In a Scandinavian legal milieu, two primary ways exist for a same-sex couple to acquire joint legal parental status, namely adoption and assisted reproduction services, both with important “subcategories”. In addition, in Finland³⁸, by a decision of a competent authority, the child’s social parent – normally the biological (and legal) parent’s spouse, cohabitee or registered partner – can be

The Danish Registered Partnership Act, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 17 f.

³⁵ *Committee Report SOU 2001:10 on Children in Homosexual Families*, Vol. B, includes the Swedish studies carried out for this purpose. In Sweden’s, then, total population of nine million inhabitants, it was estimated that as many as 40,000 children grow up in a family consisting of two homosexual adults.

³⁶ These kinds of concerns are also expressed by LOWE, Report for the Council of Europe on the Rights and Legal Status of Children Being Brought Up In Various Forms Of Marital Or Non-Marital Partnerships and Cohabitation, available at the Council of Europe website. According to this study, “it is as discriminating to the child to limit legal parenthood as to accord the child a different status and legal rights according to the circumstances of their birth and upbringing”.

³⁷ See, for example, VONK, The Role of Formalised and Non-Formalised Intentions in Legal Parent-Child Relationships in Dutch Law, in BOELE-WOELKI (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, 2009, pp. 171–195.

³⁸ The Finnish Act on Custody and Contact Rights (1984) contains no restrictions regarding factors such as the custodians’ number, sex, sexual orientation or civil status. See SAVOLAINEN, The Finnish and Swedish Partnership Acts – Similarities and Divergencies, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 35.

granted the right to exercise parental responsibilities in relation to the child, together with the child's (social and legal) parent. Such decisions do not, however, entail any full parental status.

In this contribution, the focus shall be on same-sex couples' right to acquire a *full joint legal parental status*.

3.2. STEPCCHILD ADOPTIONS

3.2.1. *The First Step towards Joint Parental Status*

So-called *stepchild adoption* whereby the partner of a parent adopts the parent's child became the first legally acknowledged form of joint same-sex parenthood in Denmark (1999), Iceland (2000), Norway (2001) and Sweden (2003). Law reforms to this effect took place between the years 1999–2003, removing the original exclusion of joint parental rights from Scandinavian registered partnerships.³⁹ Since 2009, also Finland permits stepchild adoptions in same-sex relationships.⁴⁰

A condition in all of these countries is that the step-parent wishing to adopt the child is in a *formalised relationship* with the child's legal parent who is also the child's social parent. Furthermore, the child's other legal parent – where such a parent exists – should consent to the adoption to be granted by the competent authority. In other words, there exists no automatic right for a step-parent to adopt his or her stepchild but only a right to be considered, upon certain conditions, as an adoptive parent. It should be emphasised that the requirement of a formalised relationship (a registered partnership or, where available, marriage) reflects the requirement of marriage for stepchild adoption in opposite-sex relationships. This requirement is unconditional in all the Scandinavian legal systems.

Once the stepchild adoption reforms were carried out, their foundations or impact have not been publicly debated. Each Scandinavian society seems to share or at least accept the legislator's view that stepchild adoption is a way of strengthening the legal position of children living in families with two same-sex adults. The adoption can give the child social, legal and economic security, and it

³⁹ In the legal literature see, for example, JÄNTERÄ-JAREBORG, Parenthood for Same-Sex Couples: Challenges of Private International Law from a Scandinavian Perspective, in: *Liber memorialis Petar Šarčević*, 2006, pp. 80–81 and JÄNTERÄ-JAREBORG, Schweden: Adoption für eingetragene Partner, *Zeitschrift für das gesamte Familienrechts* 2003, pp. 349 f.

⁴⁰ See Section 9 of the Finnish Act (950/2001) on Registered Partnerships, as revised by Act of 29 May 2009.

confirms the child's right to two social legal parents. At this stage of development, the step-parent's sex or sexual orientation is regarded as irrelevant from the perspective of the child's best interests.

Stepchild adoption has in the Scandinavian societies become a popular option for acquiring joint parenthood in formalised same-sex relationships. In each of the countries several such adoptions are carried out annually.⁴¹ It is not unlikely that this option has become an important reason why in particular female couples formalise their relationships.⁴²

3.2.2. *Exceptions in Relation to Inter-Country Adoptions*

An important restriction applies in three of the Scandinavian countries which is of particular interest from a private international law perspective. In Denmark,⁴³ Iceland⁴⁴ and Norway⁴⁵ stepchild adoptions by a parent's same-sex partner are not permitted regarding (previously) inter-country adopted children. If, however, the child's country of origin permits the stepchild adoption, then the adoptive parent's formalised partner may adopt the child in Norway.⁴⁶ The aim is to prevent the creation of a *limping second adoption* which is not valid in the child's country of origin. It is assumed that the countries of origin of adopted children will normally not recognise registered partnerships as being equal to marriage or regard same-sex couples as suitable adoptive parents.

In Sweden and Finland, on the contrary, the parent's same-sex partner's right to adopt the child is not subject to any special restrictions.⁴⁷ On the other hand, in Sweden, any application to adopt may be refused if the law of another country with which the applicant or the child is closely connected through citizenship or habitual residence would not recognise the adoption, subject to the condition

⁴¹ No statistics are published regarding stepchild adoptions in formalised same-sex relationships. Nevertheless, researcher Caroline Sörgjerd, Uppsala Faculty of Law, has been able to establish that in 2003, 19 such adoptions took place in Sweden and in 2004, 38 such adoptions. The author is grateful for this information.

⁴² JÄNTERÄ-JAREBORG/SÖRGJERD, *The Experiences with Registered Partnership in Scandinavia, Die Praxis des Familienrechts* 2004, p. 588.

⁴³ See the Danish Act on Registered Partnership, Section 4, as amended by Act No. 360/1999. The removal of this restriction is being considered in Denmark. See the contribution of LUND-ANDERSEN in this book.

⁴⁴ See the Icelandic Act on Registered Partnership, Section 6, as amended by Act No. 52/2000.

⁴⁵ Adoption Act of 15 June 2001 No. 36, Section 5a.

⁴⁶ See the Norwegian Act on Registered Partnership, as amended by Act 36/2001 and 612/2001, to be read together with the Norwegian Act on Adoption, Section 5a para. 2.

⁴⁷ See the analysis of the Swedish position by JÄNTERÄ-JAREBORG, *Förslagens internationellt privat- och processrättsliga konsekvenser för adoption*, included as an annex to the *Committee Report SOU 2001:10, Children in Homosexual Families*. See also SINGER, *Equal Treatment of Same-Sex Couples in Sweden, The International Survey of Family Law* 2010, pp. 395–397.

that such non-recognition would seriously harm the child,⁴⁸ for example because the child can be expected to grow up in a country not recognising the adoption. Theoretically, depending on the circumstances of the individual case and the countries concerned, this restriction provides a legal ground to refuse adoption in a same-sex relationship.⁴⁹

3.2.3. *Evaluation*

The more restrictive approach chosen by Denmark, Iceland and Norway is, obviously, more in line with the underlying ideology of any inter-country adoption as a joint venture between the child's country of origin and the receiving state, where both parties respect each other's laws and the country of origin takes the placement decisions.⁵⁰ On the other hand, at the time of the second adoption, the child has left its country of origin, probably several years ago, and has no active ties left with that country. At this stage, jurisdiction and the adoption's eventual supervision have passed over to the receiving state which is also in the best position to assess the second adoption's conformity with the child's best interests. This speaks in favour of the more pragmatic Swedish approach. In 2009, when Finland as the last Scandinavian state introduced stepchild adoption as an option for registered partners, special reference was made to the experiences in the other Scandinavian countries.⁵¹ It was pointed out in particular that there is no reason to expect that the permitting of a subsequent adoption by the adoptive parent's same-sex partner would negatively affect inter-country adoptions. Also in the Netherlands, a similar restriction regarding inter-country adopted children has been abolished.

3.3. JOINT ADOPTION BY A SAME-SEX COUPLE

3.3.1. *A Controversial Issue*

In the Scandinavian jurisdictions, only spouses may adopt a child jointly and a married person can only adopt jointly with his or her spouse. The requirement of a formalised relationship also applies in same-sex relationships. Also, once the relationship is formalised, only a joint adoption is available.

Joint adoption rights for same-sex couples turned out to be much more controversial than stepchild adoptions. Thus, Sweden (2003) was the only

⁴⁸ See Act (1971:796) on International Legal Relations Concerning Adoption, Section 2.2.

⁴⁹ This author is not aware of any case where this provision has been used by a Swedish court to deny a stepchild adoption in a same-sex relationship.

⁵⁰ The 1993 Hague Adoption Convention is based on this ideology.

⁵¹ The Finnish Government Bill, *Regeringens proposition RP 198/2008 rd.*, p. 9.

Scandinavian country to endorse this option from the beginning, once adoption was made possible in same-sex relationships. No restrictions were made regarding inter-country adoptions. In 2006, also Iceland introduced the option of joint adoptions. Upon the introduction of same-sex marriage in Norway in 2009, Norway followed suit, but only as regards married same-sex couples.⁵² In 2010, Denmark passed an Act permitting registered partners to adopt upon the same conditions as spouses.⁵³ It follows that today Finland alone does not permit joint adoptions by same-sex couples.

3.3.2. *Swedish Investigations on the Topic*

Sweden's originally more radical approach was a result of the 1999 investigation regarding the conditions of children living with a homosexual parent and the parent's same-sex partner (above, Sections 2.1–2.2). According to the findings of the Committee, the available research – in Sweden and abroad – showed that children raised by homosexual parents develop both psychologically and socially in the same way as do children with heterosexual parents.⁵⁴ The children's sexual identity is not affected. A good relationship with the parents is decisive for the child's ability to deal with external tensions relating to the parents' sexual orientation. A child growing up in loving surroundings where the child's needs are central is not negatively affected by the parents' homosexuality. It followed that with regard to the child's best interests the Committee found no justification for treating homosexual couples (who have registered their partnership) any differently from heterosexual (married) couples.⁵⁵ To make this possible, Sweden withdrew from the 1967 Council of Europe Convention on Adoption, which was interpreted in Sweden as not permitting joint adoptions by a same-sex couple.

The pragmatic manner in which sensitive issues were addressed in the investigation makes the Swedish reform particularly interesting. The commission to the Committee included, namely, an investigation on how the countries, which from the Swedish point of view are the most important countries of origin of adopted children, would respond to the prospect of permitting registered partners to adopt in Sweden. Of particular concern was whether permitting same-sex couples to adopt in Sweden would negatively affect all inter-country adoptions destined for Sweden, making the states of origin generally less willing to place their children for adoption in Sweden. This investigation was carried out through Swedish embassies in the countries concerned. None of the responding

⁵² Registered partners remain excluded from joint adoptions, see the Norwegian Marriage Act, Section 95.

⁵³ Act No. 537 of 26 May 2010.

⁵⁴ See above Section 2.2.

⁵⁵ See *Committee Report SOU 2001:10, Children in Homosexual Families*, Vol. A, p. 15.

countries reported in the *affirmative* that it would be prepared to place children for adoption by a homosexual couple.⁵⁶ But on the other hand, only Latvia reported that the planned legislation risked negatively affecting all adoptions destined for Sweden. All other consulted countries of origin avoided taking an explicit position on the issue.

3.3.3. Evaluation

The 2003 reform paved the way to what successively developed into an explicit policy in Swedish legislation: no legal distinctions should be made on the basis of a person's sexual orientation. From a Swedish point of view it was considered essential that the same rules on adoption would apply to both same-sex and opposite-sex couples. Another aim was to set a positive example for other countries, as illustrated by the following statement in the governmental Bill preceding the new law: "A Swedish openness in this matter can in time also lead to a positive change in attitudes towards homosexuals and adoption by registered partners, also in foreign countries."⁵⁷ In light of the subsequent developments, the Swedish approach has, indeed, provided a model – but only for other *receiving* countries. As was mentioned earlier, today all Scandinavian states (except Finland) permit same-sex couples living in a formalised relationship to jointly adopt a child.

In practice, however, same-sex couples are *excluded* from joint adoptions in Sweden and in the other Scandinavian countries. The major reason is that in these countries the numbers of inter-country adoptions by far exceed domestic adoptions.⁵⁸ The procedure regarding inter-country adoptions is strictly regulated requiring, inter alia, intermediation by a specially authorised adoption organisation with authorised contacts in countries of origin. As it is, the authorised adoption organisations lack access to contacts in countries of origin which are willing to place children for adoption by a same-sex couple in the Scandinavian countries.⁵⁹

⁵⁶ See *Committee Report SOU 2001:10, Children in Homosexual Families*, Vol. A, pp. 352–356.

⁵⁷ *Swedish Government Bill, Prop. 2001/02: 123*, p. 29.

⁵⁸ For figures on adoptions, see JÄNTERÄ-JAREBORG, *Registered Partnerships in Private International Law: The Scandinavian Approach*, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 154 f. In more recent years, the number of inter-country adoptions has gone down in Sweden. Today, approximately 700–800 children are annually adopted from abroad. See the figures by the Swedish International Adoption Agency (MIA) (Myndigheten för Internationella Adoptionsfrågor), *Annual Report 2010*. In 2008, altogether 201 stepchild adoptions were granted in Sweden. The great majority of domestic adoptions take place within the family, primarily as stepchild adoptions within a marriage. The number of domestic adoptions of infants outside the family concerns 20–30 children per year.

⁵⁹ For example, none of the 31 countries around the world with which the Swedish authorised adoption agencies co-operate have been interested in placing children with same-sex couples in Sweden. According to its instructions, the Swedish International Adoption Agency (MIA)

It follows that in this respect the impact of the law reform has remained a *symbolic recognition* of same-sex couples' equal worth as *prospective* adoptive parents.⁶⁰ This is best illustrated by the Swedish experiences. Although same-sex couples since 2003 qualify in Sweden for jointly adopting children, no joint adoptions had in fact taken place by 2011. Since the prospects of succeeding with a joint adoption are now generally known to be very limited, if they exist at all, very few same-sex couples in a formalised relationship seem to consider joint adoption as a serious alternative. In 2010, no Swedish authorised adoption agency had same-sex couples on its waiting list.⁶¹ The couple can in practice still qualify for a so-called joint "private adoption", i.e., adoption without the intermediation of an authorised adoption agency but by permission from the central, national adoption agency. Such adoptions are, however, strictly regulated and only exceptionally permitted to proceed, and no such adoption is reported to have taken place by a same-sex couple in Sweden.⁶²

3.3.4. *The "Same Rules for all" do not Safeguard Equality*

Thought-provokingly, as the situation is on "the adoption market", i.e. outside the family, same-sex couples have greater prospects of adopting a child if they abstain from formalising their relationship.⁶³ In all of the Scandinavian countries a single person, irrespective of his or her sexual orientation, qualifies as an adoptive parent. Single-parent adoptions are also not uncommon since several countries of origin continue to permit such adoptions. It follows that a

continues to inform its foreign contacts about this possibility under Swedish law. All of the countries, with the exception of South Africa, have responded that this is not possible. Swedish International Adoption Agency (MIA), *Annual Report 2010*, pp. 14 f.

⁶⁰ Also the Swedish government, when proposing the bill to Parliament, foresaw that the reform would have a limited practical impact. In the government's opinion, this was not a reason to refrain from the reform. See *Swedish Government Bill, Prop. 2001/02:123*, pp. 21–31. Considering that the main purpose of the 2003 law reform was to improve the legal rights of children living with same-sex parents, granting the right for a joint adoption could be claimed to have gone beyond this aim.

⁶¹ Swedish International Adoption Agency (MIA), *Annual Report 2010*, p. 14. If an authorised adoption organisation has refused to intermediate in an application to adopt, the applicants may appeal to the Swedish International Adoption Agency (MIA). So far, no appeals have been made by a same-sex couple.

⁶² According to oral information given to the author by the Swedish International Adoption Agency (MIA) in April 2011, only one such adoption known to the Agency had been under consideration in Sweden. A Swedish man had adopted, while being legally "single", a child from the USA. Later on he registered a partnership in Sweden, and his partner carried out a stepchild adoption of the child in Sweden. The men applied to the Swedish International Adoption Agency (MIA) for the right to jointly carry out a private adoption of their child's sibling from the USA; the Swedish Agency was initially positive. Before the adoption could be carried out, however, the mother withdrew her consent.

⁶³ The situation is different if one of the partners gives birth to a child during the relationship. In this case, a co-parental status is available subject to certain conditions. In other cases, the birth-mother's partner may qualify for stepchild adoption. See below Section 3.4.3.

homosexual person wishing to adopt a child should carry out the adoption before formalising the adult relationship. In other words, one should first adopt, then formalise the same-sex relationship which may enable a second adoption in the form of a stepchild adoption. A spouse or a registered partner who alone adopts a child abroad, cannot rely upon the adoption's recognition in any of the Scandinavian countries; at least in the beginning this also excludes any subsequent step-child adoption.⁶⁴ Whereas a heterosexual couple by marrying improves their possibility of qualifying to adoption of a child, the formalisation of a same-sex relationship decreases this possibility! This example shows that the application of the same rules is not, automatically, the most equal solution. Social realities and laws of other countries also need to be taken into account.

3.4. ASSISTED FERTILISATION SERVICES FOR LESBIAN COUPLES

3.4.1. *No Reason to Distinguish between Methods*

If adoption by same-sex couples is in accordance with the best interests of the child, then there is no reason to exclude (suitable) lesbian couples from the right to assisted fertilisation services.⁶⁵ Furthermore, if such treatment results in the birth of a child, the couple should also have access to joint legal parenthood. These conclusions were drawn in Sweden, immediately following the 2003 reform granting adoption rights to same-sex couples. In 2005, a law reform was carried out in Sweden granting female couples, subject to the same conditions which apply to opposite-sex couples, access to donor insemination and IVF treatment with donor sperm, at publicly-funded hospitals in Sweden.⁶⁶ Before the treatment may take place the applicants' suitability is to be assessed by the doctor in charge.⁶⁷ Not only lesbian couples who are married or have registered a partnership can qualify for the treatment, but also informally cohabiting lesbian couples.⁶⁸ The fertilised egg must be the birth-giving mother's own egg. The use

⁶⁴ Still, with the passage of time, the granting of the stepchild adoption might be concluded to be in the best interests of the child.

⁶⁵ See SINGER, *Equal Treatment of Same-Sex Couples in Sweden*, *The International Survey of Family Law* 2010, p. 397.

⁶⁶ This reform entered into force on 1 July 2005. The new provisions are found mainly in the Children and Parents Code (1949:381, *Föräldrabalken*), see in particular Chapter 1 Section 9 and the Act (2006:351) on Genetic Integrity, Chapters 6 and 7. See JÄNTERÄ-JAREBORG, Sweden: Lesbian couples are entitled to assisted fertilisation and to equal rights of parentage, *Zeitschrift für das gesamte Familienrecht* 2006, pp. 1329 f.

⁶⁷ See the Swedish Act (2006:351) on Genetic Integrity, Chapter 6 Section 3.

⁶⁸ Single women are excluded from these services at Swedish public hospitals.

of a donated “third-party” egg or the egg of the woman consenting to the treatment of her partner is not permitted.

3.4.2. *Co-Parenthood between the Birth-Mother and her Consenting Partner*

If the treatment results in the birth of a child, *both women* shall be regarded as the child’s legal parents, although not by force of an automatically applicable presumption in law. Instead, the parentage of the birth-giving woman’s female partner must be established in a particular order,⁶⁹ normally by confirmation by this “other” woman, even if the couple are married. This confirmation can take place already before the birth of the child. Alternatively, the other woman’s parentage can be established through a court order. It is her *consent to the treatment* that binds the birth-mother’s partner to the legal parentage of the child, with full parental status and full parental rights.

An aim of the law reform is to guarantee that each child has two legal parents. Single women are therefore excluded from the treatment. The male donor cannot claim legal paternity and his paternity cannot be legally established. In these respects, the law mirrors what in Sweden applies in heterosexual relations to assisted fertilisation services and how parental status is determined concerning any resulting child.⁷⁰ Confusingly enough, a new legal terminology was chosen in connection with this law reform, through the new legal concept of “parentage”, which only refers to the consenting woman’s parental status, to be compared with “paternity” regarding a man’s legal parental status.

3.4.3. *Safeguarding the Child’s Right to Information about its Origin*

Upon reaching sufficient maturity, the child has the right to request the information about the donor which is available in the hospital records, including his identity.⁷¹ This goal of safeguarding the child’s right to information about its origin also explains why the treatment covered by the 2005 law reform may only take place at a publicly funded hospital. Such hospitals have the duty to keep records on donors and to keep these records available for at least 70 years.⁷²

If the assisted fertilisation has taken place abroad or through private arrangements in Sweden, the provisions concerning the consenting woman’s parentage are not applicable. In these cases, Swedish law still strives to establish the donor’s paternity. It is only when the man’s paternity cannot be established, for example

⁶⁹ See the Swedish Parents and Children Code (1949:381), Chapter 1 Section 9.

⁷⁰ The main difference is that there is no corresponding *pater est* presumption which is applicable automatically upon the birth of the child when the mother is married to a man.

⁷¹ See the Swedish Act (2006:351) on Genetic Integrity, Chapter 6 Section 5.

⁷² See the Swedish Act (2006:351) on Genetic Integrity, Chapter 6 Section 4.

because the sperm comes from an anonymous donor, that the birth-giving mother's female partner can become a legal parent, namely subject to the condition that her application to *adopt* the child is granted. In Swedish law, this requires that she is married to (previously: a registered partner of) the child's birth-mother. If the birth-mother is in an informal relationship, stepchild adoption is excluded and the child will only have one legal parent.

It has been proposed that a woman consenting to the artificial fertilisation treatment of her partner should be permitted to confirm her parentage even in cases where the donor's identity is unknown, i.e., where the treatment has taken place abroad or outside of a publicly-funded Swedish hospital.⁷³ This is namely what applies in opposite-sex relationships under Swedish law. No bill to this effect has, however, been presented to Parliament.⁷⁴

3.4.4. Other Scandinavian Models

In *Norway* on 1 January 2009, in connection with the introduction of a gender-neutral concept of marriage, lesbian couples received the right to assisted fertilisation services; the new rules apply to children born from 1 January 2009 onwards.⁷⁵ A law amendment grants cohabiting or married female couples the right to be considered for such services, upon the same conditions as apply to heterosexual couples.⁷⁶ The fertilisation must take place at an approved health-care facility either in Norway or abroad and the donor's identity must be known.⁷⁷ Where the treatment results in the birth of a child, the birth-mother's consenting female spouse receives, *ex lege*, the status of a co-mother ("medmor").⁷⁸ If the birth-mother is unmarried, the other woman's co-motherhood is established by her confirmation or through a court order.⁷⁹ If these conditions are not met, the donor's paternity should be established. If this does not succeed, because the donor's identity is not known, the other woman can become a legal parent by carrying out a stepchild adoption. This, in turn, requires her to be in a formalised relationship with the child's birth-mother.

⁷³ See *Committee Report SOU 2007:3 Parenthood after assisted fertilisation*, ("Föräldraskap efter assisterad befruktning").

⁷⁴ The Christian Democrats have been part of the Swedish government coalition since 2006. This political party is reported (in 2011) to be very much opposed to any further reforms in this sensitive field of the law.

⁷⁵ See ASLAN/HAMBRO, New Developments and Expansion of Relationships Covered by Norwegian Law, *The International Survey of Family Law* 2009, pp. 377 f.

⁷⁶ Norwegian Biotechnology Act, Chapter 2. Single women are excluded.

⁷⁷ SVERDRUP, Same-sex marriage in Norway, *The ISFL Family Letter*, Fall 2009, p. 7.

⁷⁸ See the Norwegian Children Act, Chapter 2, Section 3.

⁷⁹ See the Norwegian Children Act, Chapter 2, Sections 4 and 4a.

The *Icelandic* position is very similar. As in Sweden and Norway, lesbian couples have access to assisted reproduction services subject to the same conditions as opposite-sex couples. As in Norway, since Iceland's same-sex marriage reform (2010), if the birth-mother is married at the time of the child's birth, her female spouse who has consented to the treatment is *ex lege* regarded as the child's co-mother. If the couple are unmarried, the other woman's parenthood needs to be established in a special order. A child cannot have both a legal father *and* a legal co-mother. When the treatment takes place privately the paternity of the donor should be established. If this does not succeed, the woman who is married to (or registered partner of) the child's birth-mother may apply for stepchild adoption.

In comparison, the *Danish* approach appears rigid. Since a law reform carried out in 2006 both single and cohabiting women have access to assisted insemination at Danish health-care units.⁸⁰ As such, however, assisted fertilisation services do not under Danish law give any right to co-parenthood or co-motherhood in lesbian relationships. A child's birth as a result of assisted fertilisation can result in joint legal parenthood for a same-sex couple only by means of a stepchild adoption. The focus is on, in other words, on stepchild adoption. This, in turn, requires a registered partnership between the birth-mother and her partner. The partner can apply to adopt the child already before its birth; where this is granted, the adoption applies from the birth of the child.⁸¹ The same applies, essentially, in *Finland* since the 2009 law reform permitting stepchild adoptions. Nevertheless, the Finnish system provides a certain flexibility which is lacking in Denmark through the possibility of a joint exercise of parental rights, by a decision of a competent authority. Such a decision does not confer joint legal parental status, and it is independent from any decision on adoption.

3.4.5. *The Child's Right to Information about the Donor*

The importance given in Swedish law to the child's right to receive information about its origin is a major reason why co-parental rights can only arise if the treatment has taken place at a publicly-funded hospital in Sweden. Basically the same requirement also applies in Iceland and Norway, although it is formulated in a slightly more flexible manner including any specially approved health-care unit. Norway even allows the treatment to take place in a corresponding unit abroad. The common core is that the donor's identity must be known to the

⁸⁰ In this respect the position in Denmark has shifted over the years and is now the most "radical" in Scandinavia. Contrary to the main rule in the other Scandinavian states, Danish legislation admits the donor to remain anonymous and does not safeguard the child's right to know its origins as effectively as the legislation in the other Scandinavian countries.

⁸¹ Danish Adoption Act Section 8a.

hospital and recorded so that the child at an appropriate level of maturity can have access to this information. A “private insemination” does not safeguard this right. The child’s right to know the donor’s identity is approached independently from the legal parental status. It follows that the donor cannot be legally established as the child’s father in any of the jurisdictions when there is a legally recognised “co-mother”.

The current discussion in Sweden has revealed, among other things, the following. Many lesbian couples are believed to choose artificial insemination abroad or private treatment in Sweden, because the conditions prevailing for treatment in the public regime in Sweden do not appeal to them. First, the waiting periods for any treatment to begin are long, up to two or three years.⁸² Many restrictions apply, such as the woman’s age – normally she is required to be under 40 years of age to qualify for this kind of a publicly-funded treatment. Furthermore, the number of treatments is limited to, say, six attempts per couple.⁸³ Second, the couple’s right to treatment is subject to a test of their suitability as prospective parents, the “suitability” focusing on their medical, psychological and social circumstances.⁸⁴ The consulted doctor may consent to the treatment only if it is considered probable that the child to be conceived will grow up in favourable circumstances. The couple may consider that this kind of test breaches their right to integrity, even if it also applies as a condition for insemination in heterosexual relations. Third, not all couples wish to have a donor chosen by the hospital and whose identity will later on be available to the child. Even if the women are married to each other they may prefer to use an anonymous donor. Since the man’s paternity cannot be established, the child can later on be adopted by the birth-mother’s spouse. In all of these cases, the women can only acquire joint parental rights if the birth-mother’s partner succeeds in adopting the child. Fourth, on the contrary, lesbian women may wish to use a donor whom they have chosen themselves, often a man with whom they have a close personal relationship; they may also wish to have this man’s paternity established. When the insemination takes place at a public hospital in Sweden, the donor is chosen by the hospital.

⁸² See DAGENS NYHETER, Lesbiska söker hjälp utomlands, 8 August 2005. The same waiting periods also apply to heterosexual couples.

⁸³ Once the treated woman reaches the age of 40 years no more treatments are normally given at a public hospital. The other woman in the couple has no “take-over right” relating to the remaining treatments, even if she is younger. In an appeal court judgment the argument that this involved indirect discrimination against a same-sex couple was dismissed by the court. The restrictions have to do with the fact that, basically, all treatment at publicly-funded hospitals in Sweden is free of charge for patients. It has, nevertheless, been much debated in Sweden whether artificial fertilisation in a homosexual relationship can be characterised as a “medical problem” whose costs should be borne by society.

⁸⁴ See the Swedish Act (2006:351) on Genetic Integrity, Chapter 6 Section 3.

3.4.6. Comparisons and Evaluation

Overall, when issues of same-sex parenthood first came under debate, the initial response was that it is impossible to deny the existence of certain differences compared to heterosexual parenthood and that these differences must also be reflected in legislation, irrespective of any political will to achieve full equality. It has been pointed out in particular that the “*pater est* presumption” cannot be applied to children born to married same-sex couples due to the impossibility that the birth-mother’s partner would be the child’s biological (genetic) parent.⁸⁵

The preceding overview shows different approaches regarding whether and how the birth-mother’s female partner can acquire a legally recognised status as a “co-parent”. At present this is possible subject to certain conditions in Sweden, Iceland and Norway, but not in Denmark and Finland. The conditions that apply are based on the aim to provide the child with two suitable (consenting) legal parents, but without prejudice to the child’s right to information about the donor. The Norwegian and Icelandic laws grant the birth-mother’s female spouse an *ex lege* parental status as the co-mother from the moment of the child’s birth. This solution can be classified as a legal co-motherhood presumption, largely corresponding to a traditional *pater est* presumption of a married woman’s husband.

Swedish law, on the other hand, requires a special confirmation procedure concerning the consenting (other) woman’s parenthood irrespective of whether the women are married to each other or not. A similar procedure applies in Sweden also in heterosexual relations whenever the mother is unmarried at the time of the child’s birth,⁸⁶ whereas married couples fall under an automatically applicable *pater est* presumption.⁸⁷ Swedish legislation also avoids using terms such as “co-mother” or “co-parenthood” and refers to the other woman solely as the child’s “parent” whose “parentage” needs to be established in a special order.

⁸⁵ Technically, of course, the *in vitro* fertilised egg could be that of the birth-mother’s partner. This kind of treatment is, however, forbidden in the Scandinavian countries.

⁸⁶ The unmarried man’s paternity or the consenting woman’s parentage is established either by the man’s or the woman’s written and witnessed confirmation of paternity/parenthood, which is to be approved by the social welfare board and the woman giving birth to the child. If the man or the woman does not voluntarily confirm paternity/parentage of the child conceived by means of a treatment to which he or she had consented, then paternity or parenthood shall be established by a court order in the resulting proceedings on paternity/parenthood.

⁸⁷ The man’s paternity can, however, be revoked if the court finds that he did not consent to the treatment or the child was not conceived by means of treatment to which he consented. The presumption of paternity may also be revoked by the husband’s approval of another man’s acknowledgement of paternity concerning the child. See the Swedish Children and Parents Code, Chapter 1.

The Swedish regulation preceded those of Norway and Iceland. In that sense the latter reforms, which have ironed out most differences in treatment, can be seen as more “modern”, more “progressive” and more “equal”.

Is it then possible to claim that Iceland and Norway have found an optimal solution in the struggle not to discriminate against same-sex couples? The complexity of the issue is demonstrated by Denmark’s and Finland’s reluctance so far to take legislative reform actions. Sweden’s more moderate position in connection with the 2005 reform was motivated, inter alia, by reference to the presumed wishes of homosexual persons wishing to have children.⁸⁸ Lesbian and gay couples may be willing to share parental status and parental rights. The donor may be a man who is well known to the women and a person who wants to be acknowledged as the legal father of the child. It was argued that a homosexual man’s access to legal parenthood risks becoming (too) restricted if the woman consenting to the birth-mother’s treatment would always be regarded as the other parent.⁸⁹ Also, reasons of clarity and legal certainty were considered to require the chosen approach requiring a special confirmation of the consenting woman’s parentage.⁹⁰ Nevertheless, proposals have been made to delete the remaining differences and to recognise *ex lege*, upon the birth of the child, the co-parenthood of the birth-mother’s female spouse, on the basis of her consent to the treatment.⁹¹ Considering the Scandinavian tradition of adjusting law to that of the more progressive neighbours, there is reason to expect that Swedish law will in this respect be amended to match that of Norway and Iceland. Denmark and Finland will most likely follow suit.⁹²

⁸⁸ See the *Swedish Government Bill, Prop. 2004/05:137* (“Assisterad befruktning och föräldraskap”).

⁸⁹ Similar concerns have been expressed in the Netherlands. If the intentions of the birth-mother and her female partner are given too prominent a position, this may happen at the expense of the donor and his intentions. See VONK, The Role of Formalised and Non-Formalised Intentions in Legal Parent-Child Relationships in Dutch Law, in: BOELE-WOELKI (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, 2009, pp. 171–195. VONK refers to a case (p. 193) decided by the Dutch Supreme Court in 2007 where the donor’s right to family life was recognised, resulting in a contact order with the child against the will of the child’s birth-mother. The Court based its decision on the long-term friendship between the mother and the donor before the conception of the child and their original joint intention to become parents. VONK emphasises that the donor’s intentions, where they have been discussed and agreed upon, should not be disregarded without proper justification.

⁹⁰ *Swedish Government Bill, Prop. 2004/05:137*.

⁹¹ This solution was already forwarded by the Committee investigating the situation of children raised by a homosexual parent, see above sections 2.1. and 3.3.2. This part of the Committee’s proposal was set aside for further consideration. A new Committee was appointed which in 2007 proposed deleting the differences, see *Committee Report SOU 2007:3 on Parenthood after assisted fertilisation* (“Föräldraskap efter assisterad befruktning”).

⁹² It remains to be seen whether informal cohabitation in the Scandinavian countries will be put on an equal footing with marriage.

3.5. PARENTHOOD THROUGH SURROGACY – A FUTURE OPTION FOR GAY COUPLES?

The prospects for two men to acquire joint parental status over a child are in the Scandinavian jurisdictions limited to adoption. As has been explained before, joint adoptions are permitted in Sweden, Iceland and Norway and more recently, also in Denmark, but in all of them only in formalised unions. Since the placement of children for adoption by a same-sex couple is not an alternative preferred by children's countries of origin, this option has had no practical impact.⁹³ Also the prospects of a stepchild adoption remain limited, due to all the restrictions surrounding this option.⁹⁴ Most likely, these factors have contributed to making surrogacy arrangements carried out in other countries appear as the only alternative for gay couples to have a child.⁹⁵ A complication, which should be taken into account, is that parenthood through surrogacy is not recognised by law in any of the Scandinavian countries.⁹⁶ Furthermore, the birth-giving woman is regarded as the child's legal mother and custodial parent.

A common characteristic, for example in Sweden, appears to be that one of the men in a formalised gay relationship is the genetic father of the child. He has, in other words, provided the sperm for the treatment which results in the child's birth by a "surrogate" mother. He has acknowledged his paternity in the child's country of birth, and the paternity acknowledgement is recognised in Sweden in accordance with the applicable rules on private international law.⁹⁷ Where the man acknowledging his paternity is a Swedish citizen, also the child has a right to become a Swedish citizen. Upon the permission of the birth-mother, a Swedish passport may be issued and the child may leave its country of birth.⁹⁸ Once the legal father has succeeded in receiving sole custody rights in Sweden,⁹⁹ his

⁹³ See above Section 3.3.3.

⁹⁴ See above Section 3.2.

⁹⁵ The other groups of persons to whom surrogacy appears as the only solution fall outside this contribution.

⁹⁶ In Sweden, for example, parenthood through surrogacy is regarded as a highly dubious way of having children with regard to the child's best interests and ethical aspects (compensation, exploitation of the birth-mother). See *Committee Report SOU 1985:5 Investigation on Insemination, Children and In-Vitro Fertilisation* (Inseminationsutredningens betänkande "Barn genom befruktning utanför kroppen") p. 50 and *Report Ds 2000:51* ("Behandling av ofrivillig barnlöshet").

⁹⁷ See the Act (1985:367) on International Questions Regarding Paternity, §8. In addition, the Swedish Migration Agency (*Migrationsverket*) requires a DNA-test supporting the paternity.

⁹⁸ In June 2011, the Swedish Foreign Ministry issued guidelines for Swedish overseas authorities with regard to passport applications in connection with childbirths through surrogacy, Memorandum of 15 June 2011. The Guidelines emphasise that Swedish law is not adjusted to surrogacy arrangements and focus on the uncertainty of the state of Swedish private international law in this respect.

⁹⁹ The outcome is not granted, for example, due to discrepancies between jurisdictions involved and the fact that custody arrangements decreed in the child's birth country (habitual

formalised partner applies for stepchild adoption in Sweden. The Swedish court assessing the application needs to find a reasonable balance between the evident evasion of law and the child's best interests in the current situation. The passage of time normally works in favour of both custody rights (to the genetic father) and adoption (by the father's partner), it becoming important to recognise the prevailing *status quo*, experienced by the child to constitute its family. The situation appears to be similar in the other Scandinavian countries.¹⁰⁰ At present, much remains unclear from a legal point of view.

4. CONCERNS OF PRIVATE INTERNATIONAL LAW

4.1. A NEW "MIXED" CHALLENGE

Although most countries in Europe and many American states are moving in the same direction,¹⁰¹ the legal recognition of same-sex couples and of same-sex parenthood remains exceptional when viewed from a global perspective. In particular, the risk of the "limping legal status" of same-sex relationships in an internationally increasingly mobile society raises serious private international law concerns. It could therefore be argued that this fact alone speaks against extending parental status and parental rights to same-sex relationships, considering that the exercise of the right to family life cannot be limited to take place within the borders of only one country. Originally domestic situations may subsequently "cross borders" and become international.

Although such concerns have been raised, for example in Sweden, they have not, in the end, been given any decisive weight as an argument against an otherwise motivated law reform. The need for the legal recognition, at a domestic level, of same-sex relationships and same-sex parenthood has been considered more

residence of origin?) are not recognised in Sweden. The father's prospects of receiving sole custody rights in Sweden may increase if according to the law of the country of birth the birth-giving woman has no such rights. On these problems from a broader international perspective, see STRUYCKEN, *Surrogacy, A New Way to Become a Mother? A New PIL Issue*, in: *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr*, 2010, pp. 366 f.

¹⁰⁰ In August 2011, issues of surrogacy were discussed by the inter-Nordic working party on family law matters (see note 9 above). In Norway, a legislative committee has been appointed to consider appropriate measures. In Finland, influential groups are lobbying for surrogacy. In Sweden, no new measures are under consideration. The same would seem to apply at present to Denmark and Iceland.

¹⁰¹ See, for example, BOELE-WOELKI, *The Legal Recognition of Same-Sex Relationships Within the European Union*, *Tulane Law Review*, Vol. 82, 2008, pp. 1949–1981 and MEYER, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, *The American Journal of Comparative Law*, Vol. 58 (Supplement) 2010: *Welcoming the World: U.S. National Reports to the XVIIIth International Congress of Comparative Law*, pp. 115–133.

important than the lack of predictability regarding what will apply in another jurisdiction. Yet, same-sex relationships and same-sex parenthood constitute huge challenges for private international law in all countries. From the point of view of a country introducing these institutions in its legislation, a reasonable aim is, obviously, to strive to safeguard them also in cross-border situations. From the point of view of other countries, the core issue is how private international law regulations should respond to the new institutions and their legal effects.¹⁰² This reaction may take the form of the recognition, in one form or another, of a relationship validly created in another country. But it may also consist of a disassociation, due to concerns of public policy, and a resulting refusal to give it any legal effect.

4.2. THE SCANDINAVIAN APPROACHES – AN OUTLINE

In my previous contribution in 2002 entitled “Registered Partnerships in Private International Law: The Scandinavian Approach”, I described in detail the approaches chosen by the different Scandinavian countries to the cross-border challenges of this new institution.¹⁰³ The original Danish approach (1989) was a) to exclude the applicability of all international treaties referring to marriage and marital rights and b) to permit partnership registration in Denmark only if there was a strong Danish connection and c) to provide a provision on *forum necessitatis* in favour of Danish jurisdiction to dissolve any partnership registered in Denmark. This approach was followed by Norway (1993) and Iceland (1996). Sweden (1994) and Finland (2002) chose a more inclusive cross-border approach, by a) not categorically excluding international treaties and b) adjusting the legislation on private international law to the new institution, also with regard to similar legal institutions created abroad. Where needed new provisions were enacted to provide the necessary supervision.

When stepchild adoption later on became possible within registered partnerships¹⁰⁴ in Denmark (1999), Iceland (2000) and Norway (2001), special exceptions were introduced in relation to inter-country adopted children, primarily in order to avoid creating limping second adoptions. Sweden (2003), on the other hand, chose a more practical approach and abstained from

¹⁰² See DE GROOT, Private International Law Aspects Relating to Homosexual Couples, *Electronic Journal of Comparative Law*, Vol. 11.3, 2007, p. 2.

¹⁰³ JÄNTERÄ-JAREBORG, Registered Partnerships in Private International Law: The Scandinavian Approach, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 137–158. See also JÄNTERÄ-JAREBORG, Parenthood for Same-Sex Couples: Challenges of Private International Law from a Scandinavian Perspective, in: *Liber memorialis Petar Šarčević*, 2006, pp. 75–91.

¹⁰⁴ See above, Section 3.2.

introducing any corresponding restrictions,¹⁰⁵ a model which Finland followed (2009). Joint inter-country adoptions by same-sex couples are steered by the countries of origin. In practice same-sex couples are excluded from adopting a child from abroad other than through private arrangements, if approved by the competent authority.¹⁰⁶

4.3. THE DIFFICULTY OF ADJUSTING LEGISLATION TO SAME-SEX PARENTHOOD – A SWEDISH EXAMPLE

Certain adjustments to the existing legislation may turn out to be necessary even if the policy, as in Sweden, is to apply the same rules to same-sex and opposite-sex couples. In Sweden this became obvious when parental status was extended to include the birth-giving mother's same-sex partner on the basis of her consent to the treatment resulting in the birth of a child. The results are found in the 2005 reforms of the Act (1979:1001) on Recognition of Nordic Paternity Decisions and the Act (1985: 367) on International Questions of Paternity. In light of the titles of these enactments and the wording of the individual provisions, they appear limited to situations where a man's legal paternity is at stake. It was therefore found necessary to clarify in these enactments that Sweden's private international regulations on issues of paternity also apply to the consenting woman's parentage. I am critical towards the manner which has been chosen in order to strive to achieve this.

The amendments were carried out in a highly technical and abstract manner, as a rule by simply adding a provision stating: "This also applies to the establishment of parentage" (= of the birth-mother's consenting same-sex partner). But does this make any sense in concrete situations where another woman's parentage (= co-parenthood) is disputed, for example the provisions concerning paternity disputes in the 1985 Act. The other woman's genetic parentage cannot be at issue, since the fertilised egg under Swedish law in these cases must be the birth-giving mother's own. Theoretically, the focus of the proceedings is likely to be whether the mother's female partner had validly consented to the treatment and to which treatment she had consented. Having regard to the fact that the treatment, qualifying the other woman to parentage, may only take place in a publicly-funded hospital in Sweden after the couple have been subjected to a special suitability test as parents, how likely is it that the originally consenting woman will not voluntarily confirm her parentage of the child? It is, furthermore, hardly likely that there could ever be *several female defendants*, unlike earlier in paternity

¹⁰⁵ See also BOGDAN, Internationale Aspekte der schwedischen Gesetzesnovelle über die Adoption von Kindern durch eingetragene Lebenspartner, *IPRax* 2002, pp. 534 f.

¹⁰⁶ See above, Section 3.3.

proceedings where there could be several potential fathers.¹⁰⁷ The titles of the existing enactments continue, furthermore, to refer to issues of *paternity*.¹⁰⁸

Simply extending the provisions of private international law on paternity to cover (a consenting woman's) parentage may at first sight appear to be an economic and formally equal solution. As my examples aim to illustrate, the gender-specific concept of "paternity" is not the same as the new Swedish concept of "parentage" limited to a specially regulated form of co-motherhood. My conclusion is that legislation should strive at equality of treatment while openly reflecting differences. The Swedish adjustments are fragmentary from a private international perspective. It remains open, for example, what kind of connection to Sweden is required for the women to qualify for the specially regulated assisted fertilisation services in Sweden which can result in joint legal parentage.

4.4. INTERNATIONAL CHALLENGES

Any new or adjusted private international law legislation, confirming equal rights (and duties) for same-sex parents, can only be given full effect in the enacting country. As the situation is at present, none of the family members can rely upon the validity of the parentage in a foreign country, in particular if, according to that country's law a child's legal parents can only consist of a father and a mother.¹⁰⁹ For a broader geographical scope of validity, joint legislative actions by several countries are necessary or, alternatively, rulings by the European Court of Human Rights¹¹⁰ or the European Union Court overruling

¹⁰⁷ According to a provision in the 1985 Act proceedings on paternity may take place at a Swedish court when the claim is addressed to a man habitually resident in Sweden or to *several men* who are habitually resident in Sweden (Section 4 para. 3). Due to DNA technology such situations have become unusual.

¹⁰⁸ A provision (Section 1 para. 2) was added to the 1985 Act stating: "The Act contains also provisions on parentage according to Chapter 1 Section 9 of the Children and Parents Code".

¹⁰⁹ A particular concern in connection with law reforms should be to take appropriate information measures.

¹¹⁰ This Court has played a significant role in removing differences of treatment on the basis of a person's sexual orientation. See, e.g., *E.B. v. France* (judgment 22 January 2008) confirming single lesbian women's right to be considered as adoptive parents, and *Salgueiro Da Silva Mouta v. Portugal* (judgment 21 December 1999) confirming gay fathers' right to custody of their children. In addition, from the Court's ruling in *SH and others v. Austria* (judgment 1 April 2010) it follows that where a contracting state permits a certain kind of treatment, in this case IVF, the right to grant such treatments cannot be exercised in a discriminatory manner. The risk of exploitation is not a justification for banning a technique outright where there is an opportunity to regulate it efficiently. The Court's case law is, however, not uniform and its interpretations are often unpredictable. In *Chavdarov v. Bulgaria* (judgment 21 December 2010), the Court found the regulation on paternal filiation to be within the concerned state's margin of appreciation. The applicant's right to "family life" had not been threatened by his inability to bring proceedings for the establishment of legal paternity.

the differences between national laws. It is not sufficient that numerous countries, “on their own”, are moving in the same direction.

In this context, the idea of a European civil status certificate, launched in the EU Commission Green Paper entitled “Less bureaucracy for citizens; promoting free movement of public documents and recognition of the effects of civil status records” of December 2010, appears particularly interesting.¹¹¹ Optimally, the aim with such a certificate could be to guarantee the continuity of a recorded civil status situation to all European citizens exercising their right to free movement within the EU. Even if it is not explicitly given as an example in the Green Paper, same-sex parenthood should qualify as a relevant kind of civil status, when documented in the civil records of the member state of origin.¹¹²

The Green Paper identifies three alternative approaches: a) conditions for the recognition of civil status are left to the member states’ discretion; b) EU rules on automatic recognition are introduced; and c) unified EU rules on choice of law are enacted to cover all situations involving the creation of a civil status.¹¹³ In my opinion, only the second alternative meets the concerns of legal certainty. A family law status validly created in one European country should be respected in all other European countries on the basis of the right to family life, as guaranteed in the European Convention on Human Rights and Fundamental Freedoms¹¹⁴ and, within the EU, also by the EU Charter on Fundamental Rights. In this respect, also the general principle of respecting rights validly acquired in the EU member state of origin is of relevance.¹¹⁵ The emphasis should be on recognition, not on choice of law.

5. CONCLUDING REMARKS

Once the stone begins to roll, it will continue doing so until no legal distinctions are made. The Scandinavian developments towards the recognition of same-sex

¹¹¹ COM(2010) 747 final of 14 December 2010.

¹¹² The Green Paper should be criticised for the cautious choice of examples. It would be a lost opportunity if a future regulation would be restricted to such, in comparison, much less controversial issues as marriage and surnames. It appears likely that in certain member states’ responses same-sex relationships and same-sex parenthood will qualify as “civil status situations unsuitable for automatic recognition” (Q 8).

¹¹³ The Green Paper (4.3) underlines that the EU has no competence to intervene in the substantive family law of the member states.

¹¹⁴ The Court’s ruling in *Schalk and Kopf v. Austria* (judgment 24 June 2010) overrules the Court’s previous case law by stating that the mutual relationship of a same-sex couple qualifies not only as “private life” but also as “family life”, to be protected by the Convention.

¹¹⁵ The judgments of the ECJ in cases such as *Garcia Avello v. Etat belge*, C-148/02, and *Grunkin and Paul v. Standesamt Niebüll*, C-353/06 are of particular interest in this context.

relationships and same-sex parenthood provide good legal illustrations of this point. A political change of climate takes place, invalidating legal differences in treatment. What Professor David D. Meyer reports to have taken place in the United States, namely that “experimenting with intermediate forms of state recognition helps to shift public opinion and open pathways to further integration of same-sex families into traditional family institutions”,¹¹⁶ applies also to the Scandinavian societies. At present, same-sex couples living in a formalised relationship in Norway, Sweden and Iceland appear to have a greater access to joint legal parenthood than registered partners have in Denmark and Finland.¹¹⁷ In Norway and Iceland, permitting same-sex marriage has been of relevance in this respect, whereas in Sweden the same-sex marriage reform has meant no extension in respect of (already full) parental rights.¹¹⁸

The overview above shows that stepchild adoption, with possible restrictions in respect of internationally adopted children, is a natural first step which encounters the least opposition. All Scandinavian states permit stepchild adoptions, subject to the condition that the step-parent is in a formalised union with the child’s legal and social parent. The practical impact of granting same-sex couples the right to adopt jointly is limited, since the states of origin of internationally adoptable children have not been interested in placing the children for adoption by same-sex couples in other countries.

It follows that artificial reproduction, including surrogacy arrangements, has a much greater future potential, even if difficult ethical issues need to be settled first before any expansion can be considered as an option by law. The child’s best interests may also need to be approached from a new perspective meaning, for example, that they are regarded as having been fulfilled unless the contrary is

¹¹⁶ See MEYER, Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships, *The American Journal of Comparative Law*, Vol. 58 (Supplement) 2010: *Welcoming the World: U.S. National Reports to the XVIIIth International Congress of Comparative Law*, p. 128.

¹¹⁷ On the other hand, Finland’s more flexible approach towards the attribution of rights concerning the exercise of parental responsibilities makes it possible for any social parent to acquire parental rights upon a decision by a competent authority, except for full legal parental status. In this sense, Finnish law grants a flexible scale of “bi-parentage” options, except for full legal parental status. The Brussels IIbis Regulation covers, reasonably, Finnish decisions granting the exercise of parental responsibilities for the same-partner to the child’s legal parent. As a result, these decisions should automatically be recognised in other member states.

¹¹⁸ From a comparative perspective it is interesting to note that certain countries are more willing to “compromise” parental rights than marriage; in the Scandinavian countries this would apply in particular to Denmark. The opposite applies, for example, in Portugal, where “marriage” is available to same-sex couples but not joint parental rights. In Sweden, on the other hand, at the time of the same-sex marriage law reform (2009), very few legal differences existed between a registered partnership and a marriage. As a result, only the “label” of the formalisation changed.

shown.¹¹⁹ In respect of concrete solutions, we can expect that the Icelandic and Norwegian models of granting the mother's female spouse, who has consented to the artificial fertilisation treatment, *ex lege* parental status upon the birth of the child will in the future also find support in other countries' legislation. In addition, at least in the Scandinavian countries, the issue whether the relationship between the two adults is formalised or not can be expected to become less important or even irrelevant.

In fact, all the developments described in this contribution mirror our prevailing understanding of what constitutes a nuclear family – two parents with children – the only novelty being that the child can now have two parents of the same sex. Any legal “co-mother” excludes the possibility to establish a legal father; likewise two legal fathers exclude a legal mother. The real test for modern family law is a willingness to reconsider the existing model of two legal parents, and to open up not only certain parental rights but a full parental status to a wider category of involved adults. As pointed out by Professor Singer, a true recognition of the “rainbow family” by law necessarily includes a questioning of the heterosexual norm of parentage. Whether jurisdictions outside of Scandinavia will be willing to lead the way and to open up new ways of approaching parenthood remains to be seen.

¹¹⁹ This approach was followed in Sweden, when adoption was made possible in formalised same-sex relationships, see above Section 2.2.

SURROGACY AND SAME-SEX COUPLES IN THE NETHERLANDS

Machteld VONK and Katharina BOELE-WOELKI

1. INTRODUCTION

In the past decades the legal position of same-sex couples in the Netherlands has changed dramatically, in particular concerning the formalisation of the relationship between the partners.¹ It is more recently that the law has focused attention on the fact that a substantial number of same-sex couples, male as well as female, desire to raise children in their families. In order to meet this desire, the possibility was introduced for same-sex couples to adopt a child related to one of them or to jointly adopt a child unrelated to either of them.² These provisions in principle make it easier for same-sex couples, both male and female, to raise children in their families. However, in practice, it turns out that it is mainly the female same-sex couples that benefit from these regulations. This is due to the fact that a female couple can give birth to a child in their relationship with the help of a sperm donor. This means that one of the women is the child's mother by operation of law and the other woman can subsequently adopt the child. For male couples the situation is far more complicated. Because they need a woman to gestate and give birth to a child, and this woman will under Dutch law automatically be the child's legal mother, both fathers will need to adopt the child. The adoption of a child which is unrelated to them also presents the male couple with substantial difficulties because there are very few children available for adoption in the Netherlands and only very few foreign countries that have children available for intercountry adoption are willing to give children up for adoption to male same-sex couples.

Recently there has been a discussion about the fact that adoption is not the most appropriate manner to establish the parenthood of the female partner of the

¹ See for more information for instance CURRY-SUMNER, Same-sex relationships in Europe: Trends towards tolerance?, *Amsterdam Law Forum* 2011, Vol. 3, No. 2, pp. 43–61, available at: www.amsterdamlawforum.org.

² See for instance VONK, *Children and their parents. A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, 2007.

birth mother in a female same-sex relationship. It has been proposed that legal parenthood should be attributed to the female partner automatically, or in the same manner as an unmarried father can acquire legal parenthood. These proposals only concern female couples and do nothing to facilitate the acquisition of legal parenthood by male same-sex couples. In conclusion one can say that the present Dutch adoption regulations offer only very few possibilities for male same-sex couples to realise their desire to raise a child in their family. Would surrogacy be a serious option for same-sex couples in the Netherlands?

2. DUTCH ATTITUDE TOWARDS SURROGACY IN GENERAL

The Netherlands does not look very favourably upon surrogacy arrangements.³ Although altruistic surrogacy is allowed under certain very strict conditions, Dutch law has no special procedure geared towards transferring parental rights and duties from the surrogate mother (and her husband) to the intentional parents. After the introduction of IVF in the Netherlands in the late 1970s, discussion arose as to whether or not surrogacy should be allowed. On the whole, the answer to this question was in the negative, which resulted in the criminalisation of mediation by means of a professional practice or company and the publication of supply and demand requests concerning surrogacy arrangements.⁴ It has become clear from subsequent parliamentary debates⁵ that it is not the intention of the applicable provisions in the Dutch Criminal Code⁶ to convict doctors co-operating with surrogacy, but to avoid the situation where women offer themselves as surrogate mothers for payment, as this might lead to a form of trade in children.

IVF surrogacy is very strictly regulated in the Netherlands. In 1989 the Ministry of Health, Welfare and Sport determined in its IVF regulation statement that surrogacy in combination with IVF was not allowed. However, after active lobbying by interest groups,⁷ in combination with the fact that the passage of time had proven that there appeared to be less interest than expected in IVF surrogacy, the IVF regulation statement issued in 1997⁸ allowed for surrogacy

³ ROSCAM ABBING, Enige gezondheidsrechtelijke aspecten van het draagmoederschap, in: BOELE-WOELKI/ODERKERK (eds.), *De (on)geoorloofdheid van het draagmoederschap in rechtsvergelijkend perspectief*, 1999, p. 26.

⁴ Act of 16 September 1993, *Stb.* 1993, 486.

⁵ *Papers Dutch Second Chamber* 1996/97, 25 000-XVI, No. 62, p. 14.

⁶ Articles 151b, 151c, 225, 236, 278, 279 and 442a Dutch Criminal Code.

⁷ DERMOUT, *De eerste logeerpartij. Hoogtechnologisch draagmoederschap in Nederland*, 2001, pp. 13–17.

⁸ *Planningsbesluit in-vitrofertilisatie*, *Stcrt.* 1998, No. 95, pp. 14–18.

in combination with IVF under very strict conditions. When this regulation statement was discussed in Parliament, the minister stated that no special regulations for the transfer of full parental rights from the surrogate mother to the intentional parents were envisioned.⁹

Moreover, the IVF regulation statement determines that IVF in combination with surrogacy must take place in accordance with the guidelines on high-technology surrogacy¹⁰ of the Dutch Society for Obstetrics and Gynaecology. These guidelines require IVF clinics to draw up their own protocol regarding IVF surrogacy. This protocol must at least ensure that the following conditions are met: there must be medical grounds for the procedure (specified in the regulation statement); the surrogate mother must have one or more living children whom she gestated and gave birth to without complications;¹¹ there must be adequate information provided to the surrogate mother and the intended parents; and, preceding the treatment, the responsible doctor must draw up a statement to the effect that the above conditions have been met and that he considers the treatment to be justified.¹²

In the late 1990s, a pilot scheme was started to study whether or not surrogacy should be allowed as a means of helping a certain group of infertile couples to have a child of their own. This pilot scheme ran until mid 2004 and only allowed for surrogacy with the intentional parents' own genetic material.¹³ The intentional parents had to find their own surrogate mother. In order to be admitted to the surrogacy programme, couples had to pass a medical, psychological and legal screening procedure. In the course of this pilot scheme, 200 couples were admitted to the initial screening procedure. Of the 105 couples that passed the initial screening, 58 couples stopped before the medical screening or did not pass the medical screening. The 47 couples that passed the medical screening subsequently attended a psychological interview. In the end, 35 couples were given legal advice and entered the IVF surrogacy programme. Twenty-four women completed the IVF treatment cycle. As a result of this pilot scheme 16 children were born to 13 women. The other 11 women who completed a full IVF cycle did not achieve ongoing pregnancies. No problems were reported with the acceptance of the babies in the intentional families or with giving up the baby

⁹ *Papers Dutch Second Chamber* 1996/97, 25 000-XVI, No. 62, p. 13.

¹⁰ *Hoog-technologisch draagmoederschap*, Guidelines Dutch Society of Obstetrics and Gynaecology, January 1999, No. 18, available at: www.nvog.nl.

¹¹ The guidelines also state that the surrogate mother must consider her own family to be complete, probably in order to minimize the risk that she decides to keep the child for herself.

¹² *Papers Dutch Second Chamber* 1996/97, 25 000-XVI, No. 51, p. 2.

¹³ DERMOUT/VAN DE WIEL/HEINTZ/JANSEN/ANKUM, Non-commercial surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy, from 1997 to 2004, *Human Reproduction* 2010, Vol. 25, No. 2, pp. 443–449.

after birth. The intake centre that was established as a result of this pilot scheme was forced to close in July 2004, since at that time no Dutch IVF clinic was willing to participate in gestational surrogacy.¹⁴ However, in April 2006, one of the Dutch licensed IVF clinics announced that it would make gestational surrogacy services available to married couples. This IVF surrogacy clinic, which was established in 2007, only caters for married heterosexual couples that bring their own surrogate. Before couples are admitted for the IVF surrogacy procedure, all parties involved have to undergo medical and psychological screening. However, this does not mean that this is the only Dutch clinic that may have to make decisions regarding IVF surrogacy, as becomes clear from a case described by doctors from a hospital in Heerlen (close to the Belgian border). Surrogates who have undergone IVF surrogacy abroad, may come to Dutch hospitals during their pregnancies and require care.¹⁵

However, IVF surrogacy is not the only form of surrogacy in the Netherlands; from the case law it is clear that other forms of surrogacy also occur. In all these cases that do not involve IVF, the surrogate mother is the genetic and biological mother of the child; this means that she provides the egg and gives birth to the child. Regarding the sperm used to conceive the child, there are a number of possibilities; this may be provided by the surrogate's partner, the intentional father or a known or unknown donor. As long as there is no commercial element and the couples involved abide by the rules set out below for the transfer of a child to a family other than its birth family, the couples do not breach Dutch law.¹⁶ However, this does not mean that they will succeed in bringing the legal situation into line with the social situation.

As was stated earlier, the Dutch government operates a very restrictive policy with respect to surrogacy. Incidents in recent years have led to numerous parliamentary questions being raised in the Second Chamber of the Dutch Parliament. The Minister of Justice has responded to the Dutch Parliament by commissioning research to be conducted into the nature and scope of the

¹⁴ See www.draagmoederschap.nl. The initiator of the trial stated, in a letter posted on the website referred to, that in the past 15 years she had striven to make IVF surrogacy acceptable to the public, the media, the insurance companies, the Dutch Society of Obstetrics and Gynaecology and the medical profession in general. She and others managed to do all this; however, 'the internal obstacles in the Academic Hospitals themselves, the ethics commissions and/or the board of directors are elusive, in particular because they do not send a reasoned rejection, just a message without any further comments that the hospital has decided not to offer IVF surrogacy services. It is impossible to discover their real reasons'.

¹⁵ Such a case is described in WINKEL, ROUMEN EN DERMOUT *Draagmoederschap na ivf in het buitenland*, *Nederlands tijdschrift voor geneeskunde*, 2010; 154:A1777.

¹⁶ Using an unknown donor whose origin cannot be traced is contrary to Dutch law. However, this will not necessarily lead to problems with the transfer of parental rights. See, for instance, District Court Roermond 24 November 2010, *LJN* BO4992.

problems related to commercial surrogacy and the unlawful placement of children. The aim is thereby to ensure that more clarity can be gleaned as to what actually occurs in the countries where the possibilities are greater than in the Netherlands, as well as providing information with regard to the Dutch response upon the return of the commissioning parents to the Netherlands. From April 2010 until January 2011, researchers at the Utrecht Centre for European Research into Family Law (UCERF) at Utrecht University's Molengraaff Institute for Private Law conducted the research commissioned by the Minister of Justice.¹⁷ The resulting report was published on 2 March 2011. The report contains an in-depth study of Dutch criminal and civil law concerning the consequences of surrogacy, and a detailed analysis of the way Dutch Private International Law does and could regard international surrogacy. Furthermore, it contains reports from four jurisdictions that allow surrogacy, namely California (USA), India, Greece and Ukraine, and eight reports from European countries that are faced with the same problems as the Netherlands, namely Belgium, the UK, Germany, France, Norway, Poland, Spain and Sweden. In these country reports, answers are provided as to whether specific rules exist regulating surrogacy, and which measures have been adopted to ensure the enforcement of those rules.

3. SURROGACY AND MALE SAME-SEX COUPLES

As is clear from the previous section, same-sex couples are not eligible for the IVF-surrogacy programme offered by the VU medical centre. This means that same-sex couples have to find other ways to realise their wish for a child genetically related to one of the partners. Male couples may approach a sister, friend or stranger to be their surrogate or they may decide to have and raise a child together with a female same-sex couple. A consequence of their ineligibility for IVF surrogacy is the fact that the woman they approach to be their surrogate will always be the child's genetic and biological mother, because she will supply the ovum and give birth to the child. This may play a role in the transfer of parenthood procedure that needs to take place after the birth of the child. However, it is as yet unclear whether it does play a role.

Once the intentional couple have found a woman willing to act as a surrogate and have agreed on the terms and conditions of the arrangement, they may draw up a written agreement. The agreement between the couple and the surrogate is not binding, and judges are by no means obliged to arrange the child's legal position in accordance with the terms of the agreement. As of the moment of birth, the woman who gives birth to the child is regarded as the

¹⁷ The research team consisted of Katharina Boele-Woelki (chair of the research group), Ian Curry-Sumner, Wendy Schrama and Machteld Vonk.

child's mother. If she is married to a man, her husband will be regarded as the child's legal father. If the surrogate mother is unmarried, the child will not have a legal father by operation of law at birth. Below will follow a brief sketch of the possibilities for transferring parental status from the surrogate mother (and her husband) to the male same-sex couple. The situations of the married and unmarried surrogate will be discussed separately. Moreover, it will be assumed that one of the men is the child's biological father.

The transfer of full parental rights in surrogacy arrangements cannot occur against the will of any of the parties involved. This means that the surrogate mother has no legal duty to hand over the child and the intentional parents are not under a legal duty to accept the child. This also applies where a contract has been drawn up in which parties have agreed on the placement of the child in the family of the intentional parents. If the child is under 6 months old, the intentional parents may only take the child into their home with the consent of the Child Protection Board.¹⁸

Under Dutch law, the woman who gives birth to the child is the child's legal mother, whether or not she is also the child's genetic mother.¹⁹ This is a mandatory statutory provision from which parties cannot deviate.²⁰ Whether the child born to the surrogate mother will automatically have a legal father depends on the surrogate's marital status.²¹ It is obvious that the surrogate mother's marital status is of great relevance where the transfer of parental rights to the intentional parents is concerned. The marital status of the intentional parents may also play a role where the transfer of parental status is concerned.²² In the discussion below, the starting point will be the placement of the child in the family of the intentional parents. This means that there is still an agreement between the surrogate mother and the intentional parents that the child will grow up with the intentional parents. Where relevant, the genetic connection between the child and the intentional parents will be discussed. The schedule below shows the possibilities for the transfer of parental rights. First of all, the situation will be discussed where the surrogate mother is married, and subsequently, where she is unmarried.

¹⁸ Article 1:241(3) DCC and Article 1 Foster Children Act (*Pleegkinderenwet*).

¹⁹ Article 1:198 DCC.

²⁰ District Court The Hague 11 December 2007, *LJN* BB9844.

²¹ Article 1:199 DCC.

²² However, as is clear from the policy guidelines of the surrogacy centre established at the VUMC, only married heterosexual intentional parents at present have access to gestational surrogacy services.

3.1. SURROGATE MOTHER IS MARRIED

The surrogate mother will be the child's legal mother, and if she is married, her husband will be the child's legal father;²³ both will have parental responsibility over the child by operation of law.²⁴ In the very unlikely situation that the surrogate mother's husband did not consent to the conception of the child, he may challenge his paternity.²⁵ This means that unless the surrogate father was completely unaware of the fact that his wife was acting as a surrogate for another couple, he is highly unlikely to succeed. In most surrogacy arrangements, the surrogate's husband will play a role. In cases of surrogacy in combination with IVF, the requirements are such that the consent of the surrogate mother's husband is required.²⁶ In a recent case the paternity of the surrogate's husband was challenged in the name of the child through an *ad hoc* guardian (*bijzonder curator*).²⁷ The child may challenge the paternity of any non-biological father, and is not bound by the consent of adults or their marital status.

This means that full parental status can, in principle, only be transferred to the intentional fathers through joint adoption. However, before the child can be adopted by the intentional fathers, the surrogate parent(s) will first have to be divested of their parental responsibility.²⁸ Divestment of parental responsibility is a measure of child protection used in cases where parents are unable or unfit to look after their child.²⁹ Parents cannot apply to the court to be divested; only the Child Care and Protection Board and the Public Prosecution Service can apply to the court to have parents divested of their responsibility.³⁰ In the late 1990s there was a discussion in Parliament as to whether parents themselves should not be given a right to apply for divestment, but the Minister of Justice at that time was against such a measure as it would introduce a possibility for parents to relinquish their parental rights.

The outcome of a divestment procedure is uncertain, as the Dutch Supreme Court has not yet had the opportunity to decide on divestment in the context of surrogacy.³¹ However, decisions by various Courts of Appeal allow for the

²³ Article 1:198 DCC (mother) and Article 1:199(a) DCC (father).

²⁴ Article 1:251(1) DCC.

²⁵ Article 1:200(3) DCC.

²⁶ *Hoog-technologisch draagmoederschap*, Guidelines Dutch Society of Obstetrics and Gynaecology, January 1999, No. 18, paragraph 3.3, available at: www.nvog.nl. VUMC treatment protocol: 'If the surrogate mother has a partner, the partner has to give his written agreement to the surrogate mother's decision to carry a surrogate pregnancy', available at: www.vumc.nl/communicatie/folders/folders/IVF/Hoog-technologisch%20draagmoederschap%20.pdf.

²⁷ District Court The Hague 21 June 2010, *L7N BN1309*.

²⁸ Article 1:1228(1)(g) and Article 1:266 DCC.

²⁹ KALKMAN-BOGERD, *Ontheffing en draagmoederschap*, *Tijdschrift voor Familie- en Jeugdrecht* 1998, No. 9, pp. 198–202.

³⁰ Article 1:267 DCC.

³¹ The Dutch Supreme Court did however determine in a case unrelated to surrogacy that parents may be unable or unfit to take care of a specific child (*Hoge Raad* 29 June 1984, *NJ* 1984, 767).

divestment of the surrogate parents on the ground that they are unable or unfit to care for this particular child since they did not intend to have it for themselves.³² If the divestment procedure is successful, the intentional fathers may be attributed with joint guardianship, which is very similar to parental responsibility. Normally, when parents are divested of parental responsibility, guardianship will be attributed to an institution for family guardianship.³³ However, in the surrogacy cases that have been published, guardianship was attributed to the intentional fathers if the court considered this to be the best possible solution for the child concerned. If the intentional fathers have taken care of the child together for a year they may file for an adoption order with the court, provided they have been living together for three years on the day the adoption request is filed. There is no special post-surrogacy adoption procedure, which means that the normal criteria for adoption apply in such cases. These criteria require the adoption to be in the child's best interests and state that adoption cannot take place if the child's parents object. Only in a very limited number of circumstances may a court disregard parental objections.³⁴ The court may for instance disregard parental objections if the child has not lived with the parents since its birth. In the earlier mentioned IVF surrogacy pilot scheme all the children were adopted by the intentional fathers a year after their birth. No legal problems were reported. Nevertheless, particularly where parents have not involved the Child Protection Board before the birth of the child, transferring parental rights from the surrogate parents to the intentional parents may be a lengthy procedure of which the outcome is uncertain.

3.2. SURROGATE MOTHER IS NOT MARRIED

If the surrogate mother is not married, the child will only have one legal parent by operation of law: the surrogate mother. She will also be the only holder of parental responsibility. One of the intentional fathers may recognise the child with the surrogate mother's consent. Once intentional father A has acquired the status of legal parent through recognition, he may apply for sole parental responsibility, to the exclusion of the surrogate mother.³⁵ Intentional father A can only file such an application if the surrogate mother is the sole holder of parental responsibility.³⁶ Intentional father B may subsequently adopt the child

This judgement has been used by Courts of Appeal to justify divestment in surrogacy cases.

³² Court of Appeal Amsterdam 19 February 1998, *NJkort* 1998, 32 and Court of Appeal The Hague 21 August 1998, *NJ* 1998, 865.

³³ Article 1:275 DCC.

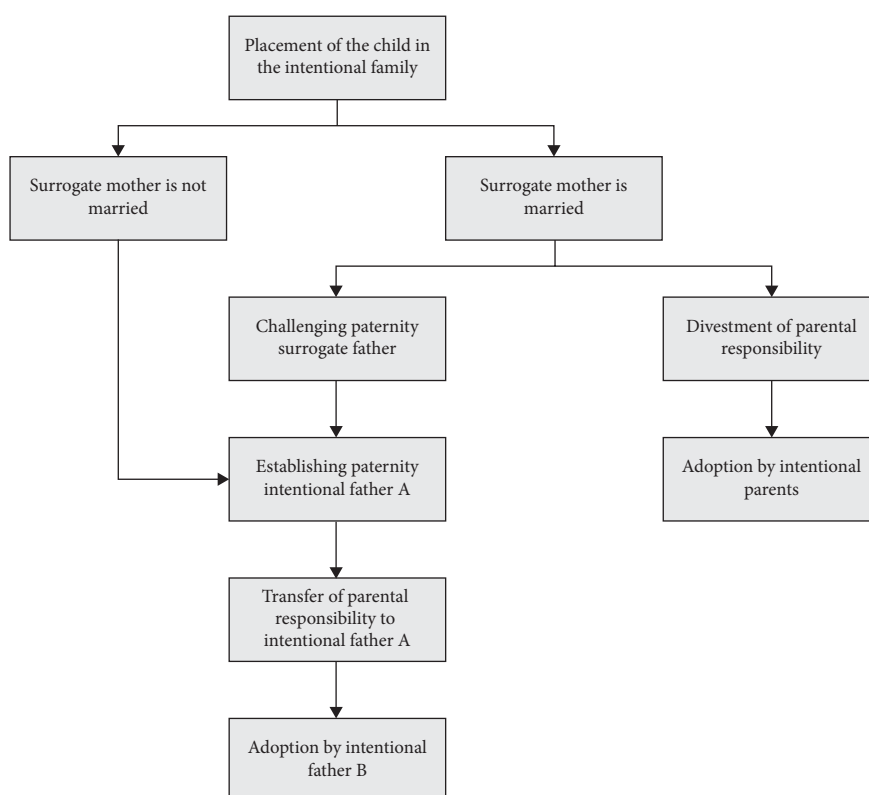
³⁴ Article 1:228(2) DCC.

³⁵ Article 1:253c DCC.

³⁶ Dutch law is ambivalent on this point; an in-depth discussion of this issue can be found in VONK, *Children and their parents. A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, 2007, Chapter 6 on partially genetic primary families.

after he has taken care of that child with intentional father A for a year and all the other criteria for adoption have been met.

It is unclear whether the unmarried intentional father B will be attributed with parental responsibility by operation of law through partner adoption. If one follows the system of the law regarding parental responsibility, joint parental responsibility does not come about by operation of law for cohabiting couples as a result of adoption. However, particularly in the case of joint adoption, it would be rather awkward to attribute parental responsibility to only one of the adoptive parents, while the other can only obtain it through registration in the parental responsibility register (as is normally the case for cohabiting parents). In the case of partner-adoption it might be more defensible not to attribute parental responsibility to the adopting partner by operation of law, although it might well be contrary to the adopter's expectations.³⁷



³⁷ KOK, Gezamenlijk gezag voorkinderen, *Tijdschrift voor Familie- en Jeugdrecht*, 2006, No. 9, p. 209 who refers to DOEK, *GS Personen- en familierecht*, 2006, Article 1:251 DCC, aant. 2A.

3.3. SURROGATE MOTHER HAS ENTERED INTO A REGISTERED PARTNERSHIP: BOTH PARTNERS HAVE PARENTAL RESPONSIBILITY

In the Netherlands, different-sex and same-sex couples have the opportunity to enter into a registered partnership. The legal consequences of such a partnership are almost the same as those of a marriage. However, an important difference between registered partnership and marriage concerns the legal status of children. If the surrogate mother has entered into a registered partnership, although her registered partner will not be a legal parent, he or she will have parental responsibility unless the child was recognised by a third party before the birth.³⁸ Thus, if one of the intentional fathers recognises the child before birth, the transfer of parenthood and parental responsibility will follow along the lines described for the unmarried surrogate mother. However, if recognition by intentional father A takes place after birth, the surrogate mother's registered partner will have parental responsibility. This may complicate the transfer of parental responsibility to intentional father A, as the parental responsibility of the birth mother's partner will need to be terminated.

4. GOING ABROAD

Since there are only a few possibilities in the Netherlands for male couples to have a baby through surrogacy, couples may start looking for options abroad.³⁹ Again, the options for male same-sex couples are less numerous than those for different-sex couples. One of the jurisdictions that is known to cater for same-sex couples is California.⁴⁰ In California surrogacy is allowed and, moreover, through a series of judgements by the Californian courts, it has also become clear that this jurisdiction allows for the transfer of full parental status from the surrogate mother to both intentional fathers. This means that a Dutch male same-sex couple may travel to California, have a child through surrogacy and return home with a birth certificate that carries both their names as parents.

Couples in the Netherlands, however, are likely to experience problems with the recognition of the Californian birth certificate.⁴¹ These problems arise, on the

³⁸ Article 1:253sa DCC.

³⁹ The following section is partly based on section 5 in VONK, *Maternity for another: A double-Dutch approach*, in: MONEGER (ed.), *Gestation pour autrui: Surrogate motherhood*, 2011.

⁴⁰ The UK also allows surrogacy for same-sex couples but is less attractive for foreign couples because there is a domicile requirement for the transfer of parental status from the surrogate mother to the intentional fathers. Same-sex couples also travel to India for surrogacy.

⁴¹ For a more concise discussion of the problems in *English* see CURRY-SUMNER/VONK, *The Netherlands: National and International Surrogacy: an Odyssey*, *The International Survey of*

one hand, because of the Dutch reticent attitude towards surrogacy. In recent months a number of cross-border surrogacy cases have reached the Dutch Courts. These concern same-sex couples as well as different-sex couples.

If a Dutch couple travel abroad for the purpose of engaging in a surrogacy arrangement and return from abroad with a child, the Dutch rules of private international law will apply in order to determine questions related to the legal status of the child. There are, broadly speaking, two different scenarios.

1. The couple have become the child's legal parents in accordance with the parentage laws of the country where the child was born. For instance, this could have occurred by operation of law, by recognition or registration on the birth certificate, or by means of a judicial or administrative legal determination of parenthood.
2. The couple (have) become the parents of the child pursuant to an adoption order either in the country of the child's habitual residence or in the country where the parents habitually reside.

It is important to distinguish between these two methods of establishing legal parenthood, because the laws which are applicable to the recognition of the established legal parenthood will differ in these two cases. In the first case, Dutch private international law rules on the recognition of legal parenthood will be applicable. These rules have been codified in the Parentage (Conflict of Laws) Act (*Wet conflictenrecht afstamming*).⁴² In the second case, three different legal instruments may be applicable, namely the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993, the Dutch Adoption (Conflict of Laws) Act (*Wet conflictenrecht adoptie*)⁴³ and the Dutch Placement of Foreign Children for Adoption Act (*Wet opneming buitenlandse pleegkinderen ter adoptie*, abbreviated as Wobka).

In principle, Dutch law will recognise parenthood established abroad, unless it does not comply with the provisions of the *Wet conflictenrecht afstamming*.⁴⁴ An example where the establishment of parenthood abroad may be contrary to the provisions of the *Wet conflictenrecht afstamming* is where a Dutch married man travels abroad and recognises the child of a woman other than his wife. If

Family Law 2011, pp. 259–280 and for such a discussion in Dutch see BOELE-WOELKI, CURRY-SUMNER, SCHRAMA and VONK, *Draagmoederschap en illegal opneming van kinderen*, WODC, 2011. <http://wodc.nl/onderzoeksdatabank/draagmoederschap.aspx>.

⁴² An English translation of this Act is available in SUMNER/WARENDORF (eds.), *Family Law Legislation of the Netherlands*, 2003.

⁴³ *Ibidem*.

⁴⁴ Articles 9 and 10 *Wet conflictenrecht afstamming*. See also SAARLOOS/VAN BERKEL, From Russia with love: ouderschap na draagmoederschap en de Wet conflictenrecht afstamming, *Nederlands Internationaal Privaatrecht* 2008, pp. 117–124.

the man in question has not had a relationship with the child or the child's mother prior to the recognition, the Dutch court may refuse to recognise the man's status as the legal father of the child.⁴⁵ The reason for this refusal is based on the assumption that recognition can be used as a means to circumvent the Dutch rules on international adoptions.⁴⁶

A number of cases where couples have returned from abroad with a child and a foreign birth certificate naming one or both of the parents have recently come before the Dutch courts. These cases concern, among other things, surrogacy arrangements that have taken place in India and Ukraine.⁴⁷ Both the case from the Ukraine and the case from India concerned the question whether or not the children born after surrogacy abroad could obtain the necessary documents to enter the Netherlands. In order to acquire these documents, the foreign birth certificate that named one (India) or both (Ukraine) of the intentional parents as the child's legal parents had to be recognised by the Dutch authorities. In both cases the relevant authorities refused to recognise the intentional parents named on the birth certificate as the children's legal parents. The children were refused entry to the Netherlands. In both cases the courts required emergency documents to be issued for the children so they could enter the Netherlands, where it could subsequently be decided whether or not the intentional parents could be regarded as the children's legal parents under Dutch law.

With respect to the second scenario, in which a couple adopt a child, two different situations need to be distinguished depending upon the habitual residence of the adoptive couple. If the couple are habitually resident in the Netherlands, it is vital that the adoption does not violate the Dutch rules on inter-country adoption.⁴⁸ Dutch residents wishing to adopt a child from abroad will first need to acquire permission to adopt (in the form of a *beginseltoestemming* ('consent in principle') from the Minister of Justice.⁴⁹ If they fail to acquire the Minister's permission, the adoption will, in principle, not be recognised in the Netherlands.⁵⁰ The couple must furthermore satisfy all the conditions laid down in the Wobka. However, in case of a surrogacy arrangement with the genetic material of the commissioning couple, it can be questioned whether the adoption

⁴⁵ Article 10(2)(a) *Wet conflictenrecht afstamming*.

⁴⁶ Explanatory note to the *Wet conflictenrecht afstamming* (Stb. 2002, No. 153), Papers *Dutch Second Chamber* 1998/99, 26 675, No. 3, pp. 13, 14 and 21. See for instance *Hoge Raad* 27 May 2005, NJ 2005, 554, *Hoge Raad* 28 April 2006, NJ 2006, 557 and BOELE-WOELKI, *Buitenlandse erkenning door gehuwde Nederlander in strijd met openbare orde*, *Ars Aequi Katern* 2005, No. 96, pp. 5312–5314.

⁴⁷ District Court Haarlem 10 January 2011, LJN BP0426 (Ukraine) and District Court The Hague 9 November 2010, LJN BP3764 (India).

⁴⁸ Articles 6 and 7 *Wet conflictenrecht adoptie*.

⁴⁹ Article 2 *Wobka*.

⁵⁰ Article 7(1)(a) *Wet conflictenrecht adoptie*.

of a child that is genetically related to the commissioning parents residing in the Netherlands, but born abroad as a result of a surrogacy arrangement, falls within the scope of the Wobka. Such a case was recently heard by the District Court in The Hague in 2007.⁵¹ A Dutch couple had travelled to England where they had entered into a surrogacy arrangement in accordance with English regulations. The genetic material of the commissioning couple had been used. After the birth the surrogate mother signed a declaration that she agreed to the adoption of the child by the commissioning parents. The court stated that Article 2 of the Wobka only allows for the adoption of foreign children if the prospective adoptive parents have obtained the consent of the Minister of Justice to adopt a foreign child.⁵² However, the court reasoned that according to the parliamentary history of the Wobka, this law was not intended to also cover the situation where the child to be adopted from abroad was conceived using the genetic material of the prospective adopters. In such cases, the rules that apply in the Netherlands to adoption subsequent to IVF surrogacy are applicable. The surrogate mother and the commissioning couple had complied with English law and with the rules that apply to adoption after IVF surrogacy in the Netherlands. The court therefore granted the adoption order, despite the fact that the couple had not obtained prior consent from the Minister of Justice to adopt a child from abroad.

However, bringing a child which is unrelated to either partner to the Netherlands without the prior consent of Minister (*beginseltoestemming*) will result in problems for both the commissioning parents and the surrogate mother. The most notorious example of such a case is the so-called *Baby Donna* case. The case concerned a Belgian surrogate mother who agreed to carry a child for a Belgian commissioning couple with the sperm of the commissioning father. Towards the end of the pregnancy, the surrogate mother informed the commissioning parents that she had miscarried. However, this turned out to be a lie. After the baby was born in February 2005, she handed the child over to a Dutch couple. The Dutch couple had informed the appropriate authorities that they would receive a newborn baby into their family for the purpose of adoption, but not that the situation concerned a child from abroad. This is important, since the couple had not followed the necessary procedure for inter-country adoption. At the time, the court was confronted with the question whether the child could remain with the couple despite the fact that the couple had not proceeded in accordance with the relevant provisions (the child had been living with the couple for some 7 months). The District Court in Utrecht (*Rechtbank Utrecht*) decided that there was 'family life' between the child and the couple on the basis

⁵¹ District Court The Hague 11 December 2007, LJN BB9844.

⁵² CURRY-SUMNER/VONK, It all depends on who you ask: Dutch parentage law in four acts, in: ATKINS (ed.), *The international survey of family law 2009 edition*, 2009, pp. 329–352.

of the fact that the child had been living with them since her birth. Accordingly, the child was allowed to remain with the couple for the time being.⁵³

Meanwhile, the Belgian commissioning parents discovered that the surrogate mother had given birth to ‘their’ child. More than 2 years after the baby was born, DNA testing revealed that the commissioning father was the child’s biological father, a fact that had been contested by the surrogate mother from the very start. The commissioning father subsequently commenced proceedings in the Dutch courts to have the child handed over to him and his wife. The court decided that it would not be in the interests of the child to leave the home and family she had been living with since birth, despite the fact that the commissioning parents (her biological father and his wife) were very willing and eager to raise her themselves.⁵⁴ Currently the surrogate mother and the Dutch couple are facing criminal charges in Belgium on account of their humiliating treatment of the baby concerned. Only very recently, a Dutch couple were prosecuted for buying a Belgian baby and registering it as their own. They were sentenced to a suspended prison sentence of 8 months, 240 hours community service and a suspended fine of 1,000 euro with a 2-year probation period.⁵⁵

Secondly, if the couple are not habitually resident in the Netherlands at the time of the adoption, the adoption will be recognised if they can provide the necessary documents and the adoption procedure complies with the requirements laid down in Article 6 Adoption (Conflict of Laws) Act (*Wet conflictenrecht adoptie*).⁵⁶

All in all, it is not always clear what the situation is following surrogacy abroad, and whether the commissioning parents will be considered the legal parents under Dutch law or will be able to become the legal parents under Dutch law.

⁵³ District Court Utrecht 26 October 2005, *LJN AU4934*.

⁵⁴ See for instance District Court Utrecht 7 May 2008, *LJN BD1068* and Court of Appeal Amsterdam 25 November 2008, *LJN BG5157*. In the most recent decision the Utrecht District Court decided that Donna’s foster parents will have to inform her that they are not her biological parents before she starts school. The court feared that given the amount of media attention Donna’s case had received, Donna would hear from children at school how she had been conceived and that her parents are not her biological parents (District Court Utrecht 10 June 2009, *LJN BI9334*).

⁵⁵ District Court Zwolle 14 July 2011, *LJN BR1608*.

⁵⁶ The adoption will not be recognized if there was no proper investigation or legal procedure prior to the adoption, if the decision would not be recognized by the State where the child and/or the parents had their habitual residence at the time of the adoption decision or if the recognition of the decision would violate Dutch public policy. Article 6(2) *Wet conflictenrecht adoptie*.

5. DEVELOPMENTS IN OTHER JURISDICTIONS

The fact that cross-border surrogacy is not exclusively a Dutch problem becomes clear when one looks at the jurisprudence from surrounding jurisdictions. For instance, in Belgium, France and the UK cross-border surrogacy cases have reached the courts as well. Cross-border surrogacy cases are also known to have been reported in Japan, Australia, Germany, Spain, Norway, Israel and New-Zealand.⁵⁷ Moreover, the fact that the Hague Conference for Private International Law has taken on the topic of cross-border surrogacy⁵⁸ indicates that it is a potentially problematic issue on a global scale.

It may be interesting to look at two cases from surrounding jurisdictions (Belgium and France) to see how these jurisdictions react to cross-border surrogacy. In Belgium the following case reached the courts in 2010: a male same-sex couple, had twin babies through surrogacy in California and returned home with a birth certificate naming both of them as parents to the child. The couple ran into problems at the Belgian registry office because the registrar refused to register the US birth certificates. The parents subsequently applied to the court in Huy to order the registrar to recognise and register the birth certificates.⁵⁹ With reference to previous judgements by the Belgian *Cour de Cassation* the Huy Court determined that the recognition of the US birth certificates would violate the Belgian *ordre public*. Evasion of Belgian parentage and adoption laws cannot subsequently be legitimised. The court therefore refused to order the registry to recognise and register the birth certificates in the civil registry. Non-recognition of the twins' US birth certificates means that in Belgium the US surrogate mother is regarded as the child's legal parent, whereas in the US the Belgian fathers are regarded as the child's legal parents. It is obvious that this may lead to serious legal problems.⁶⁰ On appeal, the Liège Court of Appeal ordered that the birth certificates be recognised and registered at the civil registry, but only as far as the legal relationship with the biological father was concerned.⁶¹ The registration of the legal parenthood of the biological father's husband was not possible, as he was not a biological parent.

⁵⁷ This information was obtained during a seminar on Surrogate Motherhood organized by the University of Aberdeen from 30 August-1 September 2011. www.abdn.ac.uk/law/surrogacy/about.shtml.

⁵⁸ www.hcch.net/index_en.php?act=events.details&year=2011&varevent=216.

⁵⁹ District Court Huy 22 March 2010, *JT* 2010, 420. See also WAUTELET, Les enfants – la filiation biologique, in: WAUTELET (ed.), *Relations Familiales Internationales. L'actualité vue par la pratique*, 2010, pp. 147–148 and HENRICOT, Belgique: La gestation autrui en droit international privé, in: MONÉGER (ed.), *Gestation pour autrui: Surrogate motherhood*, 2011, pp. 49–84.

⁶⁰ WAUTELET, Les enfants – la filiation biologique, in: WAUTELET (ed.), *Relations Familiales Internationales. L'actualité vue par la pratique*, 2010, pp. 147–148.

⁶¹ Court of Appeal Liège 6 September 2010, *Arrêt* No. 2010/RQ/20.

In France the *Cour de Cassation* rendered judgement in three cross-border surrogacy cases on 6 April 2011.⁶² The court determined that surrogacy was in violation of the French *ordre public*, and foreign birth certificates that violate the French parentage law, which considers the birth mother as the child's legal mother, cannot be recognised. One of these cases concerned twins born through surrogacy in California. These girls had entered France with their parents by using their US passports (US citizens do not need a visa to enter France). The *Cour de Cassation* recognised the parental relationship between the girls and the parents, but refused to order the twins to be registered in the French civil registry. As was explained earlier, children born through surrogacy in the US can return to France with a US passport (as they can to the Netherlands) and do not need to apply for a visa. However, children born through surrogacy in the Ukraine or India cannot return to France (or the Netherlands) without a visa or the recognition and transcription of their birth certificates.

6. LOOKING TO THE FUTURE

The Dutch legislator faces two interrelated questions at present concerning surrogacy arrangements: Should more permissive legislation be introduced in the Netherlands regarding the transfer of full parental status after national surrogacy and, if so, under what conditions? And should Dutch private international law be adapted so as to introduce the possibility to recognise cross-border surrogacy arrangements, or more particularly to recognise the parental status transferred abroad to Dutch residents, or to facilitate the transfer of full parental status to such residents in the Netherlands?

Over the past decade or so a number of authors have made suggestions as to how to facilitate the transfer of full parental status from surrogate to intentional parents, ranging from a special adoption procedure to the judicial scrutiny of the arrangement before it is entered into.⁶³ The Dutch legislator has not, as yet, reacted proactively to the suggestions. However, it seems that the time has come for the legislator to make a choice between either being more permissive or more restrictive. Regardless of the choice the legislator may make, it is important to

⁶² *Cour de Cassation* 6 April 2011, *Arrêt* No. 369 (09–66.486), *Arrêt* No. 370 (10–19.053) and *Arrêt* No. 371 (09–17.130). The California case is *Arrêt* No. 371 (09–17.130).

⁶³ See for instance: DERMOUT, *De eerste logeerpartij. Hoogtechnologisch draagmoederschap in Nederland*, 2001, VAN DEN BERG/BUIJSSEN, *Hoogtechnologisch draagmoederschap. De techniek staat voor niets, nu het recht nog!*, *Nederlands Juristenblad* 2004, pp. 724–728, VRANKEN, *Contractualisering en draagmoederschap*, *Tijdschrift voor Privaatrecht* 1997, pp. 1751–1761, KLIJNSMA, *De verzakelijking van het menselijk lichaam*, *Ars Aequi* 2008, pp. 11–19 and VLAARDINGERBROEK, *Draagmoederschap: een gecompliceerde constructie*, *Ars Aequi* 2003, pp. 171–178.

obtain a clear picture beforehand of the consequences of the selected approach. For example, what are the possible consequences of an even more restrictive approach? Will this lead to a decrease in surrogacy arrangements, or will it only mean that surrogacy will take place outside the authorities' field of vision. Should further restrictions concern all forms of surrogacy or should the genetic bond between intentional parents and the child play a role in the decision as to which forms to allow and which to restrict? These are just a number of questions that may play a role.

However, should the legislator choose to follow a (more) permissive approach and decide to regulate surrogacy and its consequences, there are also a number of questions that need to be answered. First, what types of surrogacy should be regulated and what role should the existence of a genetic link between one or both intentional parents (or the lack of such a link) play? Another important issue concerns the child's right to information about its origins. How can this right be safeguarded in the context of surrogacy? On the basis of which principles will conflicts arising between intentional and surrogate parents be resolved? For example, should there be an obligation for the surrogate mother to hand over a child that is genetically related to both intentional parents to those intentional parents even when she no longer wants to do so after the birth? Or should the act of giving birth continue to be the decisive factor in such cases? And how about the intentional parents, will they have an obligation to accept their genetic child? What are the child's best interests in such cases and according to which concepts are these interests based? Can the law of obligations play a role in family law issues? Should the answers to these questions be different where only one or neither of the intentional parents has a genetic link to the child? These are relevant and complicated legal questions with a strong moral, ethical, social and psychological component. However, that is not a reason to refrain from trying to answer these questions.⁶⁴ After all, maintaining the status quo is also a choice with consequences for all the parties involved.

⁶⁴ Legal, social and ethics scientists are currently attempting to answer these questions. In September 2011 an international group of scientists will convene in Aberdeen to discuss such issues. Also during the 2010 world conference of comparative law in Washington surrogacy was one of the topics discussed. See for the resulting articles: MONEGER (ed.), *Gestation pour autrui: Surrogate motherhood*, 2011. For sociological research see for instance: GOLOMBOK/CASEY/READINGS/BLAKE/MARKS/JADVA, Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7, *Developmental Psychology* (in press).



PART THREE
PRIVATE INTERNATIONAL LAW



PRIVATE INTERNATIONAL LAW ASPECTS OF SAME-SEX MARRIAGES AND PARTNERSHIPS IN EUROPE – DIVIDED WE STAND?

Patrick WAUTELET

1. BY WAY OF INTRODUCTION

Family law has undergone a radical change over the last twenty years or so. While marriage previously dominated the field, leaving very little room for non-married couples whose situation was mainly characterised by the absence of firm legal principles, the recent decades have seen the rise of new legal institutions affording a measure of legal protection to couples outside marriage. This has coincided with the desire to ensure that same-sex couples could find a place within the law. As a result, the landscape of family law has profoundly changed.

If one examines the current state of the law, it becomes clear that following this evolution, a few common points stand out while substantial differences remain. Whereas a large number of countries have created the possibility to register unions different from marriage, not all of them have done so. Some countries have shown indifference to the idea, other have demonstrated clear reluctance, sometimes even outright rejection – witness the provision in favour of different-sex marriage included in the recent Hungarian Constitution.¹ Among the countries which have created ‘partnerships’ and other new forms of relationships, the diversity is obvious, with some countries offering a close copy of the marriage, while others have opted for a less favourable regime. Finally, a handful of countries have opened up the possibility of marriage to same-sex partners.²

¹ See Art. L of the 2011 Constitution which is to enter into force on the 1st day of 2012. According to this provision, Hungary is to protect the “institution of marriage between man and woman...”

² The Netherlands (since 2000), Belgium (since 2003), Spain (since 2005), Sweden (since 2009) and Portugal (since 2010).

From the outset, this evolution has been closely studied from the private international law perspective. In view of the ever increasing mobility of persons within the EU and beyond the conflict of laws treatment of same-sex marriages and partnerships is indeed far from a purely theoretical concern.

The cross-border aspects of these relations have already been documented in a number of fundamental studies.³ Some years down the road, it appears useful to pause and wonder whether the difficulties and problems uncovered in these studies have been resolved. To this end, this paper intends to offer a general review of the private international law of same-sex relationships, focusing on the situation in Member States of the European Union. Because of the number of countries whose laws will be examined, we intend to adopt a bottom-up approach, starting not so much from general questions and problems, but rather from a close examination of the private international law rules pertaining to same-sex relationships (marriages and partnerships) in Europe.⁴

From this examination it will be possible to determine whether and on what issues there exists a consensus among the countries concerned on the treatment of same-sex relationships. This will be done by looking first at the possibility for same-sex partners to access a specific status. In a second stage, the enquiry will focus on the consequences arising out of a particular status. From there the paper intends to identify the difficulties arising out of the lack of consensus. In a final chapter, some thoughts will be offered on the way forward – in particular assessing the merits of a global or European solution to tackle cross-border recognition problems.

Much of the discussion will be speculative, given the (surprising) paucity of case law. No examination will be offered of the specific treatment of same-sex unions under EU law⁵ or international law.⁶ Likewise, non-marital cohabitation, which has not been registered, will not be considered.⁷

³ See among other the following groundbreaking works: CURRY-SUMNER, *All's well that ends registered?*, 2005; GOLDSTEIN, *La cohabitation hors mariage en droit international privé, Collected courses* (vol. 320 – 2006, pp. 9–389); DEVERS, *Le concubinage en droit international privé*, 2004 and GONZÁLEZ BEILFUSS, *Parejas de hecho y matrimonios del mismo sexo*, 2004.

⁴ See for another approach, focusing not so much on the existing rules and their shortcomings, but on the elaboration of a new legal framework based on new methodological approach, QUINONES ESCAMEZ, *Propositions pour la formation, la reconnaissance et l'efficacité internationale des unions conjugales ou de couple*, *Rev. crit. dr. int. priv.* 2007, pp. 357–382.

⁵ Save for the EU conflict of laws rules such as Brussels IIbis and Rome III Regulations.

⁶ See e.g. JESSURUN D'OLIVEIRA, *How do International Organisations Cope with the Personal Status of their Staff Members? Some Observations on the Recognition of (Same-Sex) Marriages in International Organisations*, in: VENTURINI/BARIATTI (eds.), *New Instruments of Private International Law*, 2009, pp. 505–531.

⁷ See e.g. GAUTIER, *Les couples internationaux de concubins*, *Rev. crit. dr. int. priv.* 1991, pp. 525–539.

2. ACCESS TO MARRIAGE AND PARTNERSHIP

The first question to be examined concerns the possibility for two persons of the same-sex to access a specific status, either marriage or partnership. May two Portuguese men residing in Belgium marry? May two Luxembourg nationals conclude a partnership in Germany? While the same question arises for marriage between man and woman, the context is different when the question relates to same-sex partnership or marriage: the relative novelty of same-sex marriage and partnership and the lack of consensus on the need to offer same-sex relations a specific legal framework means that no identical treatment with different-sex marriages has been achieved.

In order to present the regime applicable to same-sex relations, a distinction must be made between two types of access requirements: in the first place, a legal system may subject access to the registration authorities to specific requirements, aimed at ensuring that the partners present a sufficient connection with the country. In the second place requirements may concern access to the institution itself. Both of these requirements must be studied together. A distinction will be made between same-sex marriage and partnerships, as both institutions have until now been subject to different rules.

2.1. SAME-SEX MARRIAGE

In order to account for the current practice of States, a distinction must be made between those countries which have and the countries which have not opened up marriage to same-sex partners. In the latter the question of access to same-sex marriage indeed raises specific questions unknown in the former.

2.1.1. *Countries Which Have Opened Up Marriage to Same-Sex Partners*

In those countries which have opened up marriage to same-sex partners, the prevailing solution seems to apply *mutatis mutandis* the rules drafted for 'classic' marriages. In most cases, no specific provisions were therefore adopted.⁸ Same-sex marriages are governed by the very same conflict of laws provisions drafted for marriage in general. This is the case in the Netherlands,⁹ Belgium¹⁰ and, more

⁸ Portugal does not seem to have adopted any specific conflict of law rules when it opened marriage to same-sex partners. The Act N° 9/2010 of 31 May 2010 does not include any specific provision on cross-border aspects of same-sex marriage.

⁹ See Art. 2 of the *Wet Conflictenrecht Huwelijk*.

¹⁰ See Art. 46 of the Code of Private International Law (hereinafter the 'Code'). In general, see FIORINI, New Belgium Law on Same-sex Marriage and its PIL Implications, *Intl. Comp. L. Q.*

recently, Sweden¹¹ and Norway.¹² In Spain, same-sex marriages are also subject to the same rules applicable to different-sex-marriage, as no specific provisions were adopted when same-sex marriage was made possible.¹³

Likewise, the rules which govern the formal requirements of marriage have been made applicable to same-sex unions.¹⁴ This also applies to the rules limiting the jurisdiction of local authorities to celebrate a marriage: here too, the rules for 'classic marriage' have been opened to same-sex marriages.¹⁵

The application of the rules devised for the 'classic' marriage is obvious and self-explanatory: if a country decides to open up marriage to same-sex relationships, there seems to be no good reason to reserve a specific conflict of law treatment to such marriage. As one commentator has noted in relation to the lack of any distinct private international law treatment under Spanish private international law, "it should be seen as the logical consequence of the legislator's intent to ignore any difference between same-sex and different-sex marriages under Spanish law."¹⁶

2003, pp. 1039–1049 and PINTENS/SCHERPE, Gleichgeschlechtliche Ehen im belgischen internationalen Privatrecht, *Das Standesamt* 2004, pp. 290–292.

¹¹ According to Bogdan, same-sex marriages are since the Marriage Code was amended in 2009 considered to be "regular" marriages which are as such subject to the same Swedish rules dealing with the applicable law as traditional heterosexual marital unions (BOGDAN, Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden, *Nordic Journal of International Law*, 2009, pp. 253–261 at p. 256). See also JÄNTERÄ-JAREBORG, Sweden: The Same-Sex Marriage Reform with Special Regard to Concerns of Religion, *IPRax* 2010, pp. 1505–1508.

¹² Frantzen reports that no specific conflict of laws provisions were adopted to deal with access to same-sex marriage in Norway (FRANTZEN, Einführung der gleichgeschlechtlichen Ehe im norwegischen Recht, *FamRZ* 2008, pp. 1707–1708). Accordingly, the general provisions of the Norwegian Marriage Act (Act n° 47 of 4 July 1991, as amended) apply.

¹³ The application of the general rules has, however, led to many difficulties, some of which were solved by a general resolution adopted by the DGRN (*Resolución Circular de la dirección General de los Registros y de Notariado sobre matrimonios civiles entre personas del mismo sexo*, adopted on 29 July 2005). The DGRN has also issued two decisions in October 2005 and April 2006, dealing with concrete cases. These resolutions leave many questions open and have received many criticism in the literature. See in general OREJUDO PRIETO DE LOS MOZOS, Private International Law Problems Relating to the Celebration of Same-Sex Marriages: DGRN of 29 July 2005, *Yearb. Priv. Int'l. L.* 2006, vol. 8, pp. 299–306 (who questions the qualification of the gender requirement, at pp. 303–304 and also points to the "poor argumentation of the decisions of the DGRN") and VAQUERO LÓPEZ, A propósito de la resolución de la DGRN de 29 de julio de 2005 sobre matrimonios civiles entre personas del mismo sexo, *Anuario español de derecho internacional privado*, 2006, pp. 611–631.

¹⁴ See in Belgium Art. 47 of the Code; in the Netherlands Art. 4 *Wet Conflictenrecht Huwelijk* (which incorporates the solution of Art. 2 of the 1978 Hague Convention).

¹⁵ See in Belgium the application of Art. 44 of the Code. In the Netherlands, application of Art. 1:43 of the Civil Code (which provides that at least one of the future spouses should be domiciled in the Netherlands or be a Dutch citizen).

¹⁶ OREJUDO PRIETO DE LOS MOZOS, (n. 13), at p. 300.

The application of 'classic' rules does not, however, resolve all questions. These rules may, in countries where access to marriage is governed by the national law of the spouses, lead to the result that no marriage may be celebrated, if one of the future spouses possesses the nationality of a State whose law does not allow same-sex marriage. At the same time, the possibility to conclude a same-sex marriage may attract people with few or no connection to the jurisdiction. Countries are therefore engaged in a balancing exercise between opening up the possibility to conclude a marriage, so that marriage is not reserved exclusively to nationals of those States where same-sex marriage is allowed, and limiting it in order to avoid marriage tourism. In that respect, there is a clear distinction with different-sex marriage, where such considerations are absent.¹⁷

In order to deal with the restrictions imposed by the national law of the spouses, some countries which allow same-sex marriage have therefore adopted specific rules aimed at making same-sex marriage possible. So it is that in Belgium, Art. 46–2 of the Code of Private International Law provides that if the law of one of the future spouses does not allow the marriage, this law will be ignored because deemed to be in violation of international public policy.¹⁸ This is a rather radical option, which has been criticised.¹⁹ Likewise, in Spain, the Dirección General indicated that the application of a foreign law could violate public policy if the result was that same-sex marriage could not be concluded.²⁰ In the Netherlands, the difficulty is less acute as the system already includes a

¹⁷ For marriages between man and woman, the current outlook is one where restrictions are imposed mainly because of the concern to avoid marriages of convenience. See e.g. FOLETS/VANHEULE, Marriages of convenience in Belgium: the Punitive Approach Gains Ground in Migration Law, *Eur. J. Migration L.* 2006, 263–280.

¹⁸ See in general ROMAND/GEEROMS, La loi belge du 13 février 2003 et le droit international privé: de la circulaire ministérielle du 23 janvier 2004 à l'alinéa 2 de l'Art. 46 du Nouveau Code, in: *Aspects de droit international privé des partenariats enregistrés en Europe: actes de la XVIe Journée de Droit international privé du 5 mars 2004 à Lausanne*, 2004, pp. 105–136.

¹⁹ Initially, the interpretation resulted from an administrative circular issued by the Minister of Justice, which stated that any foreign legal prohibition on same-sex marriage must be considered discriminatory and contrary to Belgian public order, and therefore should not be applied (Circular of 23 January 2004, published in the *Official Gazette* of 24 January 2004). See the strong criticism by RENCHON, L'avènement du mariage homosexuel dans le Code civil belge, in *Rev. b. dr. intl. dr. comp.* 2004, 169–207, at pp. 189–190 (from a substantive point of view) and by TRAEST, De omzendbrief van 23 januari 2004 betreffende het homohuwelijk of: hoe een omzendbrief Belgische conflictenregels wil wijzigen, *Echtscheidingsjournaal*, 2004, pp. 49–52 (criticising the use of a ministerial circular).

²⁰ This was one of the many arguments used by the Direction general to reverse the decision of the registrar who had refused to celebrate a marriage between a Spanish citizen and a foreigner. The reasoning used by the Direction general is quite confused, as it rests on various mechanisms: next to the public policy argument, the Direction has also referred to renvoi and the possibility to disregard the foreign nationality of one of the partners who also possessed Spanish nationality. For more details, see GONZALEZ BEILFUSS, Private international law aspects of homosexual couples. Spanish Report, *Report to the XVIIth Congress of International Academy of Comparative Law*, Utrecht, 2006, at pp. 5–6.

mechanism in *favor matrimonii*: in accordance with the Hague Marriage Convention of 1978, Art. 2 of the *Wet Conflictenrecht Huwelijk* provides that marriage is possible if the spouses comply with the requirements of Dutch law. If this is not the case, a marriage is also possible if the spouses comply with the requirements of their national law.^{21, 22}

These rules have considerably extended the possibility to conclude same-sex marriages. In order to avoid marriage shopping, the legislators have, however, imposed some additional requirements. So it is that under Art. 2 of the Dutch law one of the spouses must have his habitual residence in the Netherlands or possess the Dutch nationality. Art. 46 of the Belgian Code goes further: it is sufficient that one of the spouses has the nationality or is habitually resident in a country under whose law same-sex marriage is possible. In Sweden, the same result is achieved by another rule: if none of the parties is a Swedish citizen or habitually resides in Sweden, each of the parties must fulfill the requirements of the law of at least one country of which he or she is a citizen or where he or she habitually resides.²³

These rules and mechanisms leave, however, some room for marriages to be concluded between spouses who could not get married in their countries of origin. As a consequence, limping relationships have been created. In most countries, it seems that the fact that the marriage will not be recognised in the country of one of the spouses, is not taken into account.²⁴

²¹ This is called the “*conflictenrechtelijke herkansing*”, see STRIKWERDA, *Inleiding tot het Nederlandse internationaal privaatrecht*, 8th ed. 2005, at p. 97, N° 108. The same solution applies in Luxembourg, which has also ratified the 1978 Hague Convention. See Art. 171 of the Luxembourg Civil Code. This explains why the Luxembourg government has refrained from suggesting the adoption of specific rules. In the draft legislation submitted to the Luxembourg Parliament, the government has indicated that the general conflict of law rule will be applicable to same-sex marriage.

²² In Norway, it seems that the *favor matrimonii* policy is also present: in principle, the requirements to celebrate a marriage are governed by Norwegian law, whatever nationality the spouses may possess. However, foreign spouses and spouses who do not habitually reside in Norway are required to submit a certificate stating that there is nothing to prevent him or her from contracting a marriage in Norway. If such documentary evidence cannot be submitted, the spouse may file a certificate stating that he or she is not registered as married or a registered partner in his or her home country. Finally, section 7(g) of the Marriage Act provides that the National Population Register may make an exception to the requirement of producing a certificate “when there are special reasons for doing so”. This could possibly be used to allow two persons of the same-sex to conclude a marriage in Norway even though such marriage would not be possible in their home jurisdiction.

²³ This follows from section 1 para. 2 of the 1904 Act on Certain International Marriages and Guardianship Relations. If one of the partners is a Swedish citizen, only Swedish law will apply.

²⁴ Bogdan indicates that the question whether the Swedish marriage will be recognised in the country of origin of the spouse “is considered to be their problem and is not taken into account by the Swedish authorities”, BOGDAN, (n. 11), at p. 257.

2.1.2. Countries Which Have Not Opened Up Marriage to Same-Sex Partners

In countries which have resisted opening up marriage to same-sex partners, no specific rules have been adopted to deal with such marriages.²⁵ Instead, two difficulties must be faced.

A first difficulty relates to the question whether the same-sex marriage should be dealt with as a marriage for the application of the conflict of law rules. An intense debate has raged on this issue, notably in France. Among others, Fulchiron has argued that even though private international law commands a wide reading of the concepts used in its rules, it would go too far to consider that a same-sex marriage is a marriage for private international law purposes.²⁶ According to Fulchiron, such an extension would touch upon the very “nature” of the marriage and would unavoidably have consequences for domestic debate.²⁷ In Italy, one court appears to have followed the same reasoning and refused to consider that a marriage celebrated in the Netherlands could be treated as a marriage because the two spouses were of the same sex.²⁸ In Ireland, the High Court decided in December 2006 that a marriage celebrated in Canada between

²⁵ I leave aside the initiatives taken by various local authorities, such as cities or regions, which have attempted to give same-sex relationships some recognition. This has been the case in Italy, as has been documented by BOSCHIERO, *Les unions homosexuelles à l'épreuve du droit international privé italien*, *Rivista di diritto internazionale* 2007, 50–131, at pp. 55–57. As Boschiero notes, these initiatives do not purport to grant same-sex partners a real legal status, at most they are relevant for benefits granted by local authorities.

²⁶ See FULCHIRON, *Le droit français et les mariages homosexuels étrangers*, *Dalloz*, Chron. 2006, n° 19, 1253–1258, at p.1254.

²⁷ The opinion of Fulchiron is, however, not undisputed. Other French authors have argued that a same-sex marriage should be considered a marriage for private international law purposes (see e.g. WEISS-GOUT/NIBOYET-HOEGY, *La reconnaissance mutuelle des mariages entre personnes de même sexe et des partenariats entre personnes de même sexe ou de sexe opposé. La situation dans les différents Etats membres. Besoin d'une action de l'UE?*, *Report European Parliament*, PE 432.731, 2010 at p. 9).

²⁸ See the decision of the *Tribunale di Latina* of 10 June 2005, published in *Famiglia e Diritto*, 2005, 411 with comments by SCHLESINGER and BONINI BARALDI. In this case, the court was seized of a request to recognise a marriage celebrated in the Netherlands between two Italian men. The local registrar had refused to register the marriage in the public records. The court held that the marriage was considered non-existent because under the Italian Constitutional tradition, a marriage could only exist between spouses of different sex. See the criticism of BONINI BARALDI, *Family vs. Solidarity. Recent Epiphanies of the Italian reductionist anomaly in the debate on de facto couples*, in: BOELE-WOELKI (ed.), *Debates in Family Law Around the Globe at the Dawn of the 21st Century*, 2009, 253, at pp. 274–276 and BOSCHIERO, (n. 25) at pp. 61–62. The Italian Minister of Justice seems to have given several indications in the same sense, see the references in ROSSOLILLO, *Registered partnerships e matrimoni tra persone dello stesso sesso: problemi di qualificazione ed effetti nell'ordinamento italiano*, (2003) *Rivista di diritto internazionale privato e processuale*, p. 363–398, at p. 391, n° 10.

two Irish women could not be recognised in Ireland since the concept of marriage was under the Irish Constitution reserved for opposite-sex couples.²⁹

If a same-sex marriage cannot be dealt with as a marriage, an alternative solution must be found. It has been suggested to look at the rules applicable for partnership – provided such rules exist. This solution had been discussed in Sweden, before this country opened up marriage to same-sex spouses.³⁰ When Sweden only allowed same-sex partners to form a partnership and not to marry, it had indeed been suggested that the celebration of a same-sex marriage would be refused because this type of union would be considered under Swedish private international law as a type of registered partnership and not as a marriage. As a consequence, the specific rule regarding access to partnership would be applied.³¹ Until now, the solution has only been expressly adopted in Switzerland.³²

Another option is to consider that a marriage between two persons of the same sex is a marriage. If one elects to consider that marriage includes both marriage between persons of different sex and same-sex marriage, it does not, however, mean that the marriage will necessarily be celebrated.³³ If one applies the classic

²⁹ *Zappone and Gilligan v Revenue Commissioners*, [2008] 2 IR 41 (High Court, Dunne J. 14 December 2006). The case is apparently still under review before the Irish Supreme Court.

³⁰ In France the same suggestion has been made by those who consider that a same-sex marriage cannot be deemed to be a marriage for private international law purposes: FULCHIRON, (n. 26) at p. 1255.

³¹ BOGDAN, Some Reflections on the Treatment of Dutch Same-Sex Marriages in European and Private International Law, in: EINHORN/SIEHR (eds.), *Intercontinental Cooperation Through Private International Law – Essays in Memory of Peter E. Nygh*, 2004, 25, at p. 28. In France, the same solution has been suggested by Callé following the adoption of a specific conflict of law rule dealing with partnerships: according to Callé, it could be possible to consider that same-sex marriage is a form of partnership as contemplated by the French legislator: CALLÉ, *Introduction en droit français d'une règle de conflit propre aux partenariats enregistrés*, *Rép. Defrénois*, 2009, n° 38989, at p. 1663.

³² See Art. 45–3 of the 1987 Swiss Private International Law Act, according to which “Un mariage valablement célébré à l'étranger entre personnes du même sexe est reconnu en Suisse en tant que partenariat enregistré”. German commentators have supported this option, see among others MANKOWSKI, Art. 17b EGBGB, in: *Staudingers Kommentar zum BGB*, 2003, at pp. 820–821, No. 22–23.

³³ Or recognised. The *Verwaltungsgericht* Karlsruhe has indeed refused to give effect to a marriage celebrated in the Netherlands between a Chinese national and a Dutch citizen: after having reviewed the matter under European law, the Karlsruhe court concluded that the same-sex marriage did not qualify as a marriage under the rules relating to free circulation of person (at that time Regulation 1612/68). For the sake of completeness, the Court added that if one considered the marriage as such and applied Art. 13 EGBGB, the conclusion would necessarily be that the marriage was not valid, since same-sex marriage is not allowed under Chinese law. The Court concluded that it was therefore not even necessary to call upon the public policy exception (*Verwaltungsgericht Karlsruhe*, 9 September 2004, available at www.lsvd.de). See the comments by KOOLHOVEN, *Het Nederlandse opengestelde huwelijk in het Duitse IPR. De eerste rechterlijke uitspraak is daar!*, *N.I.P.R.* 2005, at pp. 138–142.

rules conceived for marriage, the possibility for same-sex couples to marry, could still be blocked by various mechanisms. Take the example of France, where access to marriage is governed by the national law of the future spouses. If two Belgian citizens wish to marry in France, the law normally applicable will allow the marriage. The question then moves to another topic: will the public policy exception be used to deny these persons the possibility to marry? In France, the answer seems to be positive.³⁴ Bogdan suggested a couple of years ago that “most countries will probably decline to celebrate the same-sex marriage even if both parties are Dutch and therefore considered to be governed by Dutch law”.³⁵ This suggestion is probably to a large extent still valid today, as evidenced by the fact that some countries which have not opened up marriage to same-sex partners also refuse to allow celebration of such marriages by foreign embassies and consulates on their territory.^{36, 37}

2.2. PARTNERSHIPS

The private international law treatment of partnerships has for some time proved to be an “embarrassment”.³⁸ In the first years after same-sex partnerships started to appear, several options were considered. A first option linked partnerships to contracts and borrowed the applicable law from the rules dealing

³⁴ See e.g. WEISS-GOUT/NIBOYET-HOEGY, (n. 27), at p. 12, note 29 and MALAURIE/FULCHIRON, *La famille*, 3rd ed. 2008, at p. 91, n° 172 – who note that “... l’ordre public français, qui réserve le mariage aux personnes de sexes différents, s’opposerait à ce qu’une telle situation soit créée sur le territoire national”.

³⁵ BOGDAN, (n. 31), at p. 28. See for the position under English law before the adoption of the Civil Partnership Act, TAN, New forms of Cohabitation in Europe: Challenges for English Private International Law, in: BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, 2003, 437–461, at pp. 459–460. Ms Tan argued that recognition would be denied on public policy ground.

³⁶ This seems to be the case in Italy, see BOSCHIERO, (n. 25), at pp. 60. In the Netherlands, it seems that the position was taken early on that French consular authorities could not conclude a French law partnership if one of the partners possessed the French nationality. The reason was apparently that according to the Dutch authorities, the French partnership should be deemed to be equivalent to marriage – see on this aspect JESSURUN D’OLIVEIRA, *Le partenariat enregistré et le droit international privé*, *Travaux comité fr. droit international privé* 2000–2002, pp. 81, 89.

³⁷ Another possibility to prevent the celebration of marriage is to characterise the requirement that spouses should be of different sexes as a formal aspect of marriage and, therefore, subject to the *lex fori* (see the discussion by KNEZEVIC and PAVIC, Private International Law Aspects of Homosexual Couples in Serbia, Report to the XVIIth Congress of International Academy of Comparative Law, Utrecht, 2006, at p. 2). Another possibility mentioned in the same report is to consider that the provisions of local family law restricting access to marriage to different-sex partners are ‘Eingriffsnormen’.

³⁸ According to MAYER/HEUZÉ, *Droit international privé*, 9th ed. 407, No. 547.

with cross-border contracts.³⁹ This approach was short-lived: even though some legislators attempted to confine the partnerships they created to the realm of contracts,⁴⁰ the contractual approach was rapidly found unconvincing.⁴¹ A close observation revealed indeed the many commonalities between partnership and marriage – such as the prohibition to enter two partnerships simultaneously, the application of prohibitions inspired by marriage in relation to the kinship links between spouses and the application *mutatis mutandis* and to various degrees of rules relating to the effects of marriage.⁴² Further, it was found that allowing partners to benefit from the conflict of laws rules devised for cross-border contracts would lead to unacceptable results.⁴³

The only credible alternative to an approach based on contracts, was to start from the hypothesis that partnerships were family relations. This starting point has been rapidly accepted. However, it did not lead to unanimous results. A point of contention emerged on the question whether it was acceptable to apply the traditional rules devised for family situations and in particular for marriages. An ambitious, if isolated, position suggested that an attempt should be made to

³⁹ See e.g. the analysis of REVILLARD, *Le pacte civil de solidarité en droit international privé*, *Rép. Defrénois*, 2000, n° 37124, at p. 337, No. 13 and REVILLARD, *Les unions hors mariage. Regards sur la pratique de droit international privé*, in *Des concubinages. Etudes offertes à Jacqueline Rubellin-Devichi*, 2002, 579–599, at pp. 589–590, no. 32. The choice for contract was certainly in part inspired by the precedent of non marital cohabitation, where the rules of contract have also been applied in some cases (see OGH, 18 February 1982, *FamRZ* 1982, 1010).

⁴⁰ In France, Art. 515–1 of the Civil Code provides that “Un pacte civil de solidarité est un contrat conclu par deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune”. In Belgium, the legislator has inserted the provisions in relation to the ‘cohabitation légale’ in the third book of the Civil Code, dealing in general with assets and the way they are acquired... This has not prevented the same legislator from including specific provisions relating to partnerships in general in the Code of private international law, some of which simply refer to the rules applicable to marriage. As JESSURUN D’OLIVEIRA, (n. 36) at p. 94 has observed: “l’ambiguïté au pouvoir!”

⁴¹ See e.g. HENNERON, *New forms of cohabitation: private international law aspects of registered partnerships*, in: BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, 2003, 462–470, at p. 467–468; ERAUW/VERHELLEN, *Het conflictenrecht van de wettelijke samenwoning. Internationale aspecten van een niet-huwelijkse samenwoningsvorm*, *Echtscheidingsjournaal*, 1999, (150–161), at p. 160, nr. 44 and ROSSOLILLO, (n. 28), at pp. 386–387, n° 7. The debate has, however, reappeared with the adoption of the Rome I Regulation. Art. 1(2)(b) of the Regulation indeed provides that it does not apply to “obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations”. On the interpretation of this exclusion, see FRANCQ, *Le règlement ‘Rome I’ sur la loi applicable aux obligations contractuelles. De quelques changements...*, *J.D.I.* 2009, (41–69), No. 10.

⁴² See the observations by JESSURUN D’OLIVEIRA, (n. 36) at pp. 85–86.

⁴³ See the review of the criticisms by SERAGLINI, *Les nouvelles formes de conjugalité: nouveau ‘jouet’ pour la doctrine de droit international privé?*, in: FLAUSS-DIEM ET AL (eds.), *Du Pacs aux nouvelles conjugalités: où en est l’Europe?*, 2006, 115–146 at pp. 122–125.

treat partnerships on the basis of conflict of law rules adopted for marriage.⁴⁴ Several elements made it, however, difficult to maintain this ambition. First, the intervention of many legislators when adopting legislation on partnerships was precisely meant to create something different from marriage.⁴⁵ Further, the diversity of partnerships and lack of consensus on the content of the relationship made it difficult to proceed from the assumption that all relations should be treated equally.⁴⁶

This explains why a third approach appeared, which has rapidly gained predominance. A consensus has indeed emerged to consider that partnerships are family relations which should, however, be subject to specific rules. The rule which seems to have received widespread recognition is that access to partnership should be governed by the law of the country where the partners seek to have their union registered or otherwise formalised.⁴⁷ This is often expressed by subjecting the would be partners to the requirements of the *lex loci registrationis*.⁴⁸ This rule has been adopted in Belgium,⁴⁹ Germany,⁵⁰ France,⁵¹

⁴⁴ See e.g. CHANTELOUP, *Menus propos autour du pacte civil de solidarité en droit international privé*, *Gaz. Pal.* 2000, N° 275, pp. 4–16 and KAIRALLAH, *Les partenariats enregistrés en droit international privé* (Propos autour de la loi du 15 novembre 1999 sur le pacte civil de solidarité), *Rev. crit. dr. int. priv.* 2000, 317 ff at p. 321, §7. Kairallah suggested to distinguish between various forms of partnerships and to reserve the application of the conflict of laws rules aimed for marriage to those partnerships which closely resemble marriage.

⁴⁵ As Devers has noted, “l’élargissement des catégories du for devant aussi respecter la place de l’institution étrangère dans son environnement juridique, il était délicat de prétendre qualifier ‘mariage’ des relations de concubinage que les lois étrangères s’attachent à distinguer du mariage”, DEVERS (n. 3) at p. 461, §764.

⁴⁶ In fact, when it was suggested to apply the rules of family relationship, this was always done with some caveat or adaptation. See e.g. MAYER/HEUZÉ, *Droit international privé*, 9th ed. 407–408 n° 547: Mayer and Heuzé suggested that partnerships should be governed by the rule found in Art. 3–3 of the French Civil Code, which subjects family law relationships to the national law of the persons concerned. In view of the fact that not all countries have adopted a partnership statute, Mayer and Heuzé, however, suggested that contrary to marriage, the applicable law governs all aspects of the partnerships, from the requirements to access a partnership to the effects it produces.

⁴⁷ The application of the law of the country of registration has been widely advocated in the literature, see e.g. FULCHIRON, *Réflexions sur les unions hors mariage en droit international privé*, *J.D.I.*, 2000, 889; DEVERS, (n. 3), at pp. 196–201; HENNERON, (n. 41), at p. 469–470.

⁴⁸ Note, however, that no consensus has emerged on the scope of the rule: is it applicable only to ‘weak’ partnerships, such as the French one, or is it also applicable to ‘strong’ partnership such as the Dutch one?

⁴⁹ Art. 60 of the Code of Private International Law. Note that this rule only applies to partnerships as defined in Art. 58 of the Code. Partnerships which do not meet the requirements of this definition, because they create stronger links between the partners, are deemed to be marriages and dealt as such under the private international rules of the Code.

⁵⁰ Art. 17b EGBGB. See R. WAGNER, *Das neue Internationale Privat- und Verfahrensrecht zur eingetragenen Lebenspartnerschaft*, *IPRax* 2001, pp. 281–293 and FORKERT, *Eingetragene Lebenspartnerschaften im deutschen IPR: Art. 17b EGBGB*, 2003, 362 p.

⁵¹ Art. 515–7–1 of the Civil Code. The adoption of this law had been prepared and suggested in a report published in 2004: see GRANET-LAMBRECHTS, *Trente-deux propositions pour une*

Denmark⁵² and recently in Austria.⁵³ The same applied in Sweden before the Act on partnership was abolished.⁵⁴

Swiss law reaches the same result by declaring applicable to partnerships the rule pertaining to marriage.⁵⁵ It is interesting to note that in England⁵⁶ and in the Netherlands, as is the case in Switzerland, the rule is expressed unilaterally, by reference only to the application of domestic law.⁵⁷

The application of domestic law is also the rule when determining which formal requirements govern the creation of a partnership. Here too, different methods exist. In some countries, reference is made to the rules which apply to marriage.⁵⁸ Some laws do not include a specific conflict of law rule for the formal requirements. Rather, this question is taken together with all other requirements aimed at the creation of a partnership, which are governed by

révision de la loi du 15 novembre 1999 relative au pacs, *Dr. famille* 2005, 11 ff. – which already suggested to subject partnerships to the law of the place of registration. In general, see PEROZ, La loi applicable aux partenariats enregistrés, *J.D.I.* 2010, vol. 137, at pp. 399–410 and JOUBERT/MOREL, Les partenariats enregistrés en droit international privé depuis la loi du 12 mai 2009, *JCP*, N, 2009, 1285.

⁵² See Art. 3(2) of the Danish Act, which provides that the provisions of the Danish Act on marriage applies *mutatis mutandis* to partnerships.

⁵³ Art. 27a of the Austrian Private International Law Act of 1978, as amended by the *Eingetragene Partnerschaft-Gesetz* of 2009.

⁵⁴ Pursuant to section 3, para. 4 and section 9 of Chapter 1 of the Registered Partnership Act (today abolished), access to a partnership was always governed by Swedish law, no matter what nationality(-ies) the partners possessed. See BOGDAN, Private International Law Aspects of Homosexual Couples, *Report to the XVIIth Congress of International Academy of Comparative Law*, Utrecht, 2006, p. 3.

⁵⁵ Art. 65a of the 1987 Swiss Act on Private International Law provides that “*Les dispositions du chapitre 3 s’appliquent par analogie au partenariat enregistré, à l’exception des art. 43, al. 2, et 44, al. 2*”. As a result, Art. 44(1) of the Act applies both to marriages and partnerships. Under this provision, access to marriage or partnership is only possible provided the requirements of Swiss law are met. It is interesting to note that Art. 65(a) expressly disapplies Art. 44(2) of the Act, which makes it possible to conclude a marriage even though the requirements of Swiss law are not met, when the future spouses meet the requirements of one of their national laws. Hence, access to partnership is made more difficult than access to marriage (on the rationale of this rule, BUCHER, *Le couple en droit international privé*, 2004, at p.188, n° 525).

⁵⁶ FAWCETT/CARRUTHERS, *Cheshire, North & Fawcett Private International Law*, 14th ed. 2008, at p. 938.

⁵⁷ See Art. 1–2 of the *Wet Conflictenrecht Geregistreerd Partnerschap*. Unlike for marriage, there is no possibility to fall back on the provisions of the national law of the partners if the partners do not fulfill the requirements of Dutch law. Strikwerda notes in this respect that “*Een conflictenrechtelijke herkansing op grond van de nationale wet van de aanstaande partners ... ontbreekt hier, omdat de Nederlandse regeling van het geregistreerde partnerschap rechtsvergelijkend beschouwd betrekkelijk uniek is, zodat een verwijzing naar de nationale wet goede zin mist*” (STRIKWERDA, 8th ed. 2005, at p. 98, N° 108). On the reasons of the choice by the Dutch legislator for unilateral rules, see JESSURUN D’OLIVEIRA, (n. 36) at p. 91.

⁵⁸ E.g. Section 2(1) Danish Act. This was also the case in Sweden before the Partnership Act was abolished.

domestic law.⁵⁹ In other countries, a conflict of law rule is adopted, which provides for the application of domestic law.⁶⁰

The application of domestic law opens the way for foreigners to enter into a domestic partnership – without any examination of the possibility for the persons concerned to enter into such a partnership under their national law.⁶¹ As has been done for same-sex marriage, most States have therefore imposed additional requirements which restrict the access to partnerships. The goal was plainly to avoid to become a so-called ‘registration-haven’ for foreigners – which could be even more prevalent than for marriage, since the prevailing view in relation to the effects of partnership is to submit these effects to the law of the country where the partnership was registered (*infra*). These rules require that there be a connection between the partners and the State.

The nature of this connection may vary – and has changed over time.⁶² In many countries, these requirements are based on the residence of the partners. This is the case in Belgium,⁶³ France,⁶⁴ Luxembourg,⁶⁵ Spain⁶⁶ and Switzerland.⁶⁷ In a

⁵⁹ This is the case in Belgium (Art. 60 Belgian Code PIL), in France (Art. 515–7–1 Civil Code) and in Germany.

⁶⁰ See in the Netherlands Art. 1–3 Wet Conflictenrecht Geregistreerd Partnerschap. In Finland, § 11 Finnish Partnership Act provides that “The right to the registration of partnership before a Finnish authority shall be determined in accordance with the laws of Finland”.

⁶¹ On the possible risk of creating liming relationships, see hereinafter.

⁶² Jessurun d’Oliveira recalls that Scandinavian countries were at first hesitant to open their partnerships to foreigners, requiring a clear link with the country. The situation gradually evolved and access to partnership in these countries was made easier for foreigners: JESSURUN D’OLIVEIRA, (n. 36) at p. 87. On the evolution in Sweden, see BOGDAN, Amendment of Swedish Private International Law regarding Registered Partnerships, *IPRax* 2001, pp. 353–354.

⁶³ See Art. 59 § 2 of the Belgian Code (access to partnership is only possible provided the two partners habitually reside in Belgium).

⁶⁴ According to Art. 515–3 of the French Civil Code, “Les personnes qui concluent un pacte civil de solidarité en font la déclaration conjointe au greffe du tribunal d’instance dans le ressort duquel elles fixent leur résidence commune ou, en cas d’empêchement grave à la fixation de celle-ci, dans le ressort duquel se trouve la résidence de l’une des parties.” The same provision allows, however, also the conclusion of a PAC’s before French officials abroad (diplomatic or consular agent), provided at least one of the partners is a French national. Callé has called for these requirements to be strengthened in view of the importance given by the law of 12 May 2009 to the law of the country of registration, CALLÉ, (n. 31) at pp. 1666–7.

⁶⁵ Art. 3(1) of the Luxembourg Registered Partnership Act provides that the partners must make the declaration before the registrar of their “domicile or common residence”. Art. 4(4) of the same act requires that the partners reside legally in Luxembourg (exception to this requirement is made for citizens of EU Member States).

⁶⁶ According to GONZALEZ BEILFUSS (n. 20 at p. 10) – who reports that the requirement of holding a ‘*vencidad administrativa*’ (i.e. habitual residence supplemented by registration in the local Population Registry) has been questioned from a constitutional point of view.

⁶⁷ According to Art. 5(1) of the Swiss Partnership Act, the request for registration must be presented to the registrar of the ‘domicile’ of one of the parties. Art. 5(4) adds that if the partners are not Swiss citizens, they must first establish that they legally reside in Switzerland. See also Art. 43 (1) of the Swiss Private International Law Act (declared applicable to

limited number of States, access to partnership is reserved to nationals of the State or at least requires that one of the partners is a national. This is the case in Slovenia⁶⁸ and the Czech Republic.⁶⁹ In yet other countries, the requirements are based on a combination of residence and nationality of the partners. The combination is usually an alternative, as is the case in the Netherlands, where partners may conclude a partnership if they reside in the Netherlands but also if one of the partners is a Dutch national.⁷⁰ In Nordic countries, the same alternative system is applied, whereby registration is possible if the partners either reside in the country or are national of the country.^{71, 72} Finally, one should also mention the peculiar case of Germany: it appears that Germany does not impose any requirement in relation to the partners' nationality or residence. In other words, foreign nationals who do not habitually reside in Germany could apparently enter into a partnership in Germany on the occasion of a short-term visit to this country.

Taken together, the rules adopted for cross-border partnerships depart significantly from the traditional approach used for marriage. This is particularly striking for the emphasis placed on the role of the domestic law even in jurisdictions where access to marriage is traditionally governed by the law of the nationality of the spouses. The application of domestic law may certainly be commanded from the perspective of the practitioner, as it offers ease of application. This is particularly relevant in an area where rapid growth and change of legislations makes it more difficult for authorities to verify compliance with requirements of national law.

Beyond pragmatism and ease of application, the choice for domestic law also embodies a substantive decision: even though the number of countries which accept partnerships is steadily growing, there remains a great number of

partnerships by Art. 65a) and sec. 8(1)(b) of the UK Civil Partnership Act (requirement of 7 days of residence).

⁶⁸ Art. 3(2) Registered Partnership Act of Slovenia.

⁶⁹ § 5 Czech Republic Registered Partnership Law.

⁷⁰ See Art. 80a § 4 of the Dutch Civil Code – according to which persons who wish to conclude a partnership must in principle do so before the registrar of their domicile in the Netherlands. If the persons reside outside the Netherlands, registration is also possible if at least one of the partners is a Dutch national.

⁷¹ § 2(3)(1) of the Norwegian Law; § 10 Finish Registered Partnership Act; § 2(2) n° 2 Danish Registered Partnership Act. The Swedish Partnership Act provided likewise for a combination: the specific connection with Sweden was deemed to exist if at least one of the applicants was either habitually resident in Sweden for two years or was a Swedish citizen with its habitual residence in Sweden (section 2 of Chapter 1 of the Act, which has now been repealed).

⁷² The Scandinavian countries also adopted an interesting system: in order to take into account the fact that partnerships were already allowed in other countries, the law adds that citizenship of these countries must be taken to rank equally with local citizenship. For nationals of these countries, access to partnerships is hence made easier. See in this respect, BOGDAN, (n. 54) at p. 3.

countries where such institution is unknown. Hence the application of the classic nationality threshold, where access to a family law institution such as marriage is subject to compliance with the requirements of the national law,⁷³ would only allow registration for nationals of countries which have introduced legal partnerships. On the contrary, the application of domestic law, allows for greater participation.⁷⁴ A real political choice is therefore made when adopting such an approach.⁷⁵ At the same time, the application of domestic law helps to underline that a partnership is and remains something different from marriage. Finally, by sticking to the application of its domestic law, a country can avoid having to create a partnership under foreign law. This is appealing for many countries since the content of the 'partnership' may vary greatly in the various legislations. States make careful choices when adopting a partnership statute, as to what effects they wish the partnership to produce. This decision could be imperiled if a State was required to apply foreign law.

The choice for the application of domestic law rests upon different explanations. It also has various consequences. The first one is that it creates two categories of marital unions for conflict of laws purposes. There is indeed a clear difference between marriage and partnership. This is only the logical consequence of the State's decision to create a partnership next to the marriage. On this question, conflict of laws follows the substantive choice. It does not seem that this creates a discriminatory difference of treatment.

Another consequence is that States where partnerships are subject to domestic law will only allow the creation of a partnership in the form they have accepted. In other words, it is not possible for partners residing in State A to request that their partnership be concluded under the law of State B. For marriage, this question does not arise: whether a marriage is concluded under domestic law or foreign law, marriage is a universal concept. Even if some differences may exist when one compares the consequences attached to marriage in various laws, the 'content' of the relationship will in any case not necessarily be dictated by the law of the State where the marriage has been concluded. Current practice indeed dictates that creation and content of marriage as status are disconnected.

⁷³ The outlook is obviously different in those countries where access to marriage is subject to local law, such as England. In those countries, there is much less need for a specific regulation of same-sex relations as foreign partners cannot 'import' their own law.

⁷⁴ On this 'pioneer's problem', see hereinafter.

⁷⁵ See the observations by JESSURUN D'OLIVEIRA, (n. 36), at p. 91. Jessurun notes the "souci de favoriser les personnes, surtout de nationalité étrangère, et d'orientation homosexuelle, et de leur permettre de faire enregistrer leur partenariat". Devers suggested that it was "impossible" to adopt a neutral conflict of laws rule, DEVERS (n. 3) at p. 196, § 312.

For partnerships, this question remains relevant, as the shape and consequences of partnerships may vary in the various laws. It is enough to refer to the difference existing between countries where partnership is open only to same-sex partners, such as Germany and England, and countries where different-sex partners may also enter into a partnership. The question where a partnership is entered into remains therefore relevant.

Finally, the choice for the application of domestic law also has consequences on the recognition side. Since access to the partnership is not subject to the national law of the partners, it may be that the partners enter into a relationship which does not exist, or only exists in a significantly different shape in the country of origin. The seeds of limping relationships are therefore sown.⁷⁶

3. CONSEQUENCES OF MARRIAGE AND PARTNERSHIP – THE LIFE OF THE RELATIONSHIP

Moving beyond access to the relationship, the consequences of same-sex relationships also deserve a close examination. These consequences may touch upon diverse elements such as the duties and rights of the partners towards each other (is there a duty of fidelity? May one partner claim maintenance when the partnership is ended?) and towards the children. The consequences may affect the personal situation of the partners or their assets – one thinks of the matrimonial assets. Finally, effects in relation to inheritance law should also be considered.

Before looking at the current state of the law, one general question may arise, that of the applicability of international agreements or European regulations. There are indeed many existing international conventions on private international law dealing with the consequences of family relationships, such as the 1978 Hague Conventions on celebration of marriage and matrimonial property. The same question arises in relation to various European instruments, such the Brussels IIbis Regulation. Should these international agreements also be deemed to apply to same-sex relationships? Looking for the answer to this question is a frustrating experience, as there is very limited practice on the

⁷⁶ In France, it has been observed that even before the adoption of Art. 515–7–1, foreigners could conclude a partnership without any consideration of their national laws, see MAYER/HEUZÉ, *Droit international privé*, 408, n° 547 and HAMMJE, *Réflexions sur l'Art. 515–7–1 du Code civil*, *Rev. crit. dr. int. priv.* 2009, 483, at p. 487 – thereby opening the way for limping relationships.

subject.⁷⁷ If one leaves aside the most recent instruments,⁷⁸ none of the international texts takes a firm and open stance on whether it applies to same-sex relationships.

The starting point to deal with this vexed question should probably be that there is no room for a generic answer applicable to all international and European instruments alike. This is because the relevant regulations and conventions have been adopted in various contexts and may not all share the same aims. A further element which should probably be taken into account by way of general principle, is that recourse to national law as a guide to construe concepts used by international instruments should be avoided. This is clearly the case for the various existing European regulations.⁷⁹ As a matter of good practice, the same position should be taken when applying international conventions such as the Hague Conventions. The practice of State has, however, been mixed: while Denmark has apparently taken the position that existing international instruments should not be deemed to be applicable to partnerships, unless all Contracting States agree to it,⁸⁰ it has been argued in the Netherlands on the other hand that there is room for application of selected international conventions, such as the Hague maintenance conventions, because these conventions apply to maintenance obligations “arising from a family relationship, parentage, marriage or affinity [...]”. This is read to be broad enough to include obligations arising out of partnerships.⁸¹

⁷⁷ Bogdan mentions one instance where the question has received a firm answer, i.e. that of the intra-Nordic Marriage Convention of 1931. A Swedish Act apparently indicates expressly that this Convention does not apply to same-sex marriages, BOGDAN, (n. 11) at p. 255.

⁷⁸ See the draft EU Regulations on Matrimonial Property which were presented by the EU Commission in March 2011: one of the drafts deals expressly with the “property consequences of registered partnerships”, COM(2011) 127 final. The Commission has explained that a separate instrument was necessary for partnerships “because of the features that distinguish registered partnerships and marriage, and the different legal consequences resulting from these forms of union...” Art. 2(b) of the Proposal defines partnership as follows: “regime governing the shared life of two people which is provided for in law and is registered by an official authority”.

⁷⁹ The ECJ has already made clear that the concept of ‘civil matters’ should be interpreted autonomously when reading the Brussels IIbis Regulation (ECJ, 27 November 2007, C, case C-435/06, at § 46).

⁸⁰ Position reported by, and criticised by JESSURUN D’OLIVEIRA, (n. 36) at p. 93.

⁸¹ See the arguments and references in JESSURUN D’OLIVEIRA, (n. 36) at p. 92. See also CURRY-SUMNER, *Private International Law Aspects of Homosexual Couples: the Netherlands Report*, *E.J.C.L.* vol. 11.1 (2007) at p. 12, who indicates that “In the eyes of the Dutch authorities, divorces pertaining to cease the bond established as a result of a same-sex marriage, fall within the material scope of” both the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations and of the International Commission on Civil Status Convention on the recognition of decisions relating to the marital bond signed in Luxembourg on 8 September 1967.

If one considers the flagship European Regulation, the principle of autonomous interpretation probably means that there is today no room for application of the Brussels *Ibis* Regulation when the court is seized of a petition concerning a same-sex marriage.⁸² Although this may seem to constitute a regression for the countries which have opened marriage to same-sex partners, this result should be identical whatever position the Member State whose court is seized, has adopted vis-à-vis same-sex relationships. In other words, even if the Member State concerned has allowed same-sex partners to marry, it would run contrary to the European principle of uniform interpretation to use the provisions of the Brussels *Ibis* Regulation to determine the jurisdiction of a court in cross-border matters.⁸³

This does not mean that all States will dutifully refrain from applying the provisions of the Regulation (or from other international conventions) to same-sex relationships.⁸⁴ In fact, there is not much that can be done to stop a State from unilaterally considering that the Brussels *Ibis* Regulation applies to same-sex relationships.⁸⁵ Further, the situation may change in the future. As for all legal texts, the provisions of the Brussels *Ibis* Regulation should be read with due care for present circumstances. The question whether the Member States contemplated the application of the Regulation to same-sex relationships when negotiating the text, seems in that respect less relevant than the question how the

⁸² This view is not, however, universally accepted. Consider the position of NÍ SHUILLEABHÁIN, *Cross-Border Divorce Law. Brussels Ibis*, 2010, at pp. 110–111, § 3.42 ff and at pp. 114–116, § 3.48 ff who argues that “a broad definition of ‘matrimonial matters’ in the Brussels *Ibis* context would not affect national sensitivities (and indeed from an EU policy perspective, it would very much further the interest in ensuring free movement of judgments and consistent recognition of status, if all forms of marriage/partnership dissolution are covered”. See also the position taken by the Dutch State Committee on Private International Law in respect of the predecessor of the Brussels *Ibis* Regulation, the Brussels II Regulation. According to the committee, since the Community lacks a common definition of ‘marriage’, it should be left to the member states to define what a marriage is: Staatscommissie voor het Internationaal Privaatrecht, *Advies inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* (2001), at pp. 20–21, available at www.rijksoverheid.nl/onderwerpen/wetgeving/privaatrecht/staatscommissie-ipr.

⁸³ According to Bogdan, this is the “prevailing opinion”, i.e. that the Regulation refers merely to traditional marriages between men and women: BOGDAN, (n. 11) at p. 255.

⁸⁴ The temptation to do so will be greater when the Member State concerned has chosen to extend the application of the provisions of an international instrument, as is sometimes done by Member States in respect of European Regulations. See Art. 4(4) of the Dutch Code of Civil Procedure, which provides that the Brussels *Ibis* regime is also applicable to same-sex partners. This is, however, only the case when the Regulation is applied by analogy to situations which do not fall within its scope of application. See also Art. 1:80c (2), Netherlands Civil Code which provides that the Dutch Registrar is competent in this respect on grounds which are identical to those laid down in the Brussels *Ibis* Regulation.

⁸⁵ In this sense, BOGDAN, (n. 11) at p. 255.

concept of ‘marriage’ should be understood in a European context in 2011.⁸⁶ In the future, it may be that the ECJ comes to the conclusion that there is sufficient common ground between the Member States to interpret the concept of marriage as including same-sex marriages.

The same solution can probably be accepted when considering the application of the Brussels *Ibis* regime to partnerships. There is certainly a stronger convergence between the laws of Member States when one considers the possibility to obtain legal recognition of a union outside marriage. However, it cannot be denied that whether they concern same-sex or different-sex partners, partnerships differ precisely from marriage in that they were created as an institution next to marriage. Assimilating partnerships, even those from countries where partnerships are very close to marriage, to marriage, therefore seems too bold a move at this stage.⁸⁷

Looking at the effects of same-sex relationships, it seems again useful to distinguish same-sex marriage from partnership, since different approaches may be used in practice.

3.1. SAME-SEX MARRIAGE

3.1.1. *Between Countries Which Have Opened Up Marriage to Same-Sex Partners*

Prima facie, the treatment of same-sex marriage does not raise fundamental difficulties if one looks at countries where this form of relationship has been recognised. In these countries, no special rules have been adopted for same-sex marriages, which are therefore governed by the same rules as ‘traditional’ marriages.⁸⁸ Same-sex relationships are therefore subject to multiple rules, there being, in most countries, no single rule governing all consequences of

⁸⁶ It seems therefore moot to inquire whether applying this instrument (or another) to same-sex marriages would amount to a unilateral extension of the scope of application to situations not contemplated by the States parties, something which could constitute a violation of an international obligation. The idea that it would be wrong to apply a convention or Regulation to situations which did not exist when the texts were negotiated, proceeds from a static conception of legal interpretation, which is difficult to defend today.

⁸⁷ For the various arguments, see PINTENS, Marriage and Partnership in the Brussels IIa Regulation, in: *Liber memorialis Petar Šarčević*, 2006, 335–344 at pp. 338–343. See e.g. Tribunal of Malines, 12 January 2006, *Echtscheidingsjournaal* 2006 at p. 153, with comments by DE BACKER and JACOBS – the tribunal refused to apply the Brussels *Ibis* Regulation to a request for recognition of a Dutch ‘*flitsscheiding*’, whereby a marriage was first converted to a partnership which was thereafter terminated by parties.

⁸⁸ See e.g. for Sweden BOGDAN, (n. 11) at p. 258.

marriage.⁸⁹ Hence, when seeking to determine the effects a same-sex marriage is likely to produce, one should work with various rules depending on the issue concerned, as is commonly done for 'classic' marriages.

When one looks at a same-sex marriage concluded abroad, a preliminary question arises: will the marriage be recognised as such? Presumably, this should not raise much difficulty. As Bogdan wrote in relation to Swedish same-sex marriages, "it can be assumed that countries having same-sex marriages in their own law will normally recognise a Swedish same-sex marriage as a regular marriage".⁹⁰ Same-sex marriage will therefore be subject to the same recognition rules as other marriages.⁹¹

If one examines the fate in Belgium of a Dutch same-sex marriage, the question of the effects is at first sight non problematic: the foreign marriage will be deemed to be a marriage and all other conflict of laws rules will be applied to the marriage – if one of the spouses wishes to divorce, reference will be made to the regular conflict of laws rules relating to divorce.

As is the case for questions of access to marriage, the application of the 'normal' rules will, however, sometimes need to be nuanced. This will be the case if same-sex marriage is unknown in the country whose law is declared applicable. Say two Italian women living in Belgium get married in this country. If one of the spouses later files a divorce petition before a court in Belgium, the court will in principle apply Belgian law as the law of their common habitual residence.⁹² The spouses may, however, request the court to apply Italian law.⁹³ As same-sex marriages are unknown under Italian law, the question arises whether the court could nonetheless apply the substantive provisions of Italian law. Or should the court fall back on Belgian law?

A similar difficulty arises if one of the spouses passes away. Italian law will apply, according to both Belgian and Italian private international law, to determine whether the surviving spouse may make any claim on a house owned by the

⁸⁹ Contemporary private international law has indeed abandoned the idea that all consequences of marriages should be governed by a single rule. Instead, different rules are adopted which provide a solution for the various consequences which can arise from marriage – alimony, assets and assets division, relations with the children, etc.

⁹⁰ BOGDAN, (n. 11) at p. 260.

⁹¹ Here too one notes a variety of approaches. The 1978 Hague Convention on celebration and recognition of the validity of marriages has only been accepted by a limited number of countries. In most cases, recognition will be subject to determination that the marriage was validly celebrated or concluded in the country where it was concluded. Other requirements may exist, such as an absolute minimum age or a general public policy exception.

⁹² Art. 55(1) of the Belgian Private International Law Act.

⁹³ Art. 55(2) of the Belgian Private International Law Act.

deceased in Italy. Should the provisions of Italian law awarding rights to the surviving spouse be applied in this case, even though under the proper application of Italian law the surviving spouse would be denied that capacity?

A first difficulty is that the Italian substantive rules declared applicable may not be gender neutral and expressly refer to categories such as ‘husband’ and ‘wife’. Would the application of such rules to same-sex marriages corrupt or even violate the relevant foreign law? If one goes beyond the problem of terminology, what arises is a classic issue of ‘adaptation’: the law declared applicable starts from its own structure and does not make allowance for the legal situation already created under another law. It is accepted that the answer to this problem is to compare the substantive provisions of the laws under review and to determine whether there is a sufficient equivalence between the institutions.⁹⁴ When the question arises in a country which has made allowance for same-sex marriage, this process of adaptation will probably lead to the assumption that the same-sex marriage should be considered as such. This would entail that Belgian courts grant to the same-sex spouse all rights given to spouses under Italian inheritance law. The question whether this result would be accepted in Italy remains open.

When one looks at the rules of jurisdiction, some adaptation may also be needed. Take two same-sex partners married in Sweden, who leave Sweden and reside for a long period abroad. If one of the spouses wants to file a divorce application, it may be that this proves impossible in the country of residence of the spouses because the marriage as such is not recognised. This explains why some countries have adapted their rules of jurisdiction and made it possible for spouses to file a divorce even though the spouses would ordinarily not be able to do so.⁹⁵

3.1.2. *Between Countries One of Which Does Not Allow Same-Sex Marriage*

The picture is different if one considers the fate of a same-sex marriage in a country where such marriage is not allowed. How will a same-sex marriage celebrated in Spain fare in Italy if the spouses wish to divorce or one of them requests alimony from the other? What if the same-sex partners reside in Germany? Key question in this case is not so much which law will apply to the

⁹⁴ As explained e.g. by BUREAU/MUIR WATT, *Droit international privé*, 2nd ed. II, 2010, at p. 507, § 478; BUCHER, *La dimension sociale du droit international privé, Collected courses*, vol. 341, (27), at p. 239, § 143.

⁹⁵ See the new ground of jurisdiction adopted in Sweden for matrimonial cases so that divorce applications may be filed in Sweden if there are “special reasons” to do so, BOGDAN, (n. 11) at p. 257. Likewise in Norway, a special ground of jurisdiction was adopted to allow spouses who have married in Norway to file a divorce petition in Norway if it appears that no divorce may be obtained in the country of origin of the spouses or in the country where they reside – section 30 b, letter f of the Norwegian Marriage Act.

consequences of the marriage, but rather whether the same-sex marriage will be recognised and given any effect.

Various attitudes must be distinguished. In some countries, one may suspect that the same-sex marriage will be denied any effect. This would probably be the case in Hungary, where a recent constitutional change expressly outlawed same-sex unions. As a consequence, the same-sex spouses would not be treated as such: they would be free to remarry and could not claim any of the consequences normally attached to marriage. The denial of existence would touch the very essence of the relationship, which would not even be downgraded and treated as a partnership. The question of what law applies to the consequences of marriage therefore becomes moot.

This very radical approach is not shared by all countries which have not made it possible for same-sex couples to marry. As for other forms of family relationships unknown under domestic law, some countries may be prepared to recognise some of the consequences of a same-sex marriage validly concluded abroad. There are for example indications that even though it does not allow same-sex marriage, France would be ready to extend some recognition to foreign same-sex marriages.^{96, 97} As a rule, however, no recognition will be extended if one of the spouses possesses the French nationality.⁹⁸

⁹⁶ See in particular the answer by the French minister of Justice to question N° 16294, dated 9 March 2006: in relation to the effects in France of a same-sex marriage concluded in the Netherlands, the Minister of Justice stated that, provided none of the spouses were French nationals, such marriage could produce effects in relation to the assets of the spouse – matrimonial property and succession. (the answer has been reproduced in *Rev. crit. dr. int. priv.* 2006, at pp. 440–441). An earlier ministerial answer went in the same direction (answer to question n° 41553 of 26 July 2005, commented upon by FONGARO, *Dr. fam.* 2005, n° 255). Commentators were, however, divided as to the possibility to recognise some effects to foreign same-sex marriage. Using the doctrine of the ‘effet atténué’ of the public policy, Revillard argued that there was room for recognition of some effects: REVILLARD, *Le PACS, les partenariats enregistrés et les mariages homosexuels en droit international privé*, *Rép. Defrénois* 2005, at p. 461. Fulchiron was less convinced. According to Fulchiron, the effet atténué was a “voile chaste jeté sur une réception générale du mariage homosexuel”: FULCHIRON, (n. 26), at p.1257.

⁹⁷ See also the decision by a Luxembourg court in relation to a marriage concluded in Belgium between a Belgian national and a third country national (from Madagascar): although the Luxembourg Minister of Foreign Affairs at first refused to grant a residence permit, the Administrative Tribunal of Luxembourg, 3 October 2005, *BIJ*, 2006, 7, with critical comments by KINSCH. The Court first pointed out to the right to family life as protected by Art. 8 ECHR. It also held that refusing to recognise the marriage would be inconsistent with the choice made by the Luxembourg legislator to recognise the possibility for same-sex partners to conclude a partnership. See our comments in *L’union entre personnes de même sexe s’exporte-t-elle bien?*, *Rev. dr. étr.* 2009, 699–702.

⁹⁸ This may be inferred from the answer by the French minister of Justice to question N° 16294, dated 9 March 2006 (reproduced in *Rev. crit. dr. int. priv.* 2006, at pp. 440–441). The position is the same in Scotland for persons with Scots domicile, see CARRUTHERS, *Scots Rules of*

This approach of partial recognition had been advocated by Bogdan, who insisted that it would be more balanced to “examine the circumstances of each particular case in order to find out whether giving effect to the Dutch same-sex marriage legislation would, in *casu*, lead to a result incompatible with the *ordre public* of the forum”.⁹⁹

The effects of this piecemeal approach for the same-sex spouses are probably not as devastating as the blunt refusal to recognise the union. It remains, however, that the spouses will live in great uncertainty, without the comfort of knowing in advance what part of their relationship will be accepted. If the same-sex spouses may rely on their marriage in a specific context, it is likely that application will be made of the normal conflict of laws rules. An alternative to the piecemeal approach is to make reference to the doctrine of the preliminary question and to consider that the existence of a same-sex relationship must, as a preliminary question, be addressed under the law applicable to the main question – such as the right to maintenance or succession rights.¹⁰⁰

A last position starts from a different assumption: the existence of a family relationship as created abroad is recognised, but the institution is modified: instead of being recognised as a marriage, the same-sex marriage is ‘downgraded’. This is the position in Switzerland,¹⁰¹ Finland¹⁰² and, apparently, also in Germany.¹⁰³ As a consequence, a marriage concluded in Luxembourg between two men or two women, will be deemed to be a partnership when the spouses

Private International Law Concerning Homosexual Couples. Report to the XVIIth International Congress of Comparative Law, *E.J.C.L.* Vol. 10.3 (Dec. 2006), at p. 1.

⁹⁹ BOGDAN, (n. 31), at p. 28. It has been argued in Scotland that where same-sex marriage is valid by the *lex loci celebrationis* and where each partner has legal capacity under his personal law to enter into such marriage, recognition of such marriage could be afforded to “certain incidents” of the marriage, CARRUTHERS, (n. 98) at p. 1. This position is no longer tenable since the entry into force of the Civil Partnership Act. On the position of Scots law, see also MCKNORRIE, *Would Scots Law Recognise a Dutch Same-Sex Marriage?*, 7 *Edinburgh L. Rev.* 147–73 (2003).

¹⁰⁰ See the explanations of BOSCHIERO, (n. 25) at pp. 64–68.

¹⁰¹ See Art. 45–3 Swiss Private International Law Act.

¹⁰² MIKKOLA, Finnish Report, Report to the XVIIth Congress of International Academy of Comparative Law, Utrecht, 2006, at p. 4.

¹⁰³ At least it is argued in the literature that even though under German law same-sex marriages are not possible, it would be inconsistent to allow recognition of same-sex partnership and to refuse such recognition to foreign same-sex marriages. Accordingly, Martiny has suggested that such marriages should also be afforded recognition under Art. 17b EGBGB, MARTINY, in this book at § 2.3, footnote 30. See also MANKOWSKI/HÖFFMANN, *Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?*, *IPRax* 2011, 247–254, at pp. 250–252. A lower court in Berlin has recently followed this opinion and considered that a same-sex marriage concluded in Canada should be treated as a partnership and registered as such in the civil status registers: VG Berlin, 15 June 2010, *IPRax* 2011, at p. 270. Another lower court has likewise considered that a same-sex marriage celebrated in the Netherlands should be dealt with under Art. 17b EGBGB: AG Münster, 20 January 2010, *IPRax* 2011, at p. 269. Compare, however, with RÖTHEL, *Gleichgeschlechtliche Ehe und ordre public*, *IPRax* 2002, 496–500 –

settle in Germany. This is also the current position under English law. Under the Civil Partnership Act, a same-sex marriage concluded in the Netherlands is treated as a civil partnership. This re-characterisation of the relationship will often bring in an important limitation of the effects the relationship may produce. Although there is still some doubt on the question, it seems that the consequence of such a 'downgrade' is that the relationship will be exclusively governed by domestic law. No reference will be made to the law of the country where the relationship was formed, to govern its consequences.

3.2. PARTNERSHIPS

What law govern the rights and obligations of same-sex partners? What law will be applied when partners wish to bring an end to their relationship? These questions will be examined both for local partnerships and for foreign partnerships. In the latter case, a preliminary question arises, as one should first find out whether the foreign partnership will be recognised and, if yes, to what extent.

As no consensus has appeared on the question of the consequences of partnerships, it is necessary to distinguish between different approaches.

3.2.1. *First Approach: Law of the Country of Origin*

In a first group of countries, a clear position has emerged to the effect that the law of the country of registration of the partnership will be applied. This application of the *lex loci registrationis* has been adopted in France,¹⁰⁴ Belgium¹⁰⁵ and the Netherlands.¹⁰⁶ It has also been suggested by the European Commission in its recent Draft Regulation on the property consequences of registered partnerships.¹⁰⁷

who argued that foreign same-sex marriages should be dealt with under Art. 13 EGBGB and hence considered as marriages.

¹⁰⁴ Art. 517–7–1 of the French Civil Code.

¹⁰⁵ Art. 60 of the Code of private international law. See also in Québec, Art. 3090.1(2) of the Civil Code.

¹⁰⁶ In the Netherlands, the rule is the same although it is expressed differently. Art. 5(1) of the *Wet Conflictenrecht Geregistreerd Partnerschap* provides that for the 'personal relationships' of partners, Dutch law applies if the partnership has been concluded in the Netherlands, while according to Art. 5(2), the law of the country of origin applies if the partnership has been concluded abroad. In the latter case, the rule makes allowance for application of the mechanism of renvoi. As far as the patrimonial relationships are concerned, Art. 6(1) of the law provides that the partners may choose which law applies. If the partners have not made any choice, the law of the State of origin will apply according to Art. 7 *Wet Conflictenrecht Geregistreerd Partnerschap*, which again distinguishes the position of partnerships concluded in the Netherlands and partnerships concluded abroad – the latter being qualified by the possibility to take into account the private international law rules of the country of origin.

¹⁰⁷ See Art. 15 of the Proposal for a Council Regulation, COM (2011)127 of 16 March 2011.

The rationale of the rule is clear: in view of the diversity of laws in terms of partnerships and their effects, it was felt that it was too early to sever the umbilical chord between the partnership and the state of origin. Without a basic consensus on the shape and effects of partnerships, these countries deemed it difficult to allow the application of a foreign law on a local partnership.

At the same time, the *lex loci registrationis* principle guarantees the recognition of foreign partnerships. In principle, the adoption of the *lex loci registrationis* should solve the recognition puzzle easily: foreign partnerships are recognised provided that they comply with the requirements of the country of origin.¹⁰⁸ Recognition is in principle therefore not an issue. It will be granted when the partnership is in compliance with the requirements of the state of origin. The *lex loci registrationis* rule works in other words both as a conflict of law rule and as a recognition rule.¹⁰⁹ This is felt to be in compliance with the free movement imperatives of both the European Union and the ECHR.¹¹⁰

A foreign partnership will therefore be governed by foreign law, while a local partnership is subject to domestic law. This simple principle is only qualified by the operation of classic mechanisms, such as the public policy exception. One could imagine for example that a country could refuse to recognise the possibility for one same-sex partner to adopt the child of his/her partner, even though this is possible under the law of the country of origin. Practice has, however, shown that recognition could be granted even where it is not expected. So it is that the French Cour de cassation recently accepted to give effect to the adoption by a woman of a child born out of her partner, also a woman, excluding the application of the public policy exception which the lower courts had relied on to deny recognition to the adoption which took place in the United States.¹¹¹ Another possible limitation to the effects of a foreign partnership may be found when provisions of domestic law are deemed to be mandatory.¹¹²

¹⁰⁸ For France, see e.g. CALLÉ, (n. 31) at p. 1664.

¹⁰⁹ In fact, the need to have a rule dealing with recognition of foreign partnerships is the reason why in some countries a conflict of law rule was adopted in the first place. This is clear in France where the new Art. 515–7–1 of the Civil Code was adopted primarily to make it possible for foreign partnerships to be recognised, see HAMMJE, (n. 76) at pp. 483–484.

¹¹⁰ See in this sense, CALLÉ, (n. 31) at p. 1664–1665 and HAMMJE, (n. 76) at p. 484.

¹¹¹ Cour de cassation, 8 July 2010, *Rev. crit. dr. int. priv.* 2010, 747, with comments by HAMMJE. In another decision, the Court of First Instance of Bobigny has accepted that two same-sex partners who had concluded a civil partnership in England could benefit from the preferential tax treatment reserved in France to persons who are bound by a partnership: TGI Bobigny, 8 June 2010, *AJ Famille*, 2010, at p. 442 with comments by CRESSANT.

¹¹² This has been suggested in relation to Art. 515–4 of the French Civil Code by CALLÉ, (n. 31), at p. 1667.

The simplicity of the *lex loci registrationis* principle is, however, somewhat an illusion. Indeed, behind the appearance of a simple rule, substantial difficulties arise.¹¹³ The first one relates to the precise scope of the principle. The scope of the *lex loci registrationis* rule may be limited in two different respects: in the first place in relation to the type of partnerships concerned and in the second place in relation to the effects covered by the rule.

Looking at the first issue, there is a striking difference between the approaches of the countries concerned. In some countries, such as the Netherlands and Belgium, the legislator has outlined *ex ante* the minimum content any partnership should have, in order to qualify as partnership. So it is that under Art. 2–5 of the Dutch WCP, a foreign partnership will only be recognised as such provided the partners maintain a close personal relationship and the partnership has been registered by a local and competent authority. Further, the partnership must exclude the possibility for partners to marry or conclude another partnership with a third party. Finally, it must have consequences which are roughly similar to those arising from marriage.¹¹⁴ Belgium on the other hand reserved the application of the special rule it created for partnership to those foreign partnerships which do not create between the partners a relationship equivalent to that created by marriage.¹¹⁵

In France on the contrary, no such ‘minimum content’ rule has been adopted.¹¹⁶ Hence, the bilateral conflict of law rule may be applied to any foreign partnership,

¹¹³ The first difficulty is obviously that the application of the *lex loci registrationis* requires the authority of the host country to apply foreign law when the partnership was concluded abroad. In practice, local authorities could be required to apply Norwegian law for partners registered in Norway, German law for partners registered in Germany, etc. This difficulty has been underlined, CALLÉ, (n. 31), at p. 1667. It is, however, not unique and arises any time a bilateral conflict of law rule is adopted.

¹¹⁴ It is unclear what is the fate of a foreign partnership which does not meet these requirements – such as *e.g.* a Belgian law partnership. In the early days, a confusion appeared in the Netherlands in relation to the French partnership: the Dutch Ministry of Foreign Affairs wrote to the French embassy in The Hague that since the French partnership showed much similarity with the Dutch partnership, it should be deemed to fall within the ambit of the Dutch conflict of laws rules in relation to marriage. With Jessurun d’Oliveira, it can be said that this is quite a curious statement, JESSURUN D’OLIVEIRA, (n. 36) at p. 89.

¹¹⁵ Art. 58 of the Code. If the partnership is much stronger and produces effects equivalent to those of marriage, application may be made of the conflict of laws rules covering marriage. The abstract distinction made in the Code of Private International Law has been made more precise by a circular letter issued by the Belgian Minister of Justice in May 2007. According to this document, all registered partnerships, such as the Scandinavian and German schemes that resemble marriage, should be recognised as marriage in Belgium. For more details, see SIEBERICH, Qualifikation der deutschen Lebenspartnerschaft als Ehe in Belgien, *IPRax* 2008, pp. 277–278.

¹¹⁶ The situation is the same in Germany, where no clear definition of ‘partnership’ has been included in Art. 17b EGBGB. It seems accepted that this rule may be applied to foreign partnerships which although not identical to the German partnership, are broadly similar –

no matter how weak or strong this partnership is according to the law of its country of origin.¹¹⁷

In addition, another issue arises in relation to the scope of the *lex loci registrationis* rule. Does it cover all possible consequences of a partnership, which should therefore be governed by the law of the country of origin?¹¹⁸ The French text is in that respect, again, deceptively simple. It only refers to the “effects” of the partnership, without any further indication as to the nature of the effects covered. It is therefore unclear whether such effects as property relationship, alimony claims or succession rights are covered.¹¹⁹ The rule adopted in Belgium goes slightly further: Art. 60 of the Belgian Code refers to the consequences of the partnership on the partners’ “assets”. This seems to exclude all other effects, such as possible maintenance claims made by one of the partners. Art. 60 must, however, be read together with other provisions of the Code, which provide specific solutions for other aspects not covered by Art. 60. It seems therefore that for the consequences not covered by Art. 60, one should apply the ‘normal’ rules of the Code.¹²⁰

The Dutch legislator has gone much further in devising a comprehensive system dealing with the effects of partnerships. The WCP provides a detailed set of rules dealing with the various effects of partnerships, including rules for the relations with third parties. For some issues, the choice has not been made for the *lex loci registrationis*. The WCP, which has greatly benefited from the thinking of Jessurun d’Oliveira, subjects the matrimonial property regimes of the partners

see HOHLOCH/KJELLAND, The New German Conflicts Rules for Registered Partnerships, *Yearb. Priv. Intl. L.* 2001, 223–235, at p. 229. Comp. with MARTINY, in this book at p. 197, footnotes 26 and 27.

¹¹⁷ It has been observed that the public policy mechanism could nonetheless intervene and prohibit recognition in France of foreign partnerships *e.g.* when it appears that a partnership has been concluded between members of a family (see HAMMJE, (n. 76) at p. 487). Further, it is doubted whether the new rule may be applied to same-sex marriage (see PEROZ, (n. 51) at p. 402, n° 11).

¹¹⁸ It is clear and not challenged that issues such as the majority or the parental links between partners, remain governed by the normal conflict of law rules and could, hence, be subject to a foreign law. This is the case for the majority: under French law, two persons may only conclude a partnership provided that they are adults (Art. 515–1 Civil Code). Whether or not the partners are indeed adults, will not be examined under French law but under the normally applicable law: see *e.g.* CALLÉ, (n. 31), at p. 1664.

¹¹⁹ See the doubts of HAMMJE, (n. 76) at p. 489–490 and the examples offered by CALLÉ, (n. 31) at p. 1667–8. According to Weiss-Gout and Niboyet-Hoegy, it is clear that such effects as adoption, maintenance and inheritance rights are not governed by Art. 515–7–1: WEISS-GOUT/NIBOYET-HOEGY, (n. 27) at p. 18. Peroz argues that the rule should apply to all ‘patrimonial effects’ of the relationship ((n. 51), at p. 407, n° 26).

¹²⁰ The CIEC Convention only addresses what it calls the “effets en matière d’état civil”, which concern the effect of a partnership on the possibility for a partner to remarry, the consequences on the name of the partners and the termination of partnership, in so far as it has consequences on the previous two elements.

to the law chosen.¹²¹ Likewise, the partners may choose which law applies to the dissolution of their partnership.¹²²

The scope of the *lex loci registrationis* rule is one issue which deserves close attention. Another problem relates to the consequences of the application of the law of the country of origin. The choice for the law of the country of origin in effects amounts to the model of the *Wirkungserstreckungstheorie*, well known in the law of foreign judgments.¹²³ As with foreign judgments, the application of the law of the country of origin may give rise to difficulties. This will be the case when the law of the country of origin designates one of its institution and entrusts it with a specific mission in relation to the partnership. Say two partners want to terminate their relationship. How should this be dealt with if it appears that the termination is, according to the law of the country of origin, the privilege of an authority which does not exist in the country where termination is sought, or which does not have such competence in the country where termination is sought? This may explain why in some countries, termination was exclusively reserved for local partnerships¹²⁴ or priority was given to domestic law to govern termination.¹²⁵

The most serious difficulties arise in relation to the consequences of the partnership which are deemed not to be dealt with by the law of the country of origin, but by another conflict of law rule. As already indicated, it is generally accepted that the *lex loci registrationis* only governs some of the consequences of the partnership, leaving other consequences to the general conflict of laws rules. This is manifest when one considers the possible claims of the surviving partner on the estate of a partner who passed away. In France and Belgium, it is accepted that these claims fall outside the *lex loci registrationis* and must be dealt with under the general rule of conflict applicable for succession.¹²⁶

¹²¹ It goes in this respect even further than the 1978 Hague Convention because it does not restrict the choice by partners to the law of their nationality or residence. On this aspect, see JESSURUN D'OLIVEIRA, (n. 36) at p. 92.

¹²² According to Art. 22 WCP, Dutch law applies in principle, but the parties may make a choice in favour of the application of the *lex registrationis*.

¹²³ As noted by QUINONES ESCAMEZ, (n. 4) at p. 371.

¹²⁴ This is the case in Belgium (Art. 60–3 of the Code). In France, it seems that no such limitation exists. As a consequence, French authorities could be requested to terminate a partnership created under a foreign law. This has given rise to a debate on the question whether French authorities have jurisdiction to entertain such a request and which rules of jurisdiction should be applied, see CALLÉ, (n. 31), at p. 1669.

¹²⁵ See e.g. Art. 23 of the Dutch WCP: a foreign partnership may in principle only be terminated in the Netherlands on the basis of Dutch law. A provision is made to allow termination on the basis of foreign law if the partners have made a choice for the application of foreign law (Art. 23–2).

¹²⁶ For France: HAMMJE, (n. 76) at p. 490; CALLÉ, (n. 31), at p. 1668; KESSLER, Reconnaissance des partenariats étrangers: les enseignements de la loi du 23 juin 2006, *AJ Famille*, 2007/1, (23), at p.25; H. PEREZ, (n. 51), at p. 403, n° 13. In Belgium: VAN BOXSTAEL, *Code dip. Premiers*

The application of another law than the law of the state of origin could lead to peculiar results. If two same-sex partners who have concluded a partnership in the Netherlands, move to France where one of the partners has bought a house, French law will govern the rights and claims of the surviving partners. A question which arises in this respect is whether the Dutch law partnership may be deemed to correspond to the French law partnership to which the French law provisions on succession refer.¹²⁷ This question is not specific to same-sex partnerships. It also arises when dealing with foreign marriages which deviate from the local standard – such as polygamous unions.

It may be easier to deal with this difficulty in those countries which have made an *ex ante* determination of what constitutes a partnership equivalent to the local partnership, such Belgium and the Netherlands. To take the example of two partners bound by a German law partnership who reside in Belgium, the court will have first determined that this partnership must be seen as a marriage for the purposes of conflict of laws rules. It will then not be difficult to accept that the partners must also be treated as spouses when applying Belgian substantive law.¹²⁸

In France on the other hand, no such *ex ante* determination has been made. In the absence of such an abstract definition, judges and practitioners alike bear the responsibility of determining whether a given foreign partnership should be recognised as the equivalent of the French PAC's.

Once the hurdle of equivalence is passed, another difficulty arises which has already been mentioned in relation to same-sex marriage. The application to specific consequences of the partnership, of another law than the law of the country of origin, could result in a substantial modification of the partnership as initially created. The partnership could entail less or more effects than contemplated under the law of the State of origin. In the example of the Dutch same-sex partner living in France, whose entitlement in the estate of his deceased partner is governed by French law, this will lead to a clear 'downsizing' of the Dutch partnership, as under French law partners only have minimal succession claims. Conversely, if two persons have concluded a partnership in France and move to Belgium, the succession claims will be

commentaires, 2010, 113, n° 57; BARNICH, Les droits du conjoint survivant et du cohabitant légal survivant. Questions de droit international privé, in: VAN GYSEL (ed.), *Conjugalité et décès*, 2011, 145–160, at p. 153. Likewise in Sweden for the partnership, see BOGDAN, (n. 54) at p. 4.

¹²⁷ Art. 515–6 French Civil Code.

¹²⁸ Barnich has also argued that equivalence should be accepted for foreign partnerships which meet the definition of Art. 58 of the Belgian Code, BARNICH, (n. 126) at p. 158.

governed by Belgian law which grants more rights than French law.^{129, 130} It has been argued that if the law of origin of the partnership does not grant the surviving partner any inheritance right, this choice should be respected even if the law applicable to the inheritance rights affords some protection to the surviving partner.¹³¹

In an extreme case, the law declared applicable could simply ignore the institution of the partnership – leaving partners unprotected. Some legislators have anticipated the problem and provided a fall-back solution. This is the case in Belgium for the issue of the matrimonial assets of the partners. When questions of matrimonial assets arise in relation with third parties, the Belgian legislator has deviated from the application of the *lex loci registrationis* and preferred the application of the normal rule.¹³² It may be that the law applicable under this rule does not allow same-sex partnership. In order to deal with this vacuum, the law provides a fall-back provision in favour of the *lex loci registrationis*.¹³³ Likewise, the German legislator has adopted a specific rule which grants the surviving partner the benefit of the application of the law of the country of origin if the law applicable to the inheritance does not give the surviving partner any right.¹³⁴

3.2.2. Second Approach: Law of the Host Country

In a limited number of countries, the preference is given to another approach: the consequences of same-sex partnerships are exclusively subject to domestic law, without consideration of the law of the country where the partnership was concluded.

When dealing with local partnerships, this does not make much difference when compared with the former method. The difference appears, however, when one deals with foreign partnerships. Since only domestic law is taken into account,

¹²⁹ See Art. 745octies of the Belgian Civil Code, introduced by the Act of 28 March 2007.

¹³⁰ The draft Regulation on successions to the estates of deceased persons could bring clarity. The first draft issued by the Commission in October 2009 did not make any reference to the position of partners. Its Art. 19 provided that the law applicable would govern “the eligibility of the heirs and legatees, including the inheritance rights of the surviving spouse...” A more recent version of the draft Regulation goes further: the new Art. 19(2)(b) also includes a reference to the “inheritance rights of the surviving spouse or partner...”.

¹³¹ See BUCHER, (n. 55) at p.195–196, n° 553. See the criticism by GOLDSTEIN, (n. 3) at p. 332–333.

¹³² To be found in Art. 54 Belgian Code.

¹³³ Art. 60–3 *in fine* Code.

¹³⁴ See Art. 17b para. 1 sent. 2 EGBGB and the comments by MARTINY, in this book at § 3.3.1. See the criticism of this solution by Goldstein which deems it to be “excessive”, GOLDSTEIN, (n. 3) at p. 331–332. According to Goldstein, “De notre point de vue, il s’agit d’une illustration extrême d’un rattachement généralement critiquable de toute l’institution à la loi du lieu d’enregistrement” (at p. 332).

foreign partnerships will also be governed by domestic law, no matter where they have been concluded.

The clearest illustration of this approach is to be found in England. As is well known, under the 2004 Civil Partnership Act, a registered partnership formed abroad and capable of being recognised in England,¹³⁵ will be subject to a process of “conversion”.¹³⁶ Section 215 of the CPA indeed provides that “[t]wo people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship...”. Accordingly, two persons having concluded a PAC’s under French law, will be deemed to have entered a civil partnership. The relation will generate the same effects as a Civil Partnership concluded in England.¹³⁷ As we have already seen, the same approach, which is in conformity with the very strong *lex fori* favour of England in family law matters, applies to same-sex marriages concluded abroad.¹³⁸

The English method leads to a ‘rewriting’ of the partnership. Same-sex partners who move to England after having concluded a partnership in Finland, may find that their partnership produces fewer rights than in the home jurisdiction. On the other hand, partners bound by a French *pacte civil de solidarité* will also be treated as bound by a civil partnership. They will therefore find out that their partnership generates more effects in case of a breakdown than if they had stayed in France.

In Germany, the rule is slightly more sophisticated: the starting point is that the foreign partnership is governed by the law of the country of registration.¹³⁹ However, Art. 17b para. 4 EGBGB provides that the consequences of a foreign partnership may not exceed those provided by German law.¹⁴⁰ Even though it has been argued that this limitation should only come into play when a

¹³⁵ This supposes that the relationship is either listed in Schedule 20 of the Act or meets certain conditions (which are listed in section 214).

¹³⁶ As noted by NORRIE, Recognition of Foreign Relationships under the Civil Partnership Act 2004, *J. Priv. Intl. L.* 2006, 137–167, at p. 161.

¹³⁷ Before the adoption of the Act, the situation was muddled under English law, it was difficult to predict whether English courts would afford recognition to foreign partnerships, see TAN, (n. 35) at pp. 449–452 and pp. 455 ff. Ms Tan referred to the question as “an uncharted area for English private international law”, at p. 455. See on the same subject: MURPHY, The Recognition of Same-Sex Families in Britain: the Role of Private International Law, *Intl J. L. Policy & Fam.* (2002 – vol. 16, pp. 181–201).

¹³⁸ In California, the same approach is followed. Under Section 299.2 of the Family Code of California, a registered partnership or another legal union that was validly formed in another jurisdiction between two persons of the same-sex will be recognised as a “domestic partnership” provided it is “substantially equivalent to a domestic partnership”.

¹³⁹ See Art. 17b para. 1 EGBGB.

¹⁴⁰ On the constitutional reason for this ‘capping limit’, see THORN, The German conflict of law rules on registered partnerships, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, 159, at p. 165.

partnership may generate under foreign law consequences which are completely unknown under German law or would endanger an existing marriage,¹⁴¹ this provision means in effect that, as is the case in England, a foreign partnership may not have other effects than those provided for under German law.^{142, 143} In contrast to the rule adopted under English law, the German ‘*Kappungsgrenze*’ seems to work only to reduce the effects of foreign partnerships. The rule does not seem to work the other way around and allow a foreign partnership to produce more effects than provided for under the law of the country of origin. Account should, however, be taken of an additional provision which is made for matters relating to maintenance and to succession, which remain governed by the general conflict of laws rules. The rationale of this special treatment is apparently to guarantee that all partnerships will generate effects in those fields. As a whole, a foreign partnership may therefore generate more effects when the partners reside in Germany than in the country of origin.¹⁴⁴

The same position seems to have been adopted in Finland, where section 13 of the Partnership Act provides that the legal consequences of a foreign registered partnership are those of a local registered partnership. As a consequence, foreign partnerships may not have ‘stronger’ effects than the legal effects granted to Finnish partnerships. It has, however, been reported that this rule only applies to reduce consequences generated by foreign partnerships which produce more effects than partnerships under Finnish law. If on the other hand, the foreign partnership generates less far-reaching effects than the partnership under Finnish law, partners will not be able to enjoy additional effects after moving to Finland.¹⁴⁵

3.2.3. *Third Approach: Analogy with Marriage*

Switzerland stands out when considering the effects of partnerships: instead of subjecting those effects to the law of the country of origin or to Swiss law, the

¹⁴¹ THORN, (n. 140), at p. 165.

¹⁴² On the difficulty of comparing the effects a partnership may entail under German and foreign law, see MARTINY, (n. 103), at p. 12 and MARTINY, in this book at § 3.3.2.

¹⁴³ It seems that the approach taken by Luxembourg goes in the same direction. Under the new Art. 4(1) of the Law of 9 July 2004 on partnerships (inserted by the Law of 3 August 2010), foreign partners may register their partnerships in Luxembourg, provided they comply with the requirements of Art. 4 of the law. According to Wiwinius, the result is that the foreign partnership will be granted the same effects as a Luxembourg one (Wiwinius writes: “*L’inscription au répertoire civil permet ainsi d’assimiler le partenariat étranger au partenariat luxembourgeois*” – WIWINIUS, *Le droit international privé au Grand-Duché de Luxembourg*, 3rd ed., 2011, at p. 383, n° 1834).

¹⁴⁴ The rationale of this special treatment is apparently to guarantee that all partnerships will generate effects in those fields – see MARTINY, (n. 103), at p. 11.

¹⁴⁵ MIKKOLA, Finnish Report, *Report to the XVIIth Congress of International Academy of Comparative Law*, Utrecht, 2006, at p. 4.

Swiss legislator has chosen to apply by analogy the conflict of law rules devised for marriage. It is interesting to note that this choice was driven by the realisation that application of the *lex loci registrationis* could hinder the cross-border mobility of partners.¹⁴⁶ As a consequence, there is no single rule governing the consequences of partnerships. Rather, partners are subject to different rules depending on the consequence concerned.

As with the first model, questions arise when a law is applied to the partnership, which is different from the law under which the partnership was created. So it is that Swiss law may be applied to the matrimonial assets of partners as the law of the common residence of the partners. In practice, partners will therefore enjoy the rights and obligations provided for by Swiss law, even if this means extending the consequences of the partnership further than possible under the law of the country of origin. Although Swiss law does not make any allowance for a distinction between ‘strong’ and ‘weak’ partnerships, it has been suggested that when under the law of the country of origin, the foreign partnership only produces limited effects, the application of Swiss law should be corrected to avoid distorting the nature of the partnership.¹⁴⁷ This could for example entail that if the partnership breaks down, the partners would only be entitled to a reduced form of maintenance if it appears that under the foreign law, partners are not entitled to full fledge maintenance. This makes for a complex balancing exercise, which involves comparing the effects of partnerships under Swiss law and the law of the country of origin. Bucher has for example suggested that if it appears that under the law of the country of origin, the partnership does not have any automatic effect on the assets of the partners, the application of Swiss law should be qualified and the preference given to the application of general rules of Swiss contract law instead of the specific rules relating to matrimonial property.¹⁴⁸

4. OUTLOOK

What can be concluded from the preceding overview? Certainly, one will have noted the complexity of the questions reviewed so far. This is certainly far from specific to same-sex relationships. Cross-border family law matters can be very complex, even when the relevant conflict of laws rules have been unified. The rapid evolution of the legal rules in the field of same-sex relationship adds, however, a new dimension to the inherent complexity.¹⁴⁹

¹⁴⁶ BUCHER, (n. 55), at p. 193, § 544.

¹⁴⁷ BUCHER, (n. 55), at p.194 ff, § 548 ff.

¹⁴⁸ BUCHER, (n. 55), at p.195 ff, § 550.

¹⁴⁹ In that respect, experience has shown that from a practical perspective, it is easier to avoid working with closed lists of legal systems: the system in the Scandinavian countries, where access to partnership is made easier for the nationals of some countries whose laws also allow

That matters are not easy to grasp, derives mainly from the diversity of approaches and rules adopted by the States whose laws have been examined. Although diversity is, again, not unique to same-sex relationships, there is probably a much more diverse approach to those relationships than to any other family relationship today.

Another striking feature of the law today is the unsettled character of many questions. Although a notable evolution has occurred, with many national legislators adopting specific conflict of laws rules for same-sex relationships, many questions remain unresolved. Some of these questions pertain to the scope of application of international instruments. Others concern the difficult process of characterisation. When one succeeds in determining which law applies, questions may also arise when it appears that the law declared applicable does not recognise the relationship at hand. It is all in all a wonder that these many questions have not given rise to more case law.¹⁵⁰

The diversity and lack of certainty may lead to important obstacles for same-sex partners. This is decidedly the case when the partners move from one country to another. Same-sex relationships are indeed, much more than other relationships, prone to face recognition problem when crossing borders. Recognition issues may arise in relation to a specific effect of a relationship – such as when a country will deny any effect to the choice of law made by two same-sex partners in another country, on the basis of the latter's private international law. The difficulties may be more serious when they lead to the application to one relationship of a law under which the partners have more or less rights, as this may modify the outlook of the relationship – such as when French same-sex partners move to Belgium and the surviving partner's claim is governed by Belgian law, which grants more rights to the surviving partner than does French law.

The problem becomes fundamental when the relationship as such is denied any effect – a difficulty which affects same-sex marriage more than partnership. All in all, there is a serious risk of limping relationships.

Limping relationships are certainly not new, nor are they specific to same-sex relationships. The phenomenon is probably as old as the first attempts to tackle cross-border family relationships. In many other contexts, family relationships are deeply affected by lack of recognition – it is enough to refer to the situation of many spouses whose divorce is not recognised in their country of residence because it is based on the unilateral decision of the husband. If there is something

partnership, has been found overly cumbersome, since the list of countries was included in the law, see the observations of BOGDAN, (n. 54) at p. 4.

¹⁵⁰ See the German cases collected and made available at www.lsvd.de/211.0.html#c1638.

specific to same-sex relationship, it may even be that the plight of limping relationship is decreasing with time passing by. Indeed, as more and more States have introduced legal recognition for same-sex couples, this increases substantially the possibility for these relationships to be recognised abroad.¹⁵¹

It remains that same-sex partners and spouses may be caught in a very difficult situation when their status is not recognised abroad. This explains why in many instances, partners have felt the need to consolidate their relationship from a legal perspective. Because of the doubts existing on recognition of a partnership concluded abroad, it is not uncommon for parties to conclude a new partnership locally – and to be advised to do so. This is a clear sign that parties are aware of the precarious status of their union.¹⁵²

In many instances, partners will, however, be unable to consolidate their relationship and will instead face a complete denial of their status. As in other family contexts, this could lead to inextricable situations. Take the situation of two Dutch different-sex partners who have entered into a partnership under Dutch law. If these partners move to Germany, their partnership will not be recognised, as Art. 17b EGBGB only aims at same-sex partners.¹⁵³ The partners will further be unable to marry, both in the Netherlands and in Germany.¹⁵⁴ Finally, even dissolving the partnership requires a demonstration that life together has become unbearable. The partners may therefore be literally trapped in a relationship which may be difficult to export to the country of their new residence.¹⁵⁵

Could one say that this delicate situation is regrettable, but that the persons concerned should have verified before moving to Germany, whether their status would be recognised? Certainly, there is room to say that in the field of same-sex relationships, the persons concerned are probably better equipped to anticipate recognition difficulties. Whereas a French man and a Tunisian woman getting married in Germany have no specific reason to suspect that their marriage may

¹⁵¹ As noted by DE GROOT, *Private International Law Aspects Relating to Homosexual Couples*, *EJCL*, vol. 11.3 (2007) at p. 16.

¹⁵² According to Revillard, in many instances foreign partners chose to conclude a new partnership in France before buying a house or apartment there, REVILLARD, (n. 96), at p. 461.

¹⁵³ This issue is discussed in German literature. While some have argued that Art. 17b EGBGB only applies to same-sex relationships, other authors have suggested that this provision could also apply to partnerships between different-sex partners, see MARTINY, (n. 103), at p. 8–9 and MARTINY, in this book at p. 199.

¹⁵⁴ In both countries, the ability to marry is governed by the national law of the spouses. Under Dutch law, partners bound by a partnership may not marry.

¹⁵⁵ With due thanks to Prof. Ian Curry-Sumner (Utrecht) who gracefully shared this case with me.

not be recognised in their respective home countries – save in the situation where the marriage is manifestly of convenience –, it may be argued that the perspective is different when two Italian men residing in Belgium, conclude a marriage there. In the latter case, it is not going too far to say that the persons concerned will at least have a vague suspicion that their union could be met with scepticism, or even hostility in their country of origin. In some countries, this was acknowledged when discussing whether or not to require that civil servants inform the partners of the risk of non-recognition when celebrating a same-sex union or registering a same-sex partnership.¹⁵⁶

The heightened consciousness of same-sex partners should, however, be nuanced. Certainly, one may presume that same-sex partners getting married in Belgium or the Netherlands, are at least vaguely aware that their status could be questioned in countries where same-sex relationships are afforded no legal recognition whatsoever. The same probably applies when same-sex partners purposefully travel to a country to have their union registered because no such possibility is offered in the country where they reside.¹⁵⁷ This assumption cannot, however, be made when the recognition problem affects partners who have entered into a partnership in their home country and who afterwards travel to a country where some form of partnership also exist. This is precisely the situation of the Dutch same-sex partners living in Germany: the partners could reasonably assume that their Dutch law partnership would be recognised in Germany, *quod non*.

Limping relationships are therefore not simply the responsibility of the persons concerned.¹⁵⁸ And it will be a meager consolation for the partners and spouses

¹⁵⁶ See for the Netherlands, PELLIS, Het homohuwelijk, een bijzonder nationaal product, *FJR*, 2002, 162–168. In other countries, legislator consciously adopted provisions which could give rise to limping relationships. This is the case for the countries where a choice was made to subject access to partnerships to the *lex loci registrationis*, without any consideration of the national law of the future partners – see in France where before the adoption of Art. 515–7–1 of the Civil Code, some commentators had suggested to only open partnerships to partners whose national law allow for such relation: MAYER, Les méthodes de la reconnaissance en droit international privé, in *Le droit international privé. Esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, 2005, at p. 568, §41. This has not prevented legislator from adopting a rule linking access to partnership exclusively to French law, thereby creating the risk of limping relationships – which has been clearly stressed by French commentators, see HAMMJE, (n. 76), at p. 486 and CALLÉ, (n. 31) at p. 1665.

¹⁵⁷ See the *Wilkinson* case decided in 2006 by the English High Court, where two women residing in England, got married in British Columbia before requesting recognition of their marriage in England – *Wilkinson v. Kitzinger*, [2006] EWHC 2022 (Fam), (July 31, 2006).

¹⁵⁸ See, however, the comments made in the Explanatory Memorandum which was introduced before the Dutch Parliament, together with the Same-sex Marriage Act. The Dutch government indicated that “The question relating to the completely new legal phenomenon of marriage between persons of the same-sex concerns the interpretation of the notion of public order to be expected in other countries. Such interpretation relates to social opinion about

concerned to learn that decisional harmony¹⁵⁹ and the need to avoid limping relationships,¹⁶⁰ while still one of the overarching objectives of private international law, must today compose with other goals and objectives which may sometimes trump it.¹⁶¹

It remains that given the tendency of States to subject conflict of laws rules to substantive family law objectives, which are necessarily peculiar to local legislation, limping relationships seem unavoidable today. And this is true both on a global scale, if one considers the world at large where same-sex marriages and partnerships are still the exception, and at the European level.

What solutions could private international law offer for these difficulties? If one focuses on the recognition issue, several types of solutions may be contemplated. In the long run, it may be that same-sex couples could find support in human rights provisions and in European law. These international norms have indeed recently been called upon to support claim for cross-border recognition of family status.¹⁶² It is certainly not excluded that a same-sex couple could in certain

homosexuality... As a result of this, spouses of the same-sex may encounter various practical and legal problems abroad. This is something for future spouses of the same-sex to take into account" (Kamerstukken II 1998/1999, 26672, nr. 3, p. 7–8, I – Wet Openstelling Huwelijk of December 21, 2000. Translation taken over from WAALDIJK, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in: WITEMUTE/ANDENAS (eds.), *Legal Recognition of Same-Sex Partnerships*, 2001, pp. 437, 464.).

¹⁵⁹ Since Savigny it has been customary to point to decisional harmony as one of the key objectives of private international law – see e.g. YNTEMA, *Les objectifs du droit international privé*, *Rev. crit. dr. int. priv.* 1959, (1–29), at pp. 20–21 and WENGLER, *Les principes généraux du droit international privé et leurs conflits*, *Rev. crit. dr. int. priv.* 1952, 595–622 and 1953, 37–60. According to Wengler, legislators should act on the basis that “*le droit applicable doit être déterminé de manière telle que la solution soit, autant que possible, identique à celle donnée dans d’autres Etats, et en particulier dans ceux qui, à l’égard du même litige, affirment la compétence de leurs propres tribunaux*”, at pp. 610–611.

¹⁶⁰ Compare with the opinion of HOLLEAUX, *Die Grundbegriffe des internationalen Privatrechts*. Ein Bericht zu dem gleichnamigen Buch von P. H. Neuhaus, *FamRZ* 1963, 635–638, 637. According to the learned French judge, problems caused by limping relationships were not to be overestimated: “Daß sie (limping relationships) ein Übel sind, gibt jedermann zu, aber ein unvermeidbares und letzten Endes gar kein praktisch so fatales wie man manchmal zu meinen geneigt ist. Der bisweilen herrschende panische Schrecken vor hinkenden Verhältnissen ist eigentlich unberechtigt. Es leben tatsächlich unzählige Leute ganz gemütlich in hinkenden Familienrechtsverhältnissen. Katastrophale Fälle [...] sind wunderseltene Ausnahmen. Jedenfalls ist es bei vielen Gelegenheiten – besonders auf dem Gebiet des Familienrechts – häufig eine weit bessere, menschlich gerechtere und auch sachgemäßere Lösung, ein hinkendes Verhältnis freimütig in Kauf zu nehmen, als aus abergläubischer Achtung vor einem theoretischen Entscheidungsgleichheitsideal zu einer vielleicht rechtstechnisch vertretbaren [...] aber nichtsdestoweniger faktisch ungerechten Lösung Zuflucht zu nehmen”.

¹⁶¹ As shown by MARTINY, *Objectives and Values of (Private) International Law in Family Law*, in: MEEUSEN ET AL. (eds.), *International Family Law for the European Union*, 2007, 69, at p. 80–81.

¹⁶² As noted for example by WEISS-GOUT/NIBOYET-HOEGY, (n. 27), at pp. 14–16.

circumstances draw support from recent case law of the European Court of Human Rights and the Court of Justice to obtain recognition of its status.¹⁶³ The difficulty with this solution is, however, that it operates on an *ad hoc* basis. Partners will be required to make a case that denial of recognition constitutes a breach of say Art. 8 ECHR in view of the concrete circumstances and taking into account their legitimate expectations.¹⁶⁴ As far as the EU is concerned, the duty to recognise only becomes relevant when the situation falls within the scope of European law – although the rise of European citizenship has made it much easier to justify application of European rules.

Further, States could still, both under human rights¹⁶⁵ and internal market standards,¹⁶⁶ resist recognition on various grounds. Finally the debate on whether the principle of recognition could ever achieve the status of a rule of European primary law is still open and therefore much too tentative to constitute the basis of a general solution.¹⁶⁷ Hence, this principle based avenue falls short of a general, rule-based solution and does not seem beneficial in the short run.

¹⁶³ A Luxembourg Court in fact drew in substance from Art. 8 ECHR to grant an application for a residence permit to a third country national who had married a Belgian national in Belgium. The Court found that denial of a residence permit would amount to a disproportionate and unjustified breach of family life: Administrative Tribunal of Luxembourg, 3 October 2005, *BIJ* 2006, 7, with critical comments by KINSCH; also published in *Rev. dr. étrangers* 2009, 699.

¹⁶⁴ See for the qualifications and caveats which limit the application of Art. 8 in this context, KINSCH, Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law, in: *Liber amicorum Kurt Siehr*, 2010, 259–275, at pp. 272–275.

¹⁶⁵ As clearly demonstrated by the *Wilkinson* case decided in 2006 by the English High Court. In this case, a couple residing in England, had celebrated their marriage in British Columbia. A petition was filed in England, to have the marriage recognised as such (and not as a civil partnership under the CPA). The High Court carefully reviewed the arguments made under Art. 8, 12 and 14 of the ECHR to deny the petition: *Wilkinson v. Kitzinger*, [2006] EWHC 2022 (Fam), 31 July 2006. The Court noted in particular that the fact that the UK legislator had chosen to create a separate institution for same-sex relations, i.e. the civil partnership, and to deny same-sex partners the possibility to marry, did not as such constitute a direct interference with or intrusion upon with the private or family life protected under Art. 8 ECHR (at §§ 80 ff).

¹⁶⁶ See the explanations of FALLON, Constraints of internal market law on family law in: MEEUSEN ET AL. (eds.), *International family law for the European Union*, 2006, 149, at p. 160–162, §§ 13–15. Fallon notes that a Member State could still refuse to give effect to a same-sex marriage celebrated in another Member State using the public policy ground, provided the host Member State shows that the “substantive laws of the State of origin and of the host State differ in such a radical way about the concept of matrimonial union” (at p. 178–179, § 31). Mankowski has also noted that even if a principle of recognition were to be accepted under EU law, this would not prevent Member States from calling upon their public policy exception to withhold recognition to a foreign same-sex marriage (MANKOWSKI/HÖFFMANN, *Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?*, *IPRax* 2011, 247–254, at p. 253).

¹⁶⁷ Since the two groundbreaking contributions (LAGARDE, *Développements futurs du droit international privé dans une Europe en voie d’unification: quelques conjectures*, *RabelsZ* 2004, 225 ff and BARATTA, *Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC*, *IPRax* 2007, 5 ff), the debate has raged fiercely in the

To achieve decisional harmony, the favourite method has always been for States to agree on common rules. This is the very '*raison d'être*' of the Hague Conference. Certainly, if the Member States of the EU or of the Hague Conference were to adopt a Regulation or Convention dealing with same-sex relations, this would go a long way towards alleviating the many instances where recognition is denied today.

However, this is, again, not a miracle solution. The first caveat is that one may wonder if it is justified to adopt international rules dealing with a specific family relationship, while leaving 'regular' marriages out. Same-sex marriages are meant to be the almost exact copy of 'classic' marriages. Is it then not peculiar to provide specific rules for the recognition of this type of marriage? Further, why should different-sex relationships be denied the privilege of recognition?¹⁶⁸

In any case, it is unclear at this stage whether there would be enough support among States to consider the adoption of a new international instrument. Calls for international solutions are not new.¹⁶⁹ The Hague Conference has been considering whether or not to undertake work in this area since 1996.¹⁷⁰ Yet, the results seem meager so far.¹⁷¹ The only existing instrument at this stage, the

literature with contributions calling for the development of a new recognition paradigm (e.g. LAGARDE, La reconnaissance mode d'emploi, *Liber amicorum Hélène Gaudemet-Tallon*, 2008, pp. 481–501; ROMANO, La bilatéralité éclipsée par l'autorité: développements récents en matière d'état des personnes, *Rev. crit. dr. int. priv.* 2006, pp. 457 ff.; PAMBOUKIS, La renaissance-métamorphose de la méthode de reconnaissance, *Rev. crit. dr. int. priv.* 2008, pp. 514 ff) countered by more critical voices (see e.g. MANSEL, Anerkennung als Grundprinzip des Europäischen Rechtsraums – Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts, *RabelsZ* 2006, pp. 651 ff. and STRUYCKEN, Co-ordination and Co-operation in Respectful Disagreement, *Collected Courses*, 2009, at p. 9 ff).

¹⁶⁸ It is true that different-sex marriages may already count on the 1978 Hague Marriage Convention. This Convention has, however, only been ratified by a limited number of countries. If practice reveals significant problems of cross-border recognition of marriages, work should be undertaken to promote the 1978 Convention as well.

¹⁶⁹ See e.g. BOELE-WOELKI, De wenselijkheid van een IPR-verdrag inzake samenleving buiten huwelijk, *FJR*, 1999, 11–13 (calling for an intervention by the Hague Conference) and ERAUW/VERHELLEN, Het conflictenrecht van de wettelijke samenwoning. Internationale aspecten van een niet-huwelijkse samenwoningsvorm, *Echtsscheidingsjournaal*, 1999, 150–161, at p. 160, nr. 41–42. See more recently, WEISS-GOUT/NIBOYET-HOEGY, (n. 27), at pp. 21–23 – outlining two options for an intervention by the EU.

¹⁷⁰ In the 1980's the Hague Conference already showed some interest for work around unmarried couples, see the various notes drafted by the Permanent Bureau in relation to issues of jurisdiction, applicable law and recognition of judgments relating to unmarried couples (the documents were produced in 1987, 1992 and May 2000). The most recent note was drafted by HARNOIS/HIRSCH, Note on Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage, Including Registered Partnerships, Preliminary Document No 11 of March 2008, 60 p.

¹⁷¹ In April 2011, the Council on General Affairs and Policy of the Conference invited the Permanent Bureau to continue to follow developments in the area of "jurisdiction, applicable

Convention of the CIEC, has received little support – even though it does not purport to create a comprehensive legal framework for cross-border same-sex relationships, but only (and wisely) deals with the recognition side.¹⁷²

If one looks at the draft instruments proposed by the European Commission in relation to matrimonial property, it is striking that the text is very timid. Art. 5 §2 of the Draft Regulation relating to the property consequences of registered partnerships provides that a Member State “may decline jurisdiction if [its] law does not recognise the institution of registered partnership”.¹⁷³ It is true that Art. 18 of the same draft regulation makes it impossible for Member States to use their public policy exception on the ground that their law “does not recognise registered partnerships”. This limitation may, however, be of little use if partners do not succeed in vesting jurisdiction in a court.

The Divorce Regulation adopted in 2010 does not go much further.¹⁷⁴ Its Art. 13 provides that courts of Member States are not required to pronounce a divorce if the marriage is not valid according to the domestic law. Although this provision could probably be used in other contexts as well, it seems to open up the possibility for States to refuse to entertain a petition for divorce filed by same-sex partners.¹⁷⁵ One may further note that the EU work in the field of free movement of persons has been quite timid when it comes to same-sex relationships, leaving it to Member States to decide whether to grant free movement rights to such relationships.¹⁷⁶

law, and recognition and enforcement of judgments in respect of unmarried couples” (Conclusions and Recommendations of the Council on General Affairs and Policy, April 2011).

¹⁷² The Convention has been signed by Spain and Portugal and has only been ratified by Spain.

¹⁷³ Proposal for a Council Regulation, 2011/0058 (CNS).

¹⁷⁴ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ, L 343/10 of 29 December 2010).

¹⁷⁵ One should further note that the recent Maintenance Regulation No 4/2009 (OJ L 7/1 of 10 January 2009) remains silent on the question whether it may be applied to same-sex relationships. The Draft Succession Regulation provides in Art. 1 (3)(a) that it does not apply to “family relationships and relationships which are similar in effect”.

¹⁷⁶ Art. 2 §2b of Directive 2004/38 provides that “the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State...” must be considered a family member but only “if the legislation of the host Member State treats registered partnership as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State” – excluding partnerships registered outside the EU. Directive 2003/86 is even more timid since it only provides family reunion for the “spouse” (as defined in Art. 1§ 1a) and leaves the right to family reunion for the unmarried partner to the legislation of Member State (Art. 4 § 3). For an analysis of Regulation 2004/38 and 2003/86, see BELL, Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union, *European Review of Private Law* 2004, vol. 12(6), pp. 613–632 and more recently, GÉRARD/PARREIN, Seksuele geaardheid: een begrip in het Europese en Belgische vreemdelingenrecht?, *T. Vreemd* 2009, pp. 291–306. The same hesitation

It therefore seems illusory or at least premature to expect much from thorough cooperation between States in the form of a new international instrument.¹⁷⁷ Even if one were to focus on adaptation of existing instruments so that they could apply to same-sex relationships, it is unlikely that much support could be found.

What is left if one excludes international solutions? What remains is work on the national rules dealing with same-sex relationships. Much can be done at this level, even taking into account the probable resistance of some States. A first recommendation is certainly that States should not hesitate to act. While it is understandable that some countries hesitated to adopt specific conflict of law rules in a first stage, when same-sex partnerships and marriages were still fairly new,¹⁷⁸ such a timidity has no justification anymore. Experience has indeed shown that the absence of conflict of law rules brings about serious difficulties. The difficulties and possibilities of conflict of law rules in the field of same-sex relationships have been well explored. Legislators cannot therefore hide behind the novelty of the questions to refuse to legislate. Certainly in countries where same-sex relationships enjoy some form of legal recognition, work should be undertaken to offer a conflict of laws framework for such relationships. In other countries, the basic question should be addressed whether and to what extent foreign same-sex relationships deserve recognition.¹⁷⁹

If one considers the countries where same-sex relationships have received some form of legal recognition – which are much more likely to act than States where such relationships are left ‘outside the law’ –, States are well advised not to limit themselves to one general rule when considering how same-sex relationships should be handled in the conflict of laws. As with different-sex relationships, there are many different aspects arising out of marriages and partnerships. If anything,

can be seen in the caveat made in Art. 9 of the European Charter of Fundamental Rights whose Art. 9 only protects to the right to family life “in accordance with the national laws governing the exercise of these rights”.

¹⁷⁷ One may add that the GEDIP never reached an agreement on the subject – see the meeting reports of the meetings held starting in 1999 in Oslo, available at www.gedip-egpil.eu/gedip_reunions.html.

¹⁷⁸ As happened in France and in Belgium. It is striking that the French legislator did not intervene when modernising the PAC’s in 2006. No specific provision on the cross-border aspect was included in the act of 23 June 2006 modifying the PAC’s, even though a report had suggested to subject the PAC’s to the *lex loci registrationis*, see GRANET-LAMBRECHTS, Trente-deux propositions pour une révision de la loi du 15 novembre 1999 relative au pacs, *Dr. famille*, 2005, 11 ff.

¹⁷⁹ It cannot be excluded that in some countries, a radical position could be adopted, which denies any effect to such foreign same-sex relationships even if the partners are both foreigners. This could e.g. be the case in Hungary. It is, however, submitted, that such position will be exceptional. Further, even a blatant refusal to recognise same-sex relationships is better than uncertainty over the fate of such relationships.

the comparative overview has shown that these aspects may call for a specific treatment. Without going as far as the Dutch example,¹⁸⁰ preference should be given to a system where access to a legal status and effects of the status are governed by separate rules. When looking at the consequences of a long term relationship, one should not forget that such a relationship may have an impact on many different subjects. While it may not be appropriate to attempt to devise a rule for all possible questions – take the vexed question of whether partners may conclude gifts¹⁸¹ – there is ample room to consider adopting a system combining a general rule with specific rules dealing with particular issues, such as divorce or alimony.

If work is made of specific conflict of laws rules dealing with same-sex relationship, a first question which arises is whether to go for a unitary system or to adopt different rules for different types of same-sex relationships. Some countries have adopted a broad approach, treating identically all same-sex relationships. This is the case in England and Germany. In a limited number of countries, a distinction is made according to the nature of the same-sex relationship. The latter approach may be justified in view of the differences which still exist between same-sex partnerships under national laws. One may think of the divide between partnerships closely modeled on marriage and partnerships which still remain a pale copy thereof. For the latter category, it is more difficult to accept that access to the partnership is subject to another rule than the consequences of the partnership.¹⁸² The obvious difficulty when adopting a fragmentary approach is to fine tune the dividing line between the two categories. Belgium and the Netherlands, which have both chosen to reserve a different treatment to same-sex marriages and partnerships, have encountered difficulties when dealing with this question. The criteria retained in Art. 2(5) of the Dutch WCP are broadly similar to those of Art. 58 of the Belgian Code of Private International Law. In both countries, the test retained has sometimes proven difficult to apply.^{183, 184}

¹⁸⁰ Which probably boasts the most elaborate collection of conflict of laws rules dealing with same-sex relationships. Such a sophisticated system may prove impossible to achieve in countries where same-sex relationships are only reluctantly accepted.

¹⁸¹ See the observations by PEROZ, (n. 51) at p. 407, No 28.

¹⁸² As noted by BUCHER, (n. 55), at p.187, § 521.

¹⁸³ In Belgium, the circular letter issued by the Minister of Justice in May 2007 has given rise to one difficulty in relation to the Dutch same-sex partnership. According to the circular letter, a registered partnership should be recognised as marriage in Belgium if it sufficiently approximates marriage. Such equivalence is, however, denied for the Dutch same-sex partnership, as Dutch same-sex partners may also opt for marriage. The result is that two same-sex spouses married in the Netherlands, will be subject to the rule drafted for partnership and not to the conflict-of-laws rules covering marriage. As a consequence, when one inquires which law applies to the effects of such relationship, application will be made of Dutch law and not of Belgian law as would be the case for other marriages (under Art. 48 of the Code).

¹⁸⁴ See also difficulty in France where the recently adopted rule (Art. 515–7–1) does not define the partnerships covered. Hence a question has arisen as to whether the rule may be applied

If one focuses on partnerships, the next question is whether to stay true to the application of the law of the country of origin, i.e. the *lex loci registrationis*, which is the current standard. Certainly, in the early days of same-sex partnerships, this solution seemed the only one acceptable given the limited number of countries where such relationship was recognised.¹⁸⁵ The rapid spread of this form of relationship has, however, greatly reduced the problem. It is therefore useful to enquire whether application of the rules crafted for different-sex marriages is warranted. Given the evolution of substantive law in many countries, it is certainly more realistic today to expect an alignment, albeit limited, on conflict of laws rules crafted for different-sex relationships. One may for example wonder whether it is necessary to have specific rules limiting access to same-sex marriages or partnerships, different from those in force for classic marriage. The threat of marriage or registration tourism, if it ever was convincing, has lost much of its credibility in view of the wider acceptance of same-sex relationships in a greater number of countries. Hence, rules limiting access specifically for partnerships could be disposed of. Similarly, when looking at termination of same-sex relations, it may probably be acceptable today to modify the safety provisions adopted when very few countries gave legal effects to same-sex relationships, and which provided an unconditional forum for dissolution to all those couples who had registered their partnerships in the forum.¹⁸⁶ As has been noted, the fact that more and more countries have introduced a form of registered partnership means that one could limit the application of this safety forum to those partners who have shown that they are unable to dissolve their relationships outside the forum.¹⁸⁷

Is it realistic to expect a further alignment on rules crafted for ‘classic’ marriages, both as far as jurisdiction and applicable law are concerned? This would satisfy those commentators who have never warmed up to the widespread application of the *lex loci registrationis* – which has been called “militant”.¹⁸⁸ Although the Swiss example shows that a country which has resisted opening marriage to same-sex partners, has nonetheless adopted conflict-of-laws rules drawing in

to same-sex marriages. Peroz raises the question without giving an answer: PEROZ, (n. 51), at p. 402, No 11.

¹⁸⁵ This is in fact the main argument used by Devers to justify application of the *lex loci registrationis*, see DEVERS, (n. 3), at pp. 201–206, §§ 319–329.

¹⁸⁶ As it is the case in the Netherlands. See Art. 4(4) of the Dutch Code of Civil Procedure, which provides that “*Met betrekking tot het geregistreerd partnerschap zijn het eerste tot en met het derde lid van overeenkomstige toepassing, met dien verstande dat de Nederlandse rechter steeds rechtsmacht heeft indien het geregistreerd partnerschap in Nederland is aangegaan*”.

¹⁸⁷ The residuary forum would be downgraded to a ‘*forum necessitatis*’, as has been suggested by CURRY-SUMNER, Private International Law Aspects of Homosexual Couples: the Netherlands Report, *E.J.C.L.* vol. 11.1 (2007) at p. 17.

¹⁸⁸ See e.g. GOLDSTEIN, (n. 3), at p. 266: “*Ce rattachement exorbitant découle donc franchement d’une politique orientée et militante*”.

large part from those applicable to marriage,¹⁸⁹ it is probably illusory to think that States will adopt conflict rules which are identical or even broadly similar to conflict rules used for 'traditional' marriages.¹⁹⁰

A move towards rules more in line with those applicable for different-sex relationships would indeed face both technical and political obstacles. On the technical side, experience has shown that these rules would not be viable without additional nuances and exceptions. When dealing with access to partnership, one would need to introduce nuance to the strict application of the national law of the partners (or the law of the domicile) for fear of limiting too fiercely access to partnership. Likewise, the rule dealing with the consequences of a same-sex partnership would need to include a mechanism to deal with the case of where the applicable law does not recognise partnership.

Contemporary private international law provides tried and tested mechanisms which offer solutions for these problems. The issue of the 'unworkable' primary rule which could affect the rule dealing with the consequences of a same-sex partnership could easily be solved by adopting a sophisticated rule based on the so-called '*Kegel'sche Leiter*'. One could contemplate a provision using as primary connecting factor the law of the habitual residence of the partners and the law of the common nationality as a subsidiary connecting factor. The law of the state of registration could be applied if both the law of the common residence and of the common nationality prove unsatisfactory because they do not make any allowance for same-sex partnership.¹⁹¹ This could at least in part obviate the need for the technique of 'adaptation', which requires to examine whether there exists an 'equivalent' institution in the law declared applicable.

If the adoption of these nuances to the conflict-of-laws rules seems too complex, one could also contemplate a mixed system, whereby access to the partnership would remain subject to the *lex loci registrationis*, while the consequences would be subject to a complex rule including fall back provisions dealing with cases where the law declared applicable does not know the partnership or marriage.

While technical solutions are available to deal with the difficulties which would arise if States were to decide to abandon the *lex loci registrationis*,¹⁹² such a move

¹⁸⁹ See the Art. 65a to d of the Swiss Private International Law Act of 1987, as amended.

¹⁹⁰ Some commentators have advocated such a move, see e.g. DE GROOT, (n. 151), at p. 16.

¹⁹¹ In the words of Jessurun d'Oliveira, the *lex loci registrationis* would be used "*comme voiture-balai*": JESSURUN D'OLIVEIRA, (n. 36), at p. 95.

¹⁹² An additional technique worth considering is the mechanism of renvoi: this is particularly relevant since the conflict of laws rules adopted by States vary widely. Renvoi would help promote decisional harmony. Indeed, the application of the *lex loci registrationis* principle as a recognition rule does not necessarily allow a smooth recognition. The reference to the law of the country of origin may indeed, as is the case in Belgium or France, be understood as a

remains difficult to contemplate for another reason: bringing same-sex relationships closer to different-sex relationships would ‘promote’ same-sex partnerships to quasi-equivalent of marriage. The alternative to the *lex loci registrationis* would indeed bring the conflict of laws treatment of same-sex relationships much more in line with the rules applicable to other forms of family relationships and, primarily, marriage. The *lex loci registrationis* system on the other hand offers the advantage of keeping same-sex partnerships at a larger distance from different-sex relationships.

That a further alignment on rules crafted for ‘classic’ marriages, both as far as jurisdiction and applicable law are concerned, appears, at this stage, out of reach, is evidenced by the fact that the question whether a marriage should be considered a marriage for private international law purposes when the two spouses are of the same-sex is still highly debated in some countries.¹⁹³ It is true that it does not seem coherent to accept in general that concepts of private international law must be interpreted broadly and in particular that the category of marriage also includes foreign marriages different from the local ones – e.g. marriages celebrated before a religious authority or polygamous marriage – and to deny at the same time that a same-sex marriage should be seen as a marriage. However, practice has shown a strong resistance to this type of argument. Identical treatment of same-sex and different-sex relationships for private international law purposes is therefore far away. One should therefore not be surprised that the comparative overview reveals that most countries have kept their first generation rules, at least for partnerships, with their insistence on application of *lex loci registrationis*.¹⁹⁴

All in all, there is certainly room for evolution of the legal framework applicable to same-sex relationships. While the impetus for such an evolution will probably

mere reference to the substantive provisions of the law of origin, without any possibility to take into account the conflict of laws provisions (in France, Art. 515–7–1 refers to the “*dispositions matérielles*” of the law of the country where the relationship was registered). This could possibly lead to a quirk in the recognition process. Take the example of two partners, one of whom possesses the Belgian nationality, who have registered their partnership in Switzerland. According to Art. 65c-2 of the Swiss Act, these partners have elected to submit their partnership to Belgian law. Once the partners move to Belgium, their partnership will be deemed to be governed by Swiss law, even though they had made a clear choice for Belgian law. This problem is avoided in the Netherlands, which has made a clear choice to allow renvoi, see in particular Art. 5(2) (for the personal relationships) and Art. 7(2) (for the assets) *Wet Conflictenrecht Geregistreerd Partnerschap*.

¹⁹³ Such as France – compare e.g. Fulchiron (who denies the existence of equivalence – FULCHIRON, (n. 26), at p.1254) and CALLÉ, (n. 31), at p. 1663, who argues that same-sex marriages should be treated as such. Callé rightly notes that this would not entail recognition of all foreign marriages or of all effects arising out of such marriages.

¹⁹⁴ This has somewhat reduced the recognition problem. As noted, if all States applied the *lex loci registrationis*, this would allow a much smoother recognition (see WEISS-GOUT/NIBOYET-HOEGY, (n. 27), at p. 13).

be given by a greater convergence of the substantive law framework,¹⁹⁵ States should resist as far as possible the temptation to model their conflict-of-laws rules too closely on their substantive law and the policy underlying it. The controversy which continues to surround the application of Art. 17b EGBGB to different-sex partnerships illustrates the perils of linking too closely conflict of law rules to substantive law provisions.¹⁹⁶

¹⁹⁵ This may occur quite naturally. When France modified the legal regime for its partnership in 2006 and moved (albeit slightly) in the direction of making it stronger, this already solved a number of problems: by making its PAC's more 'institutional', it was made clear that France would be less tempted to use its public policy exception to avoid recognising foreign partnerships which go further. See in this sense KESSLER, *Reconnaissance des partenariats étrangers: les enseignements de la loi du 23 juin 2006*, *AJ Famille*, 2007/1, 23, at p. 24–25.

¹⁹⁶ It has been argued that Art. 17b of the EGBGB only considers partnerships which are similar to the one introduced under German law. As a consequence, registered partnerships between two persons of different sex would not be subject to the special rule introduced in Art. 17b (see to that effect, MARTINY, in this book at § 2.4. This view has, however, been challenged. See e.g. R. WAGNER, *Das neue Internationale Privat- und Verfahrensrecht zur eingetragenen Lebenspartnerschaft*, *IPRax* 2001, 281 at p. 292 arguing that Art. 17b should be applied to different-sex partnerships. Compare with THORN, (n. 140), at pp. 160–161 who argues that it may be possible to apply Art. 17b “by analogy” to different-sex partnerships. Some doubts have even been expressed concerning the possibility to apply Art. 17b to same-sex partnerships whose legal consequences do not go as far as the comparable German institution because they do not create a personal, family law commitment between the partners. Compare with the view accepted in Swiss law, where Art. 65a ff are deemed to be applicable to different-sex partnerships, BUCHER, (n. 55) at p.186, § 517 and p. 190, § 533.

PRIVATE INTERNATIONAL LAW ASPECTS OF SAME-SEX COUPLES UNDER GERMAN LAW

Dieter MARTINY

1. GERMAN NATIONAL LAW

1.1. REGISTERED LIFE PARTNERSHIP

1.1.1. *Purpose of Legislation*

There is no same-sex marriage in Germany. It is merely possible to enter into a registered partnership. The legal basis for registered homosexual unions is the Act on Life Partnerships of 16 February 2001 as amended.¹ After unsuccessful attempts by several gay and lesbian groups to enter into marriages under existing law, the Federal Constitutional Court declared that the legislator was nevertheless free to make legislative provision in this regard.² The intention of the legislator was to abolish discrimination of same-sex relationships for which marriage as an alternative was not available – that right being reserved for heterosexuals. This was also in line with developments in European and Community law which does not allow discrimination based on “sexual orientation” (now Art. 19 TFEU, former Art. 13 EC Treaty).³ The German registration model closely followed the pattern of the Nordic partnership laws.⁴ Therefore it was clear from the outset that a registration in Germany would find recognition in those countries, whereas recognition in some other legal systems could be difficult or be denied. However,

¹ Act on Life Partnerships introduced by Art. 3 § 25 of the Act to end discrimination of same-sex unions (“Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften”) of 16 February 2001, Official Gazette (BGBl.) 2001 I p. 266 (English translation in BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 256 ff).

² Federal Constitutional Court (Bundesverfassungsgericht) 4 October 1993, NJW 1993, 3058. Cf. RÖTHEL, *Eingetragene Lebenspartnerschaft*, in: HAUSMANN/HOHLOCH (eds.) *Das Recht der nichtehelichen Lebensgemeinschaft – Handbuch*, 2nd ed., 2004, pp. 137, 147 ff.

³ See WITZLEB, *The German ‘Registered Life Partnership’ – A Marriage That Dares Not Speak Its Name?*, *Austr. J. Fam. L.* 16 (2002) 227 ff.

⁴ WITZLEB, *Austr. J. Fam. L.* 16 (2002) 227, 233.

since there was a constitutional challenge to the Act, the legislator reserved marriage to partners of the opposite sex and avoided endowing partnership with the same content as marriage.⁵ This attitude also influenced the provisions on the applicable law. Later, the Federal Constitutional Court upheld the Act on Life Partnerships,⁶ and after a reform,⁷ the civil law provisions on registered partnerships are in most respects nearly identical to marriage.⁸

1.1.2. Formalities and Conditions of Validity for the Formation of a Life Partnership

Two persons of the same sex conclude a life partnership by making, in each other's presence, reciprocal declarations that they want to enter into such a partnership (life partners). These declarations may not be subject to any condition, whether as to time or otherwise. The declarations become valid if they are given at a competent office, which is generally the registration office (§1 Life Partnership Act). In Bavaria a notary is authorised. A life partnership cannot be validly established with a minor or a married person or a person who already is party to a life partnership with another person. It is also not possible between persons who are directly related nor between full or half siblings (§1 para. 3 Life Partnership Act).

The legislator wanted to create the possibility to legally formalise a homosexual union and to give all same-sex couples access to the legal consequences of a life partnership independent of their nationality, their domicile or their habitual residence.⁹ The risk that the home State or the State of residence will not recognise a life partnership (and create a so-called "limping" legal relationship) was accepted.¹⁰ Therefore, there is no special requirement as to nationality or habitual residence of the parties; foreign nationals with a habitual residence abroad may register in Germany. It has been argued that registering a partnership in Germany exclusively for the sake of obtaining such status (and without further

⁵ See for the guarantee of marriage and family (Art. 6 Basic Law ["Grundgesetz"]) WITZLEB, *Austr. J. Fam. L.* 16 (2002) 227, 239 ff.

⁶ Federal Constitutional Court 22 July 2002, *NJW* 2002, 2543, 2548 = *FamRZ* 2002, 1169, 1172 – 1173.

⁷ Laws of 15 December 2004, Official Gazette 2004 I p. 3396 and 6 February 2005, Official Gazette 2005 I p. 203.

⁸ However, there are still problems in social security law, see ECJ 10 May 2011 – Römer, C-147/08 – *EuZW* 2011, 432; see GRAUPNER, in this book at pp. 279–282; Federal Constitutional Court 7 July 2009, *NJW* 2010, 1439 = *FamRZ* 2009, 1977. Cf. also MOSCHEL, *Life Partnerships in Germany: Separate and Unequal?*, 16 (2009–10) *Colum. J. Eur. L.* 37 ff.

⁹ Motivation of the bill, Parliamentary Paper of the Lower House (Bundestags-Drucksache) 14/3751 p. 60. Cf. also HENRICH, *Internationales Familienrecht*, 2nd ed., 2000, pp. 52 f.

¹⁰ FRANK, Die eingetragene Lebenspartnerschaft unter Beteiligung von Ausländern, *MittBayNot* 2001 (Sonderheft Lebenspartnerschaften) 35, 37; Süß, Notarieller Gestaltungsbedarf bei Eingetragenen Lebensgemeinschaften mit Ausländern, *DNotZ* 2001, 168, 169. – Critical THORN, The German Conflict of Law Rules on Registered Partnerships, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 159, 167–168.

connection to the country) approaches fraud by law. However, since the legislator did not intend a restriction or a precondition of a connection to Germany, even travelling with the purpose of registering is not illegal and *fraude à la loi* cannot be invoked successfully.

A certificate similar to the no-impediment to marriage certificate (“Ehefähigkeitszeugnis”, cf. §1309 Civil Code) is not required, because it would often not be available.¹¹ Proof need only be offered that no marriage or life partnership with another person exists, this being made by presentation of the respective documents or, if necessary, by a declaration in lieu of an oath.

1.1.3. Legal Consequences of Life Partnerships

The life partners can designate a common name (life partnership name) (§3 para. 1 Life Partnership Act). The life partners can choose, by way of declaration, the birth name of one of the life partners as their life partnership name. A life partner whose name does not become the life partnership name can, by way of declaration, add his or her birth name or the name which is being used at the time of the declaration to the life partnership name either as a prefix or as an addition (§3 para. 2 Life Partnership Act). A life partner retains his or her life partnership name even after the termination of the life partnership. However, he or she can, by way of declaration, take up his or her birth name again (§3 para. 3 Life Partnership Act).

There is a community for life within the partnership; the partners owe each other support and care (§2 Life Partnership Act). General effects comprise also the power to represent the other partner in affairs of everyday necessities (§8 Life Partnership Act, cf. §1357 Civil Code). A special rule concerns the degree of care owed in matters of tortious liability. According to §4 Life Partnership Act, the life partners owe each other only the degree of care which they habitually use in their own affairs in accomplishing the duties which arise from the life partnership (see for a similar rule §1359 Civil Code for marriage). The life partners are also under a mutual obligation of maintenance (§5 Life Partnership Act).

Since the reform of 2005 the general rules on matrimonial property law apply. The regime of “community of acquisitions” (“Zugewinnngemeinschaft”, i.e. separation of property with an equalisation of the surplus) which is the general marital property regime in German family law (§§1363 to 1390 Civil Code) also applies to life partnerships (§6 Life Partnership Act). Each of the life partners

¹¹ WAGNER, Das neue Internationale Privat- und Verfahrensrecht zur eingetragenen Lebenspartnerschaft, *IPRax* 2001, 281, 288 f.; VON HOFFMANN/THORN, *Internationales Privatrecht*, 9th ed., 2007, § 8 No. 73d.

administers his or her own property individually. However, as in matrimonial law there are limitations on the power of a partner to dispose of the totality of his or her property or over a very large portion of his or her property without the consent of his or her partner (cf. §§1365 to 1369 Civil Code). The general principle is that property which belongs to the partners at the beginning of the partnership or which is gained by them later does not become community property. However, the gains made by the partners during life partnership should be equally distributed between them. The distribution is, however, postponed until either the death of one of the two persons or termination. In the case of termination, the “acquisitions” (accrued gains) will be calculated and the surplus will be equally divided between the partners.

Another financial consequence is that it is presumed for the benefit of the creditors of one of the life partners that movable objects which are in the possession of one or both of the life partners belong to the debtor partner (§8 para. 1 Life Partnership Act; cf. §1362 Civil Code). The life partners can also make a declaration on their property regime and may choose another property regime such as separation of property (§6 Life Partnership Act). The life partners may regulate their financial dealings by way of a marital contract (life partnership contract). This contract has to be put in writing by a notary (§7 Life Partnership Act).

There are also effects on parental responsibility. If a parent who has sole parental responsibility is involved in a life partnership, the other life partner has, together with that parent, the right of co-decision in matters of the daily life of the child. §1629 Civil Code on this so-called “small custody right” is applicable accordingly (§9 para. 1 Life Partnership Act). In the case of imminent danger, the life partner is entitled to act alone and take all legal action necessary for the well-being of the child (§9 para. 2 Life Partnership Act). Whereas an adoption by married couples must be undertaken jointly, life partners do not (yet) enjoy the right to adopt children jointly as a general matter. One of the registered partners may nevertheless adopt the other partner’s child (stepchild adoption), (§9 para. 7 Life Partnership Act). A reform to give the right to an unrestricted joint adoption is, however, underway.

The consequences of a life partnership are not restricted to the partnership itself. A life partner is deemed to be a member of the family of his or her partner as long as no other statutory disposition is made (§11 para. 1 Life Partnership Act). The relatives of one of the partners are deemed to be related by partnership with the other life partner (§11 para. 2 Life Partnership Act).

There is no formal separation procedure. If the life partners are living separately, one partner may demand of the other such maintenance which is proper

according to the standard of living as well as the financial and professional situation during the life partnership (§12 para. 1 Life Partnership Act). The provisions of the Civil Code on maintenance are applicable *mutatis mutandi*. There can also be a division of household goods. Each of the partners can demand of the other that those household goods which belong to him are to be given back (§13 para. 1 Life Partnership Act). Household goods which belong to both life partners are to be distributed equitably. The family court may designate the home at separation (§14 Life Partnership Act).

1.1.4. Termination of the Life Partnership

On application of one or both of the life partners, the life partnership will be dissolved by way of a judgment (“Aufhebung” according to §15 para. 1 Life Partnership Act). The court shall terminate the life partnership if both life partners have declared that they do not want to continue with the life partnership and they have lived separately for one year. Termination is also possible if one partner has declared that he does not want to continue the life partnership and the partners have lived separately for three years. There is also a hardship clause.

If one of the life partners cannot maintain himself after the dissolution of the life partnership, he can demand that the other life partner grant him the amount of maintenance which appears proper in light of the standard of living during the life partnership, insofar and as long as salaried work cannot be expected of him due to illness or age (§16 para. 1 Life Partnership Act). The applicable rules are basically the same as in the case of divorce. There can be decisions by the family court on household goods and a common home (§17 Life Partnership Act). If upon the termination of the life partnership the partners cannot agree on who should live in the common home in the future or who should receive the household goods, the family court shall, on application, determine the legal situation according to equity. Since January 2005 a pension rights adjustment (“Versorgungsausgleich”, cf. §1587 Civil Code) can also be carried out (§20 Life Partnership Act).

1.1.5. Succession Rights

According to German law the surviving same-sex partner is a legal heir (§10 para. 1 Life Partnership Act). In the same way as a widow or widower he or she receives a quarter of the estate vis-à-vis relatives of the first order (children) and half of the estates vis-à-vis relatives of the second order (parents of the deceased and their children) and vis-à-vis grandparents (§10 para. 1 Life Partnership Act). The surviving person shall also receive a quarter of the estate as realisation of the

acquisition of gains regime; no further payment shall be made and it is immaterial whether there has been a gain at all. If no relatives of the first or second order and no grandparents survive, the life partner shall inherit the whole estate (§10 para. 2 Life Partnership Act).

There is also a rule on forced heirship. If the deceased has excluded the surviving partner from the inheritance by way of testamentary disposition, that life partner may demand half of the value of the legal inheritance from the heirs as a statutory portion (§10 para. 6 Life Partnership Act). The provisions of the Civil Code on statutory portions are applicable accordingly.

1.2. UNREGISTERED SAME-SEX PARTNERSHIP

Despite growing social acceptance of unmarried cohabitation, there are no statutory rules in family law dealing with non-marital cohabitation. During cohabitation and after the breakdown of the relationship, there is no statutory maintenance duty. The only exception is the care for a common child (§1615l Civil Code). Compensation for services cannot normally be claimed by a partner (“Lebensgefährte”) after cessation of cohabitation. There are no special rules dealing with property; the general rules of civil law apply. All property, real or personal, owned by one of the parties remains the personal property of this party. Property acquired by the parties with joint resources and funds shall be considered joint property only if there is an appropriate agreement. However, in the case of major transactions, such as the construction of a common family home, a compensation claim based on the statutory rules of partnership law (§§705 ff. Civil Code) or the rules on unjust enrichment (§812 para. 1 sent. 2 Civil Code) may be made.¹² This example shows that, despite a certain tendency to treat non-marital cohabitation and marriage legally alike, this is not the case in all respects. Success or failure of compensation claims depends on the special circumstances of each case. The dominant opinion applies these rules to same-sex couples as well.¹³

¹² See HAUSMANN, Vermögensrechtliche Ausgleichsansprüche nach Auflösung der Lebensgemeinschaft, in: HAUSMANN/HOHLOCH (supra n. 2), pp. 225, 259 ff.

¹³ See MARTINY, Rechtsprobleme der nichtehelichen Lebensgemeinschaft während ihres Bestehens nach deutschem Recht, in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, 2005, 79, 82 f.; PALANDT(-SPRAU), *Bürgerliches Gesetzbuch*, 70th ed., 2011, § 705 BGB No. 46.

2. NON-MARITAL COHABITATION, REGISTERED PARTNERSHIPS AND SAME-SEX MARRIAGES IN THE CONFLICT OF LAWS

2.1. NON-MARITAL COHABITATION OF PERSONS OF THE OPPOSITE SEX

Due to the different forms of non-marital cohabitation in Germany and abroad, it is also necessary to decide for the purposes of private international law which rules have to be applied. The only undisputed points are that Art. 13 ff. Introductory Law to the Civil Code (“Einführungsgesetz zum Bürgerlichen Gesetzbuch”; Introductory Law¹⁴) apply for a marriage of persons of the opposite sex and that Art. 17b Introductory Law is applicable for registered same-sex life partnerships.¹⁵ For the other living forms, the characterisation can be doubtful. Because a separate German statutory provision is lacking, for cases of non-marital cohabitation of men and women the question arises which rules to apply. The provisions for contractual obligations (Art. 3 ff. Rome I Regulation¹⁶), provisions on unjust enrichment (Art. 10 Rome II Regulation¹⁷ or Art. 38 Introductory Law), conflict of laws rules for companies and the provisions for international family relationships (Art. 13 ff. Introductory Law) must particularly be taken into consideration.¹⁸ The starting point in private international law cannot be left to the applicable law for the issue (the *lex causae*); it has instead to be determined from the point of view of the law of the forum (the *lex fori*). A pure characterisation as a contractual relationship – as some authors still believe – reduces the non-marital relationship to its patrimonial aspects and ignores the personal relationship. This view excludes not only a direct application, but also an application by analogy of international family law. According to this opinion, only a characterisation as contractual is appropriate.¹⁹ However, according to the principle of the closest connection, the common nationality or the common habitual residence of the parties can also be taken into account (cf. Art. 4 para. 3 Rome I Regulation).

¹⁴ English Translation by the Federal Ministry of Justice under www.gesetze-im-internet.de/englisch_bgbeg/index.html.

¹⁵ Cf. HOHLOCH/KJELLAND, The New German Conflicts Rules for Registered Partnerships, *Yb. P.I.L.* 3 (2001) 223 ff.

¹⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ EU 2008 L 177/6.

¹⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ EU 2007 L 199/40.

¹⁸ Undecided under German law, Appellate Court (Oberlandesgericht; OLG) Zweibrücken 28 May 1993, *FamRZ* 1994, 982 = *NJW-RR* 1993, 1478.

¹⁹ PALANDT(-THORN) Art. 13 EGBGB No. 3, Art. 17 EGBGB No. 14, Art. 17b EGBGB No. 12. Cf. also SIEHR, *Internationales Privatrecht*, 2001, pp. 78 ff.

Contrary to this approach a characterisation as a family law relationship opens the path to the personal law of the partners or their habitual residence and – lacking an express provision – also to an application, *mutatis mutandi*, of several conflict of laws rules of international family law.²⁰ It remains doubtful, however, how the reference in detail should be defined and for which norms, if necessary, an analogy may be made. The family law characterisation is nevertheless given priority.²¹ Despite the fact that German internal law (still) classifies the effects of non-marital partnerships as contractual to a large extent,²² it is accepted that a characterisation in private international law is not necessarily restricted by the concepts of a country's own internal substantive law.²³ The conflict of laws rules provide appropriate solutions particularly for different foreign institutions. Insofar as the foreign law allows for claims, it often transgresses the limits of pure patrimonial compensatory claims and respective arrangements. The personal ties of two persons show that there is a similarity to marriage which is an argument for assimilation with this form of cohabitation; non-marital cohabitation is often a transitory stage, but it is also an alternative to marriage. In addition, the European Regulations on contractual and non-contractual obligations specifically exclude family relationships from their scope.²⁴

2.2. SAME-SEX REGISTERED PARTNERSHIPS

The conflict of laws rule in Art. 17b Introductory Law, which primarily refers to the law of the place of registration, applies to same-sex partnerships, i.e. unions

²⁰ See e.g. HAUSMANN, *Überlegungen zum Kollisionsrecht registrierter Partnerschaften*, *Festschrift Henrich*, 2000, pp. 241, 248–249; BUSCHBAUM, *Kollisionsrecht der Partnerschaften außerhalb der traditionellen Ehe*, *RNotZ* 2010, 73, 151 f.; ANDRAE, *Internationales Familienrecht*, 2nd ed., 2006, No. 812; KEGEL/SCHURIG, *Internationales Privatrecht*, 9th ed., 2004, p. 796; COESTER, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. X, 5th ed., 2009, Art. 17b EGBGB No. 153, 154; MANKOWSKI, in: STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Art. 13 – 17b EGBGB, 2011, Anh. zu Art. 13 EGBGB No. 61.

²¹ In the same sense e.g. HAUSMANN, *Festschrift Henrich* p. 248 f.; WAGNER, *IPRax* 2001, 284 f.; JAKOB, *Die Eingetragene Lebenspartnerschaft im Internationalen Privatrecht*, 2002, 172 f.; KEGEL/SCHURIG (supra n. 20) p. 796; HEIDERHOFF, in: BAMBERGER/ROTH (eds.), *Kommentar zum Bürgerlichen Gesetzbuch*, III, 2nd ed., 2008, Art. 17b EGBGB No. 15; GEBAUER, in: DAUNER-LIEB/HEIDEL/RING (eds.), *Anwaltkommentar BGB*, I, 2005, Art. 17b EGBGB No. 812; VON HOFFMANN/THORN § 8 No. 18; MünchKomm(-SONNENBERGER) Einl. IPR No. 529; MünchKomm(-COESTER) Art. 17b EGBGB No. 153; STAUDINGER(-MANKOWSKI) Anh. zu Art. 13 EGBGB No. 61–65.

²² See only HAUSMANN, *Nichteheliche Lebensgemeinschaft und Vermögensausgleich*, 1989, pp. 123 ff. and passim.

²³ In the same sense HOHLOCH, *Nichteheliche Lebensgemeinschaft*, in: HAUSMANN/HOHLOCH (supra n. 2), pp. 59, 74 ff.

²⁴ However, Recital 8 of the Rome I Regulation provides that the reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised. The same is true for Recital 10 of the Rome II Regulation.

between two women or two men. A relationship is to be regarded as a registered life partnership if, pursuant to a registration carrying a lesser legal status than marriage, a personal, family law commitment between two persons of the same sex is created.²⁵ The registered life partnership in German law particularly corresponds to the partnership in the Nordic legal orders, i.e. the Danish, Norwegian and Swedish laws. A similar registered partnership for persons of the same sex also exists in the Netherlands (Art. 1:80a to 80e Civil Code). According to Belgian law “statutory cohabitation” (“cohabitation légale”) is not restricted to homosexual couples (cf. Art. 1475 to 1479 C.civ.).

The French “civil solidarity pact” (“pacte civil de solidarité”, PACS, Art. 515–1 Civil Code) has, as does the Belgian “statutory cohabitation”, less significant effects than a life partnership under German law. Particularly in matrimonial property law and succession law, effects are lacking. Therefore, it would be imaginable to classify it only as a contract in the sense of the law of obligations and not as a life partnership in the sense of Art. 17b Introductory Law.²⁶ Some argue, however, that the minimal number of legal effects does not justify an exclusion of Art. 17b Introductory Law because a minimum of ties in family law is still given.²⁷

2.3. SAME-SEX MARRIAGES

Some foreign legal systems allow persons of the same sex to establish a full marriage which has exactly the same effects as a marriage of heterosexual persons (cf. Art. 143 ff. Belgian Civil Code, Art. 1:30 Dutch Civil Code, Art. 1577 Portuguese Civil Code, Art. 44 Spanish Código Civil). The legal effects of such a relationship go beyond the effects of a life partnership under German law. For the characterisation of such a union several alternatives exist. One could categorise them as marriages according to German private international law (Art. 13 Introductory Law).²⁸ However, a pre-condition to this approach would be a different functional notion of marriage in private international law than in German internal law, dropping the requirement of heterosexuality. As a consequence the personal laws of the partners would decide on the entering into a

²⁵ Cf. WAGNER, *IPRax* 2001, 288; JAKOB (supra n. 21) pp. 190–192.

²⁶ Cf. SÜSS, *DNotZ* 2001, 170 fn. 9. – Cf. also WAUTELET, in this book at pp. 151 f., 169.

²⁷ MünchKomm(-COESTER) Art. 17b EGBGB No. 12.

²⁸ RÖTHEL, *Registrierte Partnerschaften im internationalen Privatrecht*, *IPRax* 2000, 74, 76; GEBAUER/STAUDINGER, *Registrierte Lebenspartnerschaften und die Kappungsregel des Art. 17b Abs. 4 EGBGB*, *IPRax* 2002, 275, 277; THORN, in: BOELE-WOELKI/FUCHS p. 161; JAKOB (supra n. 21) p. 285; SPERNAT, *Die gleichgeschlechtliche Ehe im Internationalen Privatrecht*, 2011, pp. 49 ff.; AnwaltKommentar(-GEBAUER) Art. 17b EGBGB No. 18 f. – Contra HAUSMANN, *Festschrift Henrich* p. 251; ANDRAE (supra n. 20), No. 825. Cf. also WAUTELET, in this book at pp. 149 ff.

marriage. Against exceeding effects of the applicable foreign law one could, if necessary, take resort to German public policy (Art. 6 Introductory Law).²⁹ A celebration of such a “real” marriage of German partners would fail because his or her personal law does not allow it. The better approach seems to be that such a relationship cannot be regarded as a marriage from the very beginning because the required difference of sexes is lacking. However, if a foreign same-sex marriage cannot be recognised as a marriage in the sense of German private international law, one has to ask if it then could be recognised at least as a life partnership in the sense of German law. From the point of view of the existing German law, it is not a same-sex relationship as such, but only the exceeding effect which is offensive. It would be inconsistent if a foreign life partnership in Germany were recognised, whereas an exceeding relationship would find no recognition at all. This is an argument for the recognition of the same-sex marriage at least as a life partnership in the sense of Art. 17b Introductory Law.³⁰

The “downgrading”-approach of German private international law leads inevitably to some inconsistencies which should, however, be accepted in the interest of the parties, legal certainty and the facilitation of judicial cooperation. Therefore, despite the non-existence of the institution of same-sex marriage under German law, a registration of such a marriage concluded abroad in the German civil registries should be possible at least in the form of a registered life partnership.³¹ A similar problem arises with the termination of such a marriage under foreign law, e.g. Dutch law. According to the applicable Dutch law, a divorce can be declared (Art. 1:151 Dutch Civil Code).³² However, it is also argued (unconvincingly) that one has to be consequent also in the application of substantive law, so that only a “dissolution” of the partnership can be ordered.³³

²⁹ Sceptical GEBAUER/STAUDINGER, *IPRax* 2002, 277. – According to SPERNAT (supra n. 28), pp. 118 ff. a non-recognition of a same-sex marriage of EU-citizens would be an infringement of Art. 21 (ex. Art. 18 TEC) Treaty on the Functioning of the European Union.

³⁰ In this sense also Appellate Court Zweibrücken 21 March 2011, *StAZ* 2011, 189, 190; HENRICH, Kollisionsrechtliche Fragen der eingetragenen Lebenspartnerschaft, *FamRZ* 2002, 137, 138; VON SACHSEN GESSAPHE, Le partenariat enregistré en droit international privé allemand in: INSTITUT SUISSE DE DROIT COMPARÉ (ed.), *Aspects de droit international privé des partenariats enregistrés en Europe*, 2004, p. 9, 19–20; ANDRAE, Personenstandsrechtliche Behandlung einer gleichgeschlechtlichen Eheschließung, *StAZ* 2011, 97, 102 f.; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 12; MünchKomm(-COESTER) Art. 17b EGBGB No. 146; MünchKomm(-SIEHR) Art. 14 EGBGB No. 143; STAUDINGER(-MANKOWSKI) Art. 17b EGBGB No. 22. Similarly (analogy to Art. 17b Abs. 4 Introductory Law); WASMUTH, Eheschließung unter Gleichgeschlechtlichen in den Niederlanden und deutscher ordre public, *Liber amicorum Gerhard Kegel*, 2002, pp. 237, 242 ff. Cf. also WAUTELET, in this book at pp. 165 f.

³¹ Appellate Court Zweibrücken 21 March 2011, *StAZ* 2011, 189; ANDRAE, *StAZ* 2011, 97, 102 f.

³² Local court Münster 20 January 2010, *StAZ* 2011, 211; ANDRAE, *StAZ* 2011, 97, 103.

³³ MANKOWSKI/HÖFFMANN, Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?, *IPRax* 2011, 247, 252 f.

2.4. HETEROSEXUAL REGISTERED PARTNERSHIPS

Whether heterosexual registered partnerships should also be covered by Art. 17b Introductory Law does not appear from the wording of the provision and is disputed. Some argue that Art. 17b Introductory Law presupposes, according to the definition of §1 para. 1 sent. 1 Life Partnership Act, that the partners belong to the same sex and is therefore not applicable.³⁴ According to another view, Art. 17b Introductory Law does not mention gender and therefore also registered heterosexual life partnerships are covered.³⁵ Presupposed is only that such a union fulfils a comparable function as the German life partnership.³⁶ Insofar as a direct applicability of the provision is denied, an analogous application could be discussed.³⁷

However, one must doubt that there can be an application of Art. 17b Introductory Law for heterosexual couples as well since German law does not provide for a registered heterosexual partnership. Therefore, it becomes difficult to give effect to the legislative intention of Art. 17b Introductory Law to, on the one hand, make registration possible, but, on the other, to restrict the effects to the degree of German law. Inconsistencies are also threatening in respect to the “capping limit” (see 3.3.2.). The proposal to restrict the legal effects of heterosexual life partnerships in accord with those of homosexual life partnerships (Art. 17b para. 4 Introductory Law)³⁸ seems to be artificial and, properly speaking, unfounded.³⁹ Though German internal law does not contain any provision for registered heterosexual partnerships, it would be inconsistent to dismiss any domestic effects to the registered foreign life partnership. Furthermore, a direct application or analogy without this capping effect⁴⁰ is not convincing. In the future an analogy to Art. 13 ff. Introductory Law, which to a large extent leads to a correspondence with marriage, is preferable.⁴¹

³⁴ FRANK, *MittBayNot* 2001 SH 36; JAKOB (supra n. 21) pp. 215, 287. – Cf. also WAUTELET, in this book at p. 177.

³⁵ BUSCHBAUM, *RNotZ* 2010, 73, 83; VON HOFFMANN/THORN §8 No. 73b; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 14; *Anwaltkomm(mentar)(-GEBAUER)* Art. 17b EGBGB No. 8 ff.

³⁶ VON HOFFMANN/THORN §8 No. 73b.

³⁷ WAGNER, *IPRax* 2001, 292; BUSCHBAUM, *RNotZ* 2010, 73, 87; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 14; *MünchKomm(-COESTER)* Art. 17b EGBGB No. 132. Contra because of lacking gap JAKOB (supra n. 21) p. 215–216.

³⁸ VON HOFFMANN/THORN §8 No. 73j.

³⁹ See also JAKOB (supra n. 21) pp. 216–217.

⁴⁰ Cf. WAGNER, *IPRax* 2001, 292.

⁴¹ JAKOB (supra n. 21) p. 216, 287; PALANDT(-THORN) Art. 17b EGBGB No. 11.

2.5. UNREGISTERED SAME-SEX PARTNERSHIPS

According to its wording, Art. 17b Introductory Law, which for the determination of the applicable law expressly relates to the registration of the partnership, applies only to registered partnerships.⁴² A separate statutory provision for unregistered same-sex life partnerships is lacking. Before the reform it was argued that the determination of the applicable law should be made in the same way as for heterosexual life partnerships. Only a minority of authors proposed an approach solely according to contractual obligations. After the reform a determination of the applicable law according to the principles of international family law should be possible also for unregistered same-sex life partnerships.⁴³

Several solutions seem to be possible. First, one could analogously apply Art. 17b Introductory Law, which would, however, not make much sense. Without registration the basic rule of a reference to the place of registration cannot be met.⁴⁴ The (lacking) connection with the Life Partnership Act also speaks against such an analogy. Therefore it must be supposed that the provision cannot be applied, *mutatis mutandi*, to unregistered partnerships.⁴⁵ Consequently another determination of the applicable law is necessary. It seems to be useful to basically treat same-sex life partnerships according to the same rules as heterosexual partnerships.⁴⁶ Such cohabitation raises basically the same – or at least similar – legal problems as heterosexual cohabitation. The appropriate connection is, however, disputed.

In particular, the habitual residence of the partners can be taken into consideration. Since the legislator has now decreed that the law will only be determined according to the principle of the place of registration (Art. 17b para. 1 Introductory Law) for the more binding form of a registered life partnership, one could suppose that a determination of the applicable law by analogy to Art. 13 ff. Introductory Law, i.e. a primary determination of the applicable law according to the nationality of the parties, would be inconsistent. In this way, the less intensive relationship would be granted more legal effects.

⁴² WAGNER, *IPRax* 2001, 292; JAKOB (supra n. 21) p. 215.

⁴³ Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 6; STAUDINGER(-MANKOWSKI) Art. 17b EGBGB No. 96.

⁴⁴ WAGNER, *IPRax* 2001, 292; JAKOB (supra n. 21) p. 215; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 15.

⁴⁵ WAGNER, *IPRax* 2001, 292; FRANK, *MittBayNot* 2001 SH 36; KEGEL/SCHURIG (supra n. 20) p. 889; PALANDT(-THORN) Art. 17b EGBGB No. 1; STAUDINGER(-MANKOWSKI) Art. 17b EGBGB No. 97.

⁴⁶ BUSCHBAUM, *RNotZ* 2010, 73, 149; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 15.– Similarly MünchKomm(-SONNENBERGER) Einl. IPR No. 517; SOERGEL(-SCHURIG), *Kommentar zum Bürgerlichen Gesetzbuch*, Vol. X, 12th ed., 1996, vor Art. 13 EGBGB No. 36.

This is one of the reasons why many authors advocate the application of the common habitual residence of the partners.⁴⁷

However, if one still accepts the application, *mutatis mutandi*, of Art. 13 ff. Introductory Law for heterosexual unregistered life partnerships, this argument loses force. A compelling reason for a graduated different determination of the applicable law is not discernible, so that Art. 13 ff. Introductory Law can still be applied analogously.⁴⁸ According to the respective internal law, only a minimum of legal effects result, so that tensions with German internal law are hardly to be expected. Moreover potential results which conflict with principles of the German legal order are rather a question of German public policy (Art. 6 Introductory Law).⁴⁹ Thus, the law can also be oriented toward the standard of Art. 17b para. 4 Introductory Law, which provides a limitation of effects.

3. CONFLICT OF LAWS AND REGISTERED SAME-SEX LIFE PARTNERSHIPS

3.1. INTRODUCTION

Together with the recognition of a registered life partnership for persons of the same sex, the legislator has created a new conflict of laws rule for the formation, the legal effects and the dissolution of such relationships. It is laid down in Art. 17b Introductory Law (originally Art. 17a Introductory Law) and mainly refers to the place of registration. A transitional provision is lacking. The consequences are disputed. In particular one could apply Art. 220 paras. 1, 2 Introductory Law *mutatis mutandi* and could regard the registration as a “completed transaction” (“abgeschlossener Vorgang”).⁵⁰ Some argue that the deliberate deviation from the principles of international family law and the purpose of the legislation are arguments against an analogous application of Art. 220 Introductory Law to registered partnerships.⁵¹ The provision of Art. 17b Introductory Law could therefore also be applied to partnerships

⁴⁷ For application of the common habitual residence HENRICH, *Anspüche bei Auflösung einer nichtehelichen Lebensgemeinschaft in Fällen mit Auslandsberührung*, in: *Die richtige Ordnung – Festschrift Kropholler*, 2008, pp. 305, 311 ff.; HOHLOCH, in: HAUSMANN/HOHLOCH (supra n. 2) pp. 74 ff.; MünchKomm(-COESTER) Art. 17b EGBGB No. 149 ff.; Anwaltkommentar(-GEBAUER) Anh. II zu Art. 13 EGBGB No. 195 ff. (for general effects and consequences of dissolution). – In the same sense in the result HAUSMANN, *Festschrift Henrich* pp. 250–251.

⁴⁸ WAGNER, *IPRax* 2001, 292; BUSCHBAUM, *RNotZ* 2010, 73, 156 ff.; MARTINY, *Internationales Privatrecht*, in: HAUSMANN/HOHLOCH (supra n. 2), p. 773, 835–836.

⁴⁹ WAGNER, *IPRax* 2001, 292.

⁵⁰ Cf. PALANDT(-THORN) Art. 17b EGBGB No. 1.

⁵¹ VON HOFFMANN/THORN § 8 No. 73d.

registered abroad before 1 August 2000.⁵² Other authors come to the same result, arguing that by application of Art. 17b Introductory Law former partnerships must be regarded as “cured” and therefore as valid.⁵³ Accordingly, the effects of such a life partnership are now governed by the new private international law.⁵⁴

3.2. CHARACTERISATION AND CONNECTION OF REGISTERED LIFE PARTNERSHIPS

3.2.1. *Basic Concept*

The statutory provision of Art. 17b Introductory Law is based on several basic ideas which exist in a certain state of tension.⁵⁵ First, the legislator settled upon solutions which are different than in the other fields of international family law. He has not equated partnership with marriage, but has introduced a separate conflict of laws rule which shall take the special situation of a same-sex life partnership into account. Therefore, in respect of the formation, some of the effects and the dissolution of the partnership, the conflict of laws rule refers not to the nationality or residence of the parties, but to the place of registration (Art. 17b para. 1 sent. 1 Introductory Law). Since there is no residency requirement for registration, registration in Germany is also open to foreign nationals whose personal law (still) does not provide for such a relationship.⁵⁶ The reference to the place of registration is, however, doubtful, because a close connection precisely to the law of this place will not always exist.⁵⁷ Existing German international family law refers essentially to the nationality, the habitual residence and the choice of law of the parties.

The approach for the legal effects of the life partnership is somewhat different from that of the formation. It refers partly to the law which is applicable for the respective single issue according to the general rules of international family law; this is the case for succession (Art. 17b para. 1 sent. 2 Introductory Law). However, several modifications are provided for. The minimum effects according to the law of the place of registration shall be recognised (Art. 17b para. 1 sent. 2 Introductory Law). This gives expression to the idea that the effects of a life partnership should be generally accessible. The legislator wanted to shy away from exceeding the legal effects of a marriage. Therefore, for a life partnership, a

⁵² BUSCHBAUM, *RNotZ* 2010, 73, 83 f.; VON HOFFMANN/THORN § 8 No. 73d; MünchKomm (-COESTER) Art. 17b EGBGB No. 11; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 37.

⁵³ JAKOB (supra n. 21) pp. 286–287.

⁵⁴ In the same sense for the general effects JAKOB (supra n. 21) p. 293.

⁵⁵ See JAKOB (supra n. 21) p. 186.

⁵⁶ In more detail WAGNER, *IPRax* 2001, 289.

⁵⁷ See JAKOB (supra n. 21) pp. 180 ff.

limitation of effects according to German law was introduced (Art. 17b para. 4 Introductory Law). In this manner the applicable law can be modified in a sometimes incomprehensible and nearly unlimited way. In view of the variety of foreign solutions, it would not seem very promising to force them into the bed of Procrustes represented by German law.⁵⁸

3.2.2. Characterisation

Art. 17b Introductory Law applies only to “registered life partnerships”. This is a term of German internal law. Though the characterisation has to start with the standards of the *lex fori*, i.e. of German law, it is not determinative how far a family law approach or an approach by using a contract law characterisation prevails in foreign private international law.⁵⁹ The concept used in German private international law has to be interpreted in the framework of a comparative law basis. What is meant are relationships of two persons, formally established and with legal effects, but to be distinguished from marriage.⁶⁰ A certain degree of different effects is inherent in Art. 17b Introductory Law, as in para. 1 sent. 2 and para. 4. It is necessary that the life partnership has been registered in a public register. This register can be a general register of civil status, but a registration in another register is also sufficient insofar as this is of importance for the status.

3.2.3. Connection

According to Art. 17b Introductory Law, the law of the place of registration applies exclusively. Therefore, the possibility of legally formalising a homosexual relationship does not depend on the national law of the parties. This also applies to foreign nationals. The legislator thought that the application of the personal law of foreigners, whose personal law does not allow a registration, would not have been very helpful and therefore wanted to treat all domestic and foreign life partnerships equally.⁶¹ The reference to the place of registration also avoids, to a large extent, an application of different foreign partnership statutes.⁶² Art. 17b para. 1 Introductory Law is a multilateral conflict of laws rule.⁶³ Therefore same-sex life partnerships according to foreign law are also covered. The legal consequences established under foreign law are in principle recognised *ex lege*.⁶⁴

⁵⁸ Critical also GEBAUER/STAUDINGER, *IPRax* 2002, 275 ff.; JAKOB (supra n. 21) p. 212 f.; MünchKomm(-COESTER) Art. 17b EGBGB No. 84 ff.

⁵⁹ Cf. JAKOB (supra n. 21) p. 19 ff.

⁶⁰ Cf. also MünchKomm(-COESTER) Art. 17b EGBGB No. 11.

⁶¹ WAGNER, *IPRax* 2001, 289; HENRICH, *FamRZ* 2002, 137.

⁶² HENRICH, *FamRZ* 2002, 137.

⁶³ Motivation BT-Drucks. 14/3751 p. 60; FRANK, *MittBayNot* 2001 SH 36; WAGNER, *IPRax* 2001, 288; VON HOFFMANN/THORN § 8 No. 73b.

⁶⁴ FRANK, *MittBayNot* 2001 SH 36.

A choice of law by the parties is not provided for; a nevertheless declared contractual choice of law is inadmissible and has no private international law effects. This gives the reference to the place of registration a certain rigidity, which, however, has some degree of flexibility on account of the possibility of multiple registrations.⁶⁵ Because of the reference to internal law, a renvoi (Art. 4 para. 1 Introductory Law) is excluded for Art. 17b para. 1 sent. 1 Introductory Law. Therefore, only the foreign internal law – not the foreign conflict of laws rules – are relevant.⁶⁶ Any different foreign connection and the possibility of an election of a certain law are not taken into account.⁶⁷ It is true that the applicable law is thus easier to determine, but in the individual case the harmony of results with the State of registration may be disturbed if this State, for its part, declares another law applicable.⁶⁸

3.2.4. *Registered Life Partnership as a Preliminary Question*

For claims in the context of registered life partnerships, the question often arises if a valid life partnership was formed. Therefore the problem of the reference of an preliminary question arises here as well. In respect to registered partnerships, an independent reference of preliminary questions is basically proposed⁶⁹; however, deviations from this connection have to be considered.

3.3. MINIMUM AND MAXIMUM EFFECTS OF LIFE PARTNERSHIP

3.3.1. *Minimum Effects According to German Law*

In general a registered partnership has effects according to the law of the place of registration. Therefore legal consequences established under foreign law will also be recognised. Under foreign law, however, a partnership sometimes has no effects on questions of family law and succession law. In issues which follow the general rules, it is therefore guaranteed that at least the effects according to German law occur (Art. 17 para. 1 sent. 2 Introductory Law). This modification does not mean, however, that the consequences always follow German law. The determination of applicable law which occurs according to the general rules will, as such, not be modified. This is particularly true as to the respect of renvoi

⁶⁵ Cf. FRANK, *MittBayNot* 2001 SH 38.

⁶⁶ FRANK, *MittBayNot* 2001 SH 37; WAGNER, *IPRax* 2001, 290; JAKOB (supra n. 21) pp. 292 f.

⁶⁷ FRANK, *MittBayNot* 2001 SH 38; HENRICH, *FamRZ* 2002, 137, 139 f.

⁶⁸ MünchKomm(-COESTER) Art. 17b EGBGB No. 14.

⁶⁹ In more detail JAKOB (supra n. 21) p. 247; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 22 ff.

(Art. 4 para. 1 Introductory Law)⁷⁰ and for the rule that a special conflict of laws rule for a particular category property has priority (“Einzelstatut bricht Gesamtstatut”; Art. 3a para. 2 Introductory Law).⁷¹ It is also not guaranteed that the same effects as under German law always occur. Rather, the provision of Art. 17 para. 1 sent. 2 Introductory Law only prevents a discrimination of same-sex partners.⁷² It does, therefore, not apply if the foreign law declines to grant the respective legal position in the same situation for a spouse as well. This is true not only in family law, but also in succession law.⁷³

3.3.2. *Limitation of Legal Effects*

If foreign law has to be applied, a limitation of effects occurs, if necessary. The effects of a registered life partnership abroad cannot go beyond what is provided according to the provisions of the Civil Code and the Life Partnership Act (Art. 17b para. 4 Introductory Law). Insofar the country of registration principle is limited.⁷⁴ This “capping limit” (“Kappungsgrenze”) has the consequence that from a German point of view no exceeding claims can exist.⁷⁵ However, since European Regulations and private international treaties have priority (Art. 3 Introductory Law), this provision will not affect the application of regulations, bilateral agreements and multilateral conventions.⁷⁶ Hence, insofar as the applicable law is determined by the general rules, the provision of Art. 3a para. 2 Introductory Law is not superseded.⁷⁷

Inconsistencies can result from the limited reference of Art. 17b para. 4 Introductory Law to “life partnerships registered abroad”. Also for life partnerships registered in Germany, foreign law may be applicable in matters enumerated in Art. 17b para. 1 sent. 2 Introductory Law. Consequently – according to the wording – only the general public policy clause (Art. 6 Introductory Law) but not the capping limit applies.⁷⁸ On the other hand, the systematic context of Art. 17b para. 4 Introductory Law often leads to the conclusion that it refers in principle to all effects of para. 1 sent. 1 and para. 1 sent. 2 half-sentence 2 (register maintaining State) or sent. 2 half-sentence 1

⁷⁰ Cf. PALANDT(-THORN) Art. 17b EGBGB No. 10.

⁷¹ SÜSS, *DNotZ* 2001, 175; FRANK, *MittBayNot* 2001 SH 43; GEBAUER/STAUDINGER, *IPRax* 2002, 279 f.

⁷² HENRICH, *FamRZ* 2002, 137, 144.

⁷³ HENRICH, *FamRZ* 2002, 137, 144.

⁷⁴ JAKOB (supra n. 21) pp. 178 ff. speaks therefore of a restricted country of registration principle. Cf. also WAUTELET, in this book at pp. 173 f.

⁷⁵ For a restriction to matrimonial property law, BUSCHBAUM, *RNotZ* 2010, 73, 85 ff.

⁷⁶ GEBAUER/STAUDINGER, *IPRax* 2002, 278 ff.

⁷⁷ MünchKomm(-COESTER) Art. 17b EGBGB No. 58.

⁷⁸ For criticism see WASMUTH, *Festschrift Kegel* pp. 275 ff.; GEBAUER/STAUDINGER, *IPRax* 2002, 281; MünchKomm(-COESTER) Art. 17b EGBGB No. 89ff.

(general provisions).⁷⁹ However, a considerable restriction of the scope of para. 4 results from the assumption that the capping limit is not directed against the exceeding effects as such, but only refers to the registering place law.⁸⁰ This implies, however, a narrow interpretation of the purpose of para. 4, this outcome being less due to a distrust of the reference to the place of registration than due to a fear of exceeding internal law.

A comparison has to be undertaken between foreign and German law. Effects exceeding the provisions of the Civil Code and the Life Partnership Act do not occur. This applies particularly to the general effects and the effects of a partnership in matrimonial property law.⁸¹ As a restriction of the scope of application is lacking, para. 4 also applies to the formation of a life partnership,⁸² the dissolution of a life partnership,⁸³ a pension rights adjustment, and the applicable law concerning succession and adoption.⁸⁴ As for the rest, it is doubtful what is meant by “effects” and to which fields of law the restriction relates in detail.⁸⁵ Which standard has to be applied is also doubtful.⁸⁶ One could regard the German provisions in their whole breadth as an absolute limit. Then any preferential treatment of the partner would fail. An interpretation that is more oriented to the purpose of the statute is also proposed, however. According to this view, the Life Partnership Act and Civil Code serve as a starting point, but the whole German law of same-sex life partnerships is the standard of comparison.⁸⁷ Therefore, not every favouring of the same-sex partner which exceeds German law is excluded.⁸⁸

In particular, effects are excluded which assimilate life partnership and marriage to a greater degree than German law does. Originally this restriction was considered in relation to the so-called “distance command” (“Abstandsgebot”), requiring that a certain distance be maintained from the institution of marriage, as seemingly required by constitutional law (cf. the protection of marriage and family in Art. 6 para. 1 Basic Law). However, after the Federal Constitutional

⁷⁹ WAGNER, *IPRax* 2001, 292; HENRICH, *FamRZ* 2002, 137, 140; GEBAUER/STAUDINGER, *IPRax* 2002, 276; JAKOB (supra n. 21) pp. 314–315.

⁸⁰ MünchKomm(-COESTER) Art. 17b EGBGB No. 91 ff.

⁸¹ WAGNER, *IPRax* 2001, 292.

⁸² See MünchKomm(-COESTER) Art. 17b EGBGB No. 100 f.

⁸³ See MünchKomm(-COESTER) Art. 17b EGBGB No. 112 ff.

⁸⁴ See MünchKomm(-COESTER) Art. 17b EGBGB No. 108, 110.

⁸⁵ In more detail GEBAUER/STAUDINGER, *IPRax* 2002, 276 ff.

⁸⁶ Cf. WAGNER, *IPRax* 2001, 292; HENRICH, *FamRZ* 2002, 137, 140; JAKOB (supra n. 21) pp. 314–315.

⁸⁷ MünchKomm(-COESTER) Art. 17b EGBGB No. 97.

⁸⁸ VON HOFFMANN/THORN § 8 No. 73j. Cf. also THORN, in: BOELE-WOELKI/FUCHS (supra n. 1) p. 165.

Court in essence did not impose a “distance command” for the provision for heterosexual and homosexual couples,⁸⁹ some authors have argued there should be a narrow interpretation of the purpose of Art. 17b para. 4 Introductory Law. Its function should be restricted to the substantive protection of marriage. Otherwise applicable foreign law would then only have to be modified if the legal position of married couples in Germany is detrimentally affected, be it in the sense of a comparable discrimination or an impairment of existing claims.⁹⁰ Some categorise the limitation of effects as a special case of German public policy (Art. 6 Introductory Law) (special public policy clause).⁹¹ The norm does not seem to presuppose any domestic element.⁹² However, since without a domestic element a modification of the foreign laws is not required, such an element is seen by some as an implicit condition.⁹³

Additionally, the relationship to the general public policy clause (Art. 6 Introductory Law) is obscure.⁹⁴ The application of German law as the weaker law shall protect domestic legal relations.⁹⁵ However, in reality it creates a considerable degree of uncertainty. Its effects – which are restrictive, oriented only toward the *lex fori*, disturb the system of private international law and can only be defined with difficulty – are subject to criticism.⁹⁶ In the wake of the last reform of German partnership law which brought German internal law even more in line with German matrimonial law, the relevance of the provision will decline.

3.3.3. Public Policy

As always, it has to be examined whether the application of foreign law would be manifestly incompatible with German public policy (Art. 6 Introductory Law).⁹⁷ The decisive factor is mainly whether there is a violation of essential principles of German law and a domestic element (“Inlandsbezug”). Where the effects of foreign law simply exceed German law, the special public policy clause of Art. 17b para. 4 Introductory Law applies.

⁸⁹ Federal Constitutional Court 17 July 2002, *NJW* 2002, 2543, 2548 = *FamRZ* 2002, 1169, 1172 f.

⁹⁰ MünchKomm(-COESTER) Art. 17b EGBGB No. 85–87.

⁹¹ JAKOB (supra n. 21) p. 180; VON HOFFMANN/THORN § 8 No. 73j; PALANDT(-THORN) Art. 17b EGBGB No. 4. – See also for a characterisation as ‘weaker law’ JAKOB (supra n. 21) pp. 180, 185–186; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 70.

⁹² See GEBAUER/STAUDINGER, *IPRax* 2002, 278, 280 f.

⁹³ MünchKomm(-COESTER) Art. 17b EGBGB No. 96.

⁹⁴ See in more detail GEBAUER/STAUDINGER, *IPRax* 2002, 277 f.; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 79.

⁹⁵ Cf. FRANK, *MittBayNot* 2001 SH 39.

⁹⁶ See GEBAUER/STAUDINGER, *IPRax* 2002, 275 ff.; JAKOB (supra n. 21) pp. 186–188, 232–234; MünchKomm(-COESTER) Art. 17b EGBGB No. 85 ff.; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 73 ff.; STAUDINGER(-MANKOWSKI) Art. 17b EGBGB No. 87 f.

⁹⁷ JAKOB (supra n. 21) pp. 222 ff.; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 39.

3.4. FORMATION OF A LIFE PARTNERSHIP

3.4.1. *Reference to the Place of Registration*

The formation of a registered life partnership is governed by the internal law of the place of its registration (Art. 17b para. 1 sent. 1 Introductory Law). Therefore it is the *lex loci celebrationis* which is determinative and – unlike as under Art. 13 para. 1 Introductory Law – the nationality of the partners is irrelevant.⁹⁸ Their residence is also not decisive.⁹⁹ Germans may also register their life partnership abroad.¹⁰⁰ If the State maintaining the register permits that the relevant registration may take place in another State (in particular in a consulate) the place of the registration itself is also irrelevant.¹⁰¹ The Hague Celebration of Marriages Convention of 1978, which was not ratified by Germany in any case, is not applicable for the life partnership.¹⁰²

The law of the place of registration determines the prerequisites for the formation of a life partnership.¹⁰³ The formation of the life partnership includes personal requirements that must be met by the parties. Preliminary questions like majority are independently determined.¹⁰⁴ For example, the preliminary question of majority is to be determined according to Art. 7 Introductory Law¹⁰⁵ and the existence of a former marriage independently according to Art. 13 Introductory Law.¹⁰⁶ If the requirements of the law of the place of registration are met, a different view of the personal law of the parties is irrelevant insofar as the place of registration is concerned. If this law does not permit a registered partnership, a “limping” partnership (“hinkende Partnerschaft”) comes into being.¹⁰⁷

The prescribed formalities for the registration must be met according to the law of the place of registration. The general provision of Art. 11 Introductory Law is not applicable.¹⁰⁸ A life partnership registered abroad will therefore be recognised

⁹⁸ FRANK, *MittBayNot* 2001 SH 37; HENRICH, *FamRZ* 2002, 137, 137.

⁹⁹ FRANK, *MittBayNot* 2001 SH 37.

¹⁰⁰ Cf. HENRICH (supra n. 9) p. 53.

¹⁰¹ MünchKomm(-COESTER) Art. 17b EGBGB No. 20.

¹⁰² Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, *StAZ* 1977, 202. – In more detail WAGNER, *IPRax* 2001, 284.

¹⁰³ MünchKomm(-COESTER) Art. 17b EGBGB No. 27.

¹⁰⁴ HAUSMANN, *Festschrift Henrich* p. 256; FRANK, *MittBayNot* 2001 SH 37; WAGNER, *IPRax* 2001, 288; HENRICH, *FamRZ* 2002, 137.

¹⁰⁵ HENRICH, *FamRZ* 2002, 137; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 42.

¹⁰⁶ PALANDT(-THORN) Art. 17b EGBGB No. 3.

¹⁰⁷ FRANK, *MittBayNot* 2001 SH 37; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 8.

¹⁰⁸ Motivation BT-Drucks. 14/3751 p. 60; FRANK, *MittBayNot* 2001 SH 37; WAGNER, *IPRax* 2001, 289; PALANDT(-THORN) Art. 17b EGBGB No. 3; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 41.

at home if the foreign internal law has been observed.¹⁰⁹ A similar restriction as in Art. 13 para. 3 sent. 1 Introductory Law is lacking whereby – in Germany – only a relationship according to the German provisions on formalities is formed.¹¹⁰

3.4.2. *Change of Applicable Law*

Art. 17b Introductory Law refers to the place of registration, a reference which is in principle immutable. Neither a change of nationality nor a change of the place of residence of one of the partners has an effect in private international law.¹¹¹ Therefore, a change of the applicable law is in principle excluded. Nevertheless, Art. 17b Introductory Law renders possible an adaptation to a law to which the parties later have a closer connection because a second registration of the same relationship in another State leads to a change of the applicable law.¹¹² Whether such a second registration of an already existing life partnership is allowed at all is a question of internal law and is to be answered by the law of the new place of registration.¹¹³

If there are registered life partnerships between the same persons in different jurisdictions, a reference to the place of the registration should technically lead to a simultaneous application of several legal orders. In order to avoid such a cumulation and the ensuing conflicts, the special provision of Art. 17b para. 3 Introductory Law provides that the last formed partnership is relevant from the date of its formation in respect of the legal effects and consequences of a life partnership. This means that, as a result, the applicable law for a partnership may change.¹¹⁴ The last formed life partnership is *ex nunc* to be observed.¹¹⁵ The “effects” of Art. 17b para. 3 Introductory Law seem to refer primarily to the status, the “consequences” also to single claims. The parties may also register again in Germany after validly founding a life partnership abroad.¹¹⁶ As a result, the parties may therefore elect German law. According to its wording, Art. 17b para. 3 Introductory Law applies only to effects named in Art. 17b para. 1 Introductory Law, i.e. the general effects as well as the effects and consequences under matrimonial property law. The rule seems, however, also to be applicable for questions regarding the law of names, mentioned in Art. 17b para. 2 sent. 1 Introductory Law.¹¹⁷

¹⁰⁹ JAKOB (supra n. 21) p. 286.

¹¹⁰ In more detail MünchKomm(-COESTER) Art. 17b EGBGB No. 26.

¹¹¹ FRANK, *MittBayNot* 2001 SH 38; MünchKomm(-COESTER) Art. 17b EGBGB No. 15; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 39.

¹¹² Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 31.

¹¹³ STAUDINGER(-MANKOWSKI) Art. 17b EGBGB No. 79.

¹¹⁴ WAGNER, *IPRax* 2001, 291; JAKOB (supra n. 21) pp. 180, 293.

¹¹⁵ FRANK, *MittBayNot* 2001 SH 38; MünchKomm(-COESTER) Art. 17b EGBGB No. 16; PALANDT(-THORN) Art. 17b EGBGB No. 3.

¹¹⁶ FRANK, *MittBayNot* 2001 SH 38 f.; PALANDT(-THORN) Art. 17b EGBGB No. 3.

¹¹⁷ FRANK, *MittBayNot* 2001 SH 38.

3.5. EXISTING LIFE PARTNERSHIP

3.5.1. Family Name

For the family name in the context of a registered life partnership, as an initial matter the basic rule of Art. 10 para. 1 Introductory Law applies, according to which the respective personal law of the same-sex partner is determinative.¹¹⁸ Additionally, there is a special provision which declares Art. 10 para. 2 Introductory Law applicable, *mutatis mutandis* (Art. 17b para. 2 sent. 1 Introductory Law). The parties can therefore upon or after the formation of a life partnership make a choice of law by declaration to the competent registration body (i.e. generally the civil registrar).¹¹⁹ With this choice of law they elect the applicable law of names; they are, however, restricted to one of their national laws. Persons with dual nationality can, in departure from Art. 5 para. 1 Introductory Law, choose either of their national laws (Art. 10 para. 2 sent. 1 No. 1 Introductory Law). It is immaterial which nationality is the effective nationality and the German nationality – contrary to the general rule – does not prevail. Additionally, German law may also be elected if (at least) one of the partners has his or her habitual residence in Germany (Art. 10 para. 2 sent. 1 No. 2 Introductory Law).

The parties have to make the choice of law together. A declaration during the registration or an authenticated declaration to the German civil registrar is required, i.e. the competent body for the registration according to the law of the German State (“Land”)¹²⁰ (Art. 10 para. 3 sent. 2 Introductory Law). Since the election of the applicable law of names is a declaration in the field of private international law and not a declaration according to internal law, Art. 11 Introductory Law does not apply to the form.¹²¹ For the choice of law it is insignificant if the life partnership was formed in Germany or abroad.

After a domestic registration, a declaration on the use of the name may also be made abroad. The family name will then be determined by the law elected by the parties, who can use the possibilities of this legal order. If German law is chosen, §3 Life Partnership Act applies. According to this act, same-sex partners can determine a common name. Choice of law and choice of a name under internal law can be jointly made in a single declaration. If no election of law by the parties is possible or has not been declared, there is a reference to the respective personal law of the partner according to Art. 10 para. 1 Introductory Law.¹²² If both parties are foreign nationals and the life partnership has, according to their

¹¹⁸ HENRICH, *FamRZ* 2002, 137, 138.

¹¹⁹ HENRICH, *FamRZ* 2002, 137, 138 f. – Cf. JAKOB (supra n. 21) p. 341.

¹²⁰ MünchKomm(-COESTER) Art. 17b EGBGB No. 69.

¹²¹ PALANDT(-THORN) Art. 17b EGBGB No. 7.

¹²² FRANK, *MittBayNot* 2001 SH 41; PALANDT(-THORN) Art. 17b EGBGB No. 7.

personal law, no consequences on their name, the use of a common name is not possible. Each partner retains at the formation of the partnership his or her name.¹²³

3.5.2. *General Effects of Partnership*

The general effects of a registered life partnership are governed by the internal law of the place of registration (Art. 17b para. 1 sent. 1 Introductory Law). Unlike under the inapplicable Art. 14 para. 1 No. 1, 2 Introductory Law, the nationality and the residence of the parties are not determinative in this case. A choice of law by the parties themselves is not provided for.¹²⁴ Therefore a choice of law admitted by foreign private international law will have no consequences in Germany.¹²⁵ Because of the reference to the respective internal law, a renvoi is excluded. The general effects of a partnership include all those which are a consequence of the life partnership and are not governed by special conflict of laws rules, e.g. the obligation of a community for life, the special standard of liability in case of tort, the presumed agency of partners and the property presumption benefiting creditors.

For the general effects of the life partnership, the principle of limitation of effects also applies. (Art. 17b para. 4 Introductory Law). The effects of the foreign law must therefore not go further than the Civil Code and Life Partnership Act. An additional modification is the protection of legal relations according to Art. 17b para. 2 sent. 2 Introductory Law. If due to a subsequent, additional registration another law is applicable, the general effects are governed *ex nunc* by this new law.

3.5.3. *Matrimonial Property Law Effects*

The effects in matrimonial property law of a registered life partnership are governed also by the internal law of the place of registration (Art. 17b para. 1 sent. 1 Introductory Law). Unlike under the inapplicable Art. 15 para. 1 Introductory Law, the nationality or the residence of the parties is irrelevant. A contractual choice of law pursuant to Art. 15 para. 2 Introductory Law is not possible.¹²⁶ Because of the reference only to the internal law, a renvoi does not take place. Accordingly, a choice of law permitted by foreign private international law remains disregarded.¹²⁷ If the law of the *situs* of the property contains special

¹²³ FRANK, *MittBayNot* 2001 SH 41 f.

¹²⁴ FRANK, *MittBayNot* 2001 SH 38; BUSCHBAUM, *RNotZ* 2010, 73, 84.

¹²⁵ SÜSS, *DNotZ* 2001, 170; FRANK, *MittBayNot* 2001 SH 38.

¹²⁶ FRANK, *MittBayNot* 2001 SH 38; MünchKomm(-COESTER) Art. 17b EGBGB No. 42; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 44 f.

¹²⁷ SÜSS, *DNotZ* 2001, 170; FRANK, *MittBayNot* 2001 SH 38.

provisions, an application of this law according to Art. 3a para. 2 Introductory Law (“Einzelstatut bricht Gesamtstatut”) can occur.¹²⁸ The effects of matrimonial property law encompass special rules for the property of the partners, particularly for the allocation and division of property and for compensatory claims.

To understand the limitation of legal effects according to Art. 17b para. 4 Introductory Law, a comparison with German matrimonial property law is necessary. This means the “community of acquisitions” as the legal property regime of matrimonial law. However, the determination of the limitation of legal effects is difficult.¹²⁹ For example, according to foreign law, a community property regime with joint and severable liability of the partner may exist, which goes beyond the consequences of the property regime of German law which creates no such liability. Therefore such liability cannot be imposed.¹³⁰

If due to a subsequent, additional registration another matrimonial property law applies – unlike matrimonial property law – the doctrine of immutability (cf. Art. 15 para. 1 Introductory Law) does not apply.¹³¹ Instead the matrimonial property law relations of the partners are governed *ex nunc* by the new law. If necessary, compensation in the framework of the respective internal law has to take place.¹³²

3.5.4. Protection of Third Parties

As with spouses, life partnerships may pursuant to foreign law entail a number of effects for other individuals. Third parties often do not know of them or they do not expect them. Therefore, there is also a need to protect the trust placed in legal and commercial transactions. Despite the fact that there is already a general limitation of effects in Art. 17b para. 4 Introductory Law, there is a special protection under Art. 17b para. 2 sent. 2 Introductory Law for the general effects of the partnership. This provision is a unilateral conflict of laws rule.¹³³ Its content is in accordance with Art. 16 para. 2 Introductory Law.¹³⁴ Therefore, here a comparison of the most favourable results according to the developed standards has to be undertaken as well. Internal law is more favourable, which in the individual case helps the creditor or contractual partner to reach the result aspired to by him.¹³⁵

¹²⁸ Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 46.

¹²⁹ In more detail FRANK, *MittBayNot* 2001 SH 39 f.; GEBAUER/STAUDINGER, *IPRax* 2002, 280; BUSCHBAUM, *RNotZ* 2010, 73, 89.

¹³⁰ FRANK, *MittBayNot* 2001 SH 39.

¹³¹ SÜSS, *DNotZ* 2001, 170; JAKOB (supra n. 21) p. 300.

¹³² FRANK, *MittBayNot* 2001 SH 39 n. 20; SÜSS, *DNotZ* 2001, 170.

¹³³ WAGNER, *IPRax* 2001, 290; VON HOFFMANN/THORN § 8 No. 73h.

¹³⁴ STAUDINGER(-MANKOWSKI) Art. 17b EGBGB No. 74.– An equivalent to Art. 16 para. 1 Introductory Law is lacking, MünchKomm(-COESTER) Art. 17b EGBGB No. 45.

¹³⁵ STAUDINGER(-MANKOWSKI) Art. 16 EGBGB No. 55 ff.

If the general effects are governed by the foreign life partnership law, for movable property in Germany §8 para. 1 Life Partnership Act applies. Therefore, also the pro-creditor presumption of property of §1362 Civil Code is applicable.

Legal acts performed in Germany are subject to §8 para. 2 of the Life Partnership Act in conjunction with §1357 Civil Code. Insofar as this provision on the legally implied agency of the spouse (“Schlüsselgewalt”) is more favourable for third parties acting in good faith than the otherwise applicable foreign law, German law applies (Art. 17b para. 2 sent. 2 Introductory Law). Essentially, this determination depends on whether the provisions in question are more favourable for the creditor. The standard for good faith is basically the same as in Art. 16 Introductory Law.¹³⁶ The creditor or contractual partner is acting in bad faith if he knew or was grossly negligent in not knowing that the partnership was subject to foreign law.¹³⁷

3.5.5. *Effects in Maintenance Law*

For the consequences of a life partnership in maintenance law, the applicable law is determined according to the general provisions (Art. 3 no. 1 lit. c Introductory Law¹³⁸ in conjunction with EU Council Decision of 30 November 2009¹³⁹ and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance¹⁴⁰). There is no definition of a family relationship in Art. 2 Maintenance Regulation. Recital 21 makes clear that the rules on conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based. The establishment of family relationships continues to be covered by the national law of the Member States, including their rules of private international law. It is argued that claims based on registered partnerships are included under the Maintenance Regulation.¹⁴¹ The Hague Protocol determines the law applicable to maintenance obligations (Art. 1 para. 1 Hague Protocol). It covers particularly the existence of an obligation (Art. 11 Hague Protocol). The Hague Protocol also speaks of “family relationships” (Art. 1 para. 1 Hague Protocol). It leaves its application to same-sex-partners open. It is argued that States which do not recognise such a partnership are allowed to not apply the Protocol.¹⁴² From a German point of

¹³⁶ STAUDINGER(-MANKOWSKI) Art. 17b EGBGB No. 74.

¹³⁷ Cf. STAUDINGER(-MANKOWSKI) Art. 16 EGBGB No. 54.

¹³⁸ As amended by Art. 12 Law of 23 May 2011, Official Gazette 2011 I p. 898.

¹³⁹ Council Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (OJ EU 2009 L 331/17).

¹⁴⁰ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ EU 2009 L 331/19.

¹⁴¹ GRUBER, Die neue EG-Unterhaltsverordnung, *IPRax* 2010, 128, 130 with further references.

¹⁴² BONOMI, The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, *YbPrIntL* 10 (2008), 333, 339 f.

view, the classification of a registered civil partnership as a family relationship seems to be appropriate.¹⁴³ The same is true for same-sex marriages.¹⁴⁴ According to the Hague Protocol the habitual residence of the claimant is determinative (Art. 3 para. 1 Hague Protocol).

3.5.6. *Effects in Succession Law*

The consequences of a life partnership in succession law are primarily governed by the applicable law determined according to the general provisions of international succession law (Art. 17b para. 1 sent. 2 half-sentence 1 Introductory Law). Therefore, the *lex successionis* according to Art. 25 Introductory Law is determinative.¹⁴⁵ This reference leads in principle to the personal law of the deceased (Art. 25 para. 1 Introductory Law). The law of the place of registration is not referred to. The application of the same law to succession claims of the surviving same-sex partner and claims of third parties avoids tensions between the successorial legal positions of several involved persons.¹⁴⁶ The determination of the preliminary question of the existence of a life partnership is disputed. Whereas some authors always answer it independently (i.e. according to Art. 17b para. 1 sent. 1 Introductory Law),¹⁴⁷ others – at least for the dissolution of a life partnership – want to refer to the conflict of laws rule of the foreign law governing the main question (i.e. according to the private international law of the *lex successionis*).¹⁴⁸

The principle of nationality in international succession law applies only subject to a renvoi (Art. 4 para. 1 Introductory Law). Therefore, it must always be examined if the foreign law determines the applicable law in a different manner, e.g. with a reference to the domicile or the *lex rei sitae*. This can lead to the splitting of an inheritance for movables and immovables.¹⁴⁹ If necessary, a special determination of the applicable law for foreign immovable property according to Art. 3a para. 2 Introductory Law (“Einzelstatut bricht Gesamtstatut”) also takes place.¹⁵⁰ According to the dominant opinion, the German personal law of the deceased gives way if the succession law of the country in which immovable property is located governs these immovables because of their location (*lex rei sitae*). This is for instance the case in France. Therefore, the succession to immovable property in France will be determined

¹⁴³ GRUBER, *IPRax* 2010, 128, 130; RAUSCHER(-ANDRAE), *Europäisches Zivilprozess- und Kollisionsrecht*, Vol. IV, 2010, HUntStProt Art. 1 No. 7.

¹⁴⁴ ANDRAE, *StAZ* 2011, 97, 103.

¹⁴⁵ VON HOFFMANN/THORN § 8 No. 73g.

¹⁴⁶ Cf. FRANK, *MittBayNot* 2001 SH 42.

¹⁴⁷ PALANDT(-THORN) Art. 17b EGBGB No. 9.

¹⁴⁸ HENRICH, *FamRZ* 2002, 137, 143; MünchKomm(-COESTER) Art. 17b EGBGB No. 59.

¹⁴⁹ Cf. FRANK, *MittBayNot* 2001 SH 42.

¹⁵⁰ Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 32, 55.

by French law. According to that law, the same-sex partner cannot become an heir.¹⁵¹ Apart from this, Art. 25 para 2 Introductory Law provides that German law can be elected for domestic immovable property as the applicable succession law.¹⁵²

The *lex successionis* also determines the pre-conditions of testate and intestate succession and the existence of a compulsory portion of the testator's estate. According to German law, the surviving same-sex partner is a legal heir (§10 para. 1 Life Partnership Act). If the so-determined foreign law grants the same-sex partner a legal succession right as under German law, this result remains unchanged. For the application of the respective internal succession law, however, it has to be determined by interpretation if a given life partnership under foreign law can be regarded as a life partnership in the sense of the norms of succession law. Concerning §10 of the German Life Partnership Act, it is argued that no problem of "substitution" exists because of the less significant legal effects of the French PACS and the "cohabitation légale" of Belgian law.¹⁵³

The increase of the share in the estate by one-fourth according to §1371 para. 1 Civil Code is also to be characterised as a question of matrimonial property law, which is governed by the law of the place of registration (Art. 17b para. 1 sent. 1 Introductory Law). Therefore, a share determined by foreign succession law may be increased by one-fourth.¹⁵⁴

If the life partnership, however, grants no legal succession right, Art. 17b para. 1 sent. 1 applies *mutatis mutandi* (Art. 17b para. 1 sent. 2 half-sentence 2 Introductory Law). This leads to the internal law of the place of registration. Because of the reference to the internal law, only a renvoi is excluded. This rule does not override, however, the provisions on the determination of the *lex successionis*. Therefore neither a renvoi nor the principle that a special conflict of laws rule for particular property has priority ("Einzelstatut bricht Gesamtstatut", Art. 3a para. 2 Introductory Law) is excluded. For example, the succession to French immovable property is governed by the *lex rei sitae*, i.e. French law. Art. 17b para. 1 sent. 2 Introductory Law leaves the applicable law for succession unchanged. The French internal law, according to which the partner of a PACS is not granted a succession right, will not be modified.¹⁵⁵

¹⁵¹ SÜSS, *DNotZ* 2001, 173; FRANK, *MittBayNot* 2001 SH 43; HENRICH, *FamRZ* 2002, 137, 143.

¹⁵² FRANK, *MittBayNot* 2001 SH 42.

¹⁵³ MünchKomm(-COESTER) Art. 17b EGBGB No. 61; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 36.

¹⁵⁴ In more detail BAMBERGER/ROTH(-LORENZ) Art. 25 EGBGB No. 56; MünchKomm(-COESTER) Art. 17b EGBGB No. 65 ff.

¹⁵⁵ FRANK, *MittBayNot* 2001 SH 43; SÜSS, *DNotZ* 2001, 175; GEBAUER/STAUDINGER, *IPRax* 2002, 279.

Difficulties arise insofar as Art. 17b para. 1 sent. 2 half-sentence 2 Introductory Law mentions a “legal succession right” of the partners. Foreign law often grants the surviving spouse no genuine succession right, but only a legacy (particularly a right of usufruct). Since German conflict of laws rules only aim to prevent discrimination against same-sex partners, but do not modify foreign succession law as such, also weaker approaches of this nature suffice in succession law.¹⁵⁶ In addition, the failure to provide for a compulsory portion in the testator’s estate cannot be substituted in this way.¹⁵⁷ However, if the same-sex partner, in contrast to a surviving spouse, has no entitlement under succession law, the law of the place of registration applies (Art. 17b para. 2 sent. 2 half-sentence 2 Introductory Law). If this is German law, the effects according to German law are applicable. Therefore, if under foreign law the same-sex partner is granted no rights, the legal succession is governed by German law.

If the German rules benefit the surviving partner more than a surviving spouse according to the foreign law, a modification under German law will not take place.¹⁵⁸ This also applies if the legal position is the same. The capping limit of Art. 17b para. 4 Introductory Law also has to be respected in succession law.¹⁵⁹ This will rarely, however, be of any practical significance.

3.6. DISSOLUTION OF A LIFE PARTNERSHIP

3.6.1. *Dissolution*

The *actus contrarius* to the formation – the dissolution of a registered life partnership – is also governed by the internal law of the place of registration (Art. 17b para. 1 sent. 1 Introductory Law). Therefore, for the determination of the applicable law, the same connecting factor is used as for entering a partnership. An exception clause for divorce (Art. 17 para. 1 sent. 2 Introductory Law) does not exist. Because of the reference to internal law a *renvoi* (Art. 4 para. 1 Introductory Law) is excluded.

The dissolution may – in accordance with German law – be declared by a court decision. The relevant date for such a decision is the pendency of the application for dissolution.¹⁶⁰ According to foreign law a consensual dissolution or unilateral declaration is sometimes also possible.¹⁶¹ In these cases the date of the dissolution

¹⁵⁶ HENRICH, *FamRZ* 2002, 137, 144; MünchKomm(-COESTER) Art. 17b EGBGB No. 63.

¹⁵⁷ HENRICH, *FamRZ* 2002, 137, 144; MünchKomm(-COESTER) Art. 17b EGBGB No. 63.

¹⁵⁸ HENRICH, *FamRZ* 2002, 137, 144.

¹⁵⁹ FRANK, *MittBayNot* 2001 SH 43; GEBAUER/STAUDINGER, *IPRax* 2002, 279.

¹⁶⁰ JAKOB (supra n. 21) p. 314; MünchKomm(-COESTER) Art. 17b EGBGB Rn. 36.

¹⁶¹ HENRICH, *FamRZ* 2002, 137, 140.

is determinative.¹⁶² A dissolution of a life partnership by a subsequent celebration of marriage is also possible and to be respected.¹⁶³

A domestic dissolution of a life partnership registered abroad is not particularly regulated. Since there is no restriction that a dissolution in Germany can only be accomplished by a court (cf. Art. 17 para. 2 Introductory Law for divorce), it can be concluded that in Germany a dissolution can also be effected in a manner as is provided for by a foreign *lex causae*.¹⁶⁴ Therefore, dissolution by a common declaration of the parties made within Germany and also by a unilateral declaration is possible. Some argue that because of the grave consequences, there should always be the participation of a German court.¹⁶⁵ This is, however, only required under German internal law, not by private international law. Yet it is unclear which municipal authorities should be competent for the acceptance of the declaration. It has been proposed that those German bodies which register the formation of such relationships are competent.¹⁶⁶

The extra-judicial dissolution of a life partnership abroad is also not regulated. Since here a decision of a public body is lacking, the dissolution is – in the same way as a private divorce of spouses – to be characterised as substantive rather than procedural. Therefore, the existing norms for a dissolution in other cases have to be applied. As a consequence, a foreign dissolution of a partnership without a judgment can be recognised in Germany.¹⁶⁷ The only pre-condition is that the requirements of the applicable foreign internal law are met. Where German internal law has to be applied, an extra-judicial dissolution of the life partnership will have no effect (cf. §15 para. 1 Life Partnership Act) even if it corresponds to the respective *lex loci actus*.¹⁶⁸

3.6.2. *Division of Property, Use of the Home and Household Goods*

The division of property associated with the dissolved life partnership takes place according to the matrimonial property law rules. The law of the place of registration also governs (Art. 17b para. 1 sent. 1 Introductory Law). For the division of household goods, in principle the law of the place of registration is also applicable (Art. 17b para. 1 Introductory Law).¹⁶⁹ But on the right to use a

¹⁶² MünchKomm(-COESTER) Art. 17b EGBGB No. 36.

¹⁶³ HENRICH, *FamRZ* 2002, 137, 140.

¹⁶⁴ WAGNER, *IPRax* 2001, 287; HENRICH, *FamRZ* 2002, 137, 141; MünchKomm(-COESTER) Art. 17b EGBGB No. 37, 40; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 48.

¹⁶⁵ JAKOB (supra n. 21) pp. 304–305.

¹⁶⁶ HENRICH, *FamRZ* 2002, 137, 141. – A German judgment considered to be necessary and (in Germany) sufficient JAKOB (supra n. 21) p. 306–307.

¹⁶⁷ Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 84. – Undecided VON HOFFMANN/THORN § 8 No. 73n.

¹⁶⁸ MünchKomm(-COESTER) Art. 17b EGBGB No. 39.

¹⁶⁹ HENRICH, *FamRZ* 2002, 137, 142.

common home and household goods situated in Germany, German internal law may be applied according to the special, unilateral conflict of laws rule of Art. 17a Introductory Law (Art. 17b para. 2 sent. 1 Introductory Law).¹⁷⁰

3.6.3. *Pension Rights Adjustment*

The reform of 2004 introduced an explicit conflict of laws rule for a pension rights adjustment. It is governed by the law of the register-maintaining State which is applicable according to Art. 17b para. 1 sent. 1 Introductory Law.¹⁷¹ Similar to the case of divorce (cf. Art. 17 para. 3 Introductory Law), it is only to be carried out in those cases where German law is applicable and where a pension rights adjustment is provided for in at least one of the countries of which the partners are nationals at the time the application for dissolution is served upon the respondent. Where under such conditions no pension rights adjustment can be carried out, it may be effected, upon application by either partner, if the other partner has acquired a domestic pension rights expectancy during any period within the life partnership. All of this is subject to the proviso that, in light of the economic situation of both partners and in consideration of the respective periods of residence abroad, a pension rights adjustment must not be inequitable in the case at issue (Art. 17b para. 1 sent. 4 Introductory Law). Theoretically, also here the capping limit of Art. 17b para. 4 Introductory Law applies.

3.6.4. *Maintenance Obligations*

In the case of dissolution of a life partnership, maintenance claims after dissolution are governed by Arts. 3 and 5 ff. Hague Protocol of 2007.¹⁷² According to these provisions the law of the habitual residence of the claimant generally governs.

3.7. THIRD PARTY EFFECTS OF LIFE PARTNERSHIP

The respective applicable law of the maintenance claim must determine how the existence of a registered life partnership affects maintenance obligations existing against other persons. Contractual obligations of one or both partners with third parties are governed by the rules of international contract law (Art. 3 ff. Rome I Regulation).¹⁷³ If the registered partnership has third party effects on other legal relationships, the *lex causae* of these relationships must govern.¹⁷⁴ This is true,

¹⁷⁰ HENRICH, *FamRZ* 2002, 137, 142; MünchKomm(-COESTER) Art. 17b EGBGB No. 72.

¹⁷¹ Art. 17b para. 1 sent. 3 Introductory Law as amended by Art. 20 No. 1 Law of 3 April 2009, Official Gazette 2009 I p. 700.

¹⁷² ANDRAE, *StAZ* 2011, 97, 103.

¹⁷³ WAGNER, *IPRax* 2001, 291; JAKOB (supra n. 21) p. 190.

¹⁷⁴ MünchKomm(-COESTER) Art. 17b EGBGB No. 74.

e.g. for tenancies of the partner with third parties (cf. the right to assume a tenancy according to §563 para. 1 Civil Code). Therefore, a home situated in Germany is generally subject to German law, even when the same-sex partners are foreign nationals or they have formed their life partnership abroad. Whether the registered life partnership has legal effects for social security is determined by the applicable national social security law.¹⁷⁵ In Germany exceeding legal effects according to foreign social security law will not be taken into account.¹⁷⁶ However, EU law and anti-discrimination law have to be respected.

3.8. ISSUES OF PARENT AND CHILD LAW

3.8.1. *Parentage and Name*

In the framework of life partnerships, questions of parentage law may arise. The general provision of Art. 19 para. 1 Introductory Law, which primarily contains a reference to the habitual residence of the child, applies.¹⁷⁷ The reference to the applicable law for the general effects of marriage in Art. 19 para. 1 sent. 3 Introductory Law is meaningless for same-sex life partnerships.¹⁷⁸ The family name of a child of one of the partners will be determined by the nationality of the child (Art. 10 para. 1 Introductory Law) or the law elected by the custodian (Art. 10 para. 3 Introductory Law).¹⁷⁹

3.8.2. *Adoption*

Only some jurisdictions currently allow a common adoption or a step-parent adoption by the partners of a same-sex relationship. In international adoption law, the Hague Adoption Convention of 1993¹⁸⁰ has priority. This convention does not deal specifically with adoption by homosexual couples, so that one could presume its non-applicability. According to German private international law, the admissibility of an adoption will be determined by the nationality of the adopting person (Art. 22 para. 1 sent. 1 Introductory Law). This also applies for an adoption by one of the partners.¹⁸¹

¹⁷⁵ HENRICH (supra n. 9) p. 53.

¹⁷⁶ HENRICH (supra n. 9) p. 53.

¹⁷⁷ See in more detail JAKOB (supra n. 21) pp. 342 ff. – Cf. also WAGNER, *IPRax* 2001, 291.

¹⁷⁸ JAKOB (supra n. 21) p. 343; MünchKomm(-COESTER) Art. 17b EGBGB No. 77.

¹⁷⁹ In more detail MünchKomm(-COESTER) Art. 17b EGBGB No. 83.

¹⁸⁰ Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect to Intercountry Adoption, BGBl. 1993 II p. 1035.

¹⁸¹ JAKOB (supra n. 21) p. 349; MünchKomm(-COESTER) Art. 17b EGBGB No. 81.

For spouses, a common adoption is provided for; it is governed by their applicable law on the general effects of marriage (Art. 22 para. 1 sent. 2 Introductory Law). A separate conflict of laws rule for the adoption by same-sex partners is lacking since German domestic law still does not permit a common adoption. An application, *mutatis mutandi*, of Art. 22 para. 1 sent. 2 Introductory Law is conceivable, which then would lead to the law of the State of the registration of the life partnership. An argument for this solution is the recognition of the registered life partnership as a family law relationship.¹⁸² However, in the interest of legal certainty, other authors only envision a common adoption if it is permitted by the personal laws of both partners (Art. 22 para. 1 sent. 1 Introductory Law).¹⁸³ Even then the question remains whether the capping limit¹⁸⁴ or the public policy clause (Art. 6 Introductory Law) applies.¹⁸⁵

3.8.3. *Custody and Contact*

Insofar as custodial rights of the same-sex partner over children of the other partner are concerned, general custody provisions apply. In particular, the Hague Convention on Child Protection of 1996 applies.¹⁸⁶ In other cases, according to the general provision of Art. 21 Introductory Law, the parent-child-relationship is governed by the law of the habitual residence of the child.¹⁸⁷ Whether the same-sex partner is a holder of custodial rights is characterised by some as a question of the law applicable to the life partnership,¹⁸⁸ by others more correctly as an issue of custodial rights.¹⁸⁹

3.9. INTERNATIONAL CIVIL PROCEDURE

3.9.1. *Jurisdiction*

For jurisdictional purposes a distinction has to be made according to the matter of the proceedings. Insofar as the existence or dissolution of a life partnership is concerned, the European Brussels IIbis Regulation on jurisdiction and

¹⁸² MünchKomm(-COESTER) Art. 17b EGBGB No. 82.

¹⁸³ JAKOB (supra n. 21) p. 350.

¹⁸⁴ Pro MünchKomm(-COESTER) Art. 17b EGBGB No. 110.

¹⁸⁵ In more detail JAKOB (supra n. 21) pp. 351–354. – Contra for step-child adoption MünchKomm(-COESTER) Art. 17b EGBGB No. 117.

¹⁸⁶ Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, OJ EU 2008 L 251/39.

¹⁸⁷ MünchKomm(-COESTER) Art. 17b EGBGB No. 79.

¹⁸⁸ FORKERT, *Eingetragene Lebenspartnerschaften im deutschen IPR*, 2003, p. 113.

¹⁸⁹ MünchKomm(-COESTER) Art. 17b EGBGB No. 33, 79; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 43.

recognition is – according to the dominant view – not applicable.¹⁹⁰ Since the Regulation covers only marriage and parental responsibility (Art. 1 para. 1 lit. a, b), the relevant jurisdiction provision is German national law and contained in §103 Family Proceedings Act (Familienverfahrensgesetz; FPA).

According to German law, proceedings in life partnership matters comprise the dissolution of a life partnership and the declaration of the existence or the non-existence of a life partnership. German courts may also dissolve registered partnerships according to foreign law.¹⁹¹ Bases of jurisdiction are those of §103 FPA. According to this provision, German jurisdiction exists if one of the partners is or was German at the time of the registration (§103 para. 1 No. 1 FPA) or if a partner has his or her habitual residence in Germany (§103 para. 1 No. 2 FPA). Moreover, German courts already have jurisdiction if the life partnership was formed before a German civil registrar (§103 para. 1 No. 3 FPA).¹⁹² Therefore, it is guaranteed that a partnership registered in Germany can also be terminated by a German court.

Additionally, German family courts have ancillary jurisdiction for individual consequences of dissolution (“Folgesachen”, §103 para. 2 FPA).¹⁹³ These include the statutory maintenance obligation, the legal relationship in respect of the common home and the household, and claims concerning matrimonial property (§137 para. 2 FPA). German courts may also have jurisdiction if the partnership has been registered abroad.¹⁹⁴ The same is true for same-sex marriages.¹⁹⁵ An analogous application of the provision for unregistered foreign partnerships is, however, rejected¹⁹⁶

3.9.2. Recognition of Foreign Decisions

The EU-Regulation on jurisdiction and recognition in matrimonial affairs is not applicable; according to the dominant interpretation the Regulation confines itself to marriage and parental responsibility.¹⁹⁷ However, the application of

¹⁹⁰ WAGNER, *IPRax* 2001, 282; PINTENS, Marriage and partnership in the Brussels IIa Regulation, *Liber memorialis Petar Šarčević*, 2006, pp. 335, 339; ANDRAE, *StAZ* 2011, 97, 99 f.; JAKOB (supra n. 21) p. 269; VON HOFFMANN/THORN § 8 No. 73k; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 55. Cf. Council Regulation (EC) No 2201/2003 of 27th November 2003 in relation to jurisdiction and the recognition and enforcement of judgments in matrimonial matters; WAUTELET, in this book at p. 160.

¹⁹¹ MünchKomm(-COESTER) Art. 17b EGBGB No. 41, 120.

¹⁹² Cf. JAKOB (supra n. 21) p. 309.

¹⁹³ In more detail MünchKomm(-COESTER) Art. 17b EGBGB No. 120 ff.

¹⁹⁴ WAGNER, *IPRax* 2001, 292.

¹⁹⁵ ANDRAE, *StAZ* 2011, 97, 101 f. Cf. also Local court Münster 20 January 2010, *StAZ* 2011, 211.

¹⁹⁶ WAGNER, *IPRax* 2001, 292.

¹⁹⁷ HENRICH, *FamRZ* 2002, 341; PINTENS, *Liber memorialis Petar Šarčević*, 2006, pp. 335, 339; GEBAUER/STAUDINGER, *IPRax* 2002, 281; PALANDT(-THORN) Art. 17b EGBGB No. 10.

bilateral agreements is possible since proceedings on same-sex partnerships concern civil matters. Under national law the provisions of §§108, 109 FPA apply.¹⁹⁸ Insofar as a decision of a public authority is delivered, it is – as always – equated with a court decision.¹⁹⁹ The jurisdiction of foreign courts will be determined by the “mirror image” principle, i.e. the foreign State will be granted the same degree of jurisdiction as according to domestic law (§109 para. 1 No. 1 FPA). Therefore, for the foreign jurisdiction, the standard of §103 FPA applies. Consequently, nationality and the habitual residence are decisive. An analogous application of §107 FPA, which contains a special procedure for formal recognition in matrimonial affairs, is not provided for in respect of same-sex marriages and registered partnerships.²⁰⁰ Though the purpose of the provision – the creation of legal certainty and exercise of control – would not conflict with an analogous application,²⁰¹ a restriction of recognition without statutory basis would occur. Moreover, it would be difficult to circumscribe cases, in which such a procedure would be practical and useful.

4. CONCLUSION

The intention of the legislator to abolish discrimination of against same-sex relationships has influenced also the conflict of laws rule. However, only for some of the effects – mainly succession – is the applicability of the general rules ordered. The chosen reference to the place of registration for the formation, but also for the other effects – previously unknown in traditional international family law – was not uncommon at the time of enactment. The now-growing tendency to accept same-sex partnerships and even to assimilate them completely with marriage was not fully discernable at the date of the passage of the bill. Instead it was clear from the very beginning that a registration in Germany would not find recognition everywhere. The legislator nevertheless took into account the creation of “limping” life partnerships and was eager to grant a minimum standard even if foreign law seemed less developed. Internal German law had not achieved equality between life partnership and marriage in many respects, and there was a serious concern that the new legislation could be unconstitutional. Therefore, the legislator was possibly more cautious than necessary and introduced the limitation of effects with the capping limit. The end result is a relatively complicated and, to a certain extent, strange mixture of different approaches carrying the danger of always giving too little or too much.

¹⁹⁸ PALANDT(-THORN) Art. 17b EGBGB No. 10.

¹⁹⁹ HAU, in: HORNDASCH/VIEFHUES (eds.), *Kommentar zum Familienverfahrensrecht*, 2nd ed., 2011, § 103 FamFG No. 4.

²⁰⁰ BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 58; HAU, in: PRÜTTING/HELMS, *FamFG*, 2009, § 107 FamFG No. 21, 22.– For an analogy JAKOB (supra n. 21) pp. 250, 310–313.

²⁰¹ Cf. HAUSMANN, *Festschrift Henrich* p. 265.

Some of the existing German restrictions will be of lesser importance in the future with the progressive development of German internal law. Moreover, this may hopefully one day open the path toward simplifying the overcomplicated provisions of Art. 17b Introductory Law. However, the growing importance of same-sex marriages is, as such, not taken into account in the existing German statute. National reform efforts are difficult at a time when the issues at stake are increasingly covered by European Regulations.



WORKSHOP: CROSS-BORDER RECOGNITION (AND REFUSAL OF RECOGNITION) OF REGISTERED PARTNERSHIPS AND MARRIAGES WITH A FOCUS ON THEIR FINANCIAL ASPECTS AND THE CONSEQUENCES FOR DIVORCE, MAINTENANCE AND SUCCESSION

Dieter MARTINY

Case 1: “Income from the Italian Restaurant in Cologne” (Financial Consequences)

In 2008 two Italian nationals, Chiara and Daniela, entered into a registered partnership in Cologne (Germany). They later moved to Florence (Italy). Chiara owned a restaurant in Cologne in her own name and had a good income whereas Daniela mainly helped Chiara and worked as a waiter. After a deterioration of their relationship, Daniela wants to know whether she has a claim to some of the money Chiara earned. Under German law there is a registered partnership with the financial consequences taking the form of a community of acquisitions (Zugewinnngemeinschaft) which allows a compensation claim upon the dissolution of the partnership. Under Italian family law there is no registered partnership.

Question:

Which law would apply under the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships of 16 March 2011?¹

¹ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 of 16 March 2011.

Application of Regulation Proposal on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships of 16 March 2011

1. JURISDICTION

The first question is whether the Regulation Proposal on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (Proposal RP) of 16 March 2011 would apply. According to Art. 1 para. 1 Proposal RP, the Regulation shall apply to matters of the property consequences of registered partnerships. There are definitions in Art. 2.

1.1. PROPERTY CONSEQUENCES

“Property consequences” encompasses the set of rules concerning the property relationships of the registered partners, between themselves and in respect of third parties, resulting from the link created by the registration of the partnership (Art. 2 lit. a Proposal RP).

1.2. REGISTERED PARTNERSHIP

“Registered partnership” means the regime governing the shared life of the two people which is provided for in law and is registered by an official authority (Art. 2 lit. b Proposal RP). Because both marriage and registered partnerships may or may not be open to opposite-sex couples or to same-sex couples, depending on the Member State, the two proposals of Regulations try to avoid different classifications and are gender neutral.² However, here one does not encounter a problem because a same-sex partnership has been registered in Germany.

² See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Bringing legal clarity to property rights for international couples, COM(2011) 125 final.– Cf. WAUTELET, in this book at pp. 166 f., 180.

1.3. JURISDICTION OF ITALIAN AND GERMAN COURTS

There is a general rule on jurisdiction in Art. 5 of the Proposal. Jurisdiction to rule on proceedings concerning the property consequences of a registered partnership shall lie with the courts of the Member State of the partners' common habitual residence (para. 1 lit. a). Therefore, Italian courts would have jurisdiction. However, the courts referred to in points (a), (b) and (c) of Art. 5 para. 1 may decline jurisdiction if their law does not recognise the institution of registered partnership. Because there is no registered partnership under Italian law, Italian courts could decline jurisdiction.

Hence the plaintiff has the opportunity to go to the German courts because of the registration of the partnership in Germany (Art. 5 para. 1 lit. d). Italy should then recognise the German judgment (Art. 21). Recognition may not be refused merely on the grounds that the law of the Member State addressed does not recognise registered partnerships or does not accord them the same property consequences.

2. DETERMINATION OF THE LAW APPLICABLE TO THE PROPERTY CONSEQUENCES

2.1. IMPLICIT RULE PROVIDING FOR RECOGNITION OF PERSONAL AND FAMILY STATUS IN THE EU?

There is no explicit rule on the recognition of partnerships in the Proposal. It will be discussed later in more detail³ whether there is an implicit rule providing for recognition of personal and family status in the EU.⁴ If one accepts such an approach, a Member State is obliged to acknowledge that the partners entered into a registered partnership in another Member State. Whether a partnership is validly registered in another Member State should therefore be determined by the law of that State. In our case German law applies; the requirements of German law are met.

2.2. PRELIMINARY QUESTION

Under a more traditional approach, the preliminary question arises whether there is a valid registered partnership. No specific provision of the Proposal deals with this preliminary question. Generally two different approaches are possible

³ See Question 2.

⁴ See BARATTA, Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC, *IPRax* 2007, 4 ff.

– an independent or a dependent connection. However, it is not clear which rule leads to a law which decides whether there is a valid registration. There is also no specific article in the Proposal on the issue of registration.

It seems to be advisable that the connection should be the same as in Art. 15 of Proposal RP. According to this provision, the law applicable to the property consequences of registered partnerships is the law of the State in which the partnership was registered. This means that German law applies. There has been a registration in Cologne (Germany) under the German law on life partnership. Therefore the registration must be recognised in all Member States.

There is an exclusion of renvoi under Art. 19 Proposal RP. Where the Regulation provides for the application of the law of a State, it refers to the rules of substantive law in force in that State other than its rules of private international law. It is quite clear, however, that between Member States there is no renvoi problem at all. The choice of law rules of the Regulation apply and these should have priority.

If one were not to follow this approach on registration, one could apply the national German conflict rules on partnerships. For the question of whether a valid partnership has been entered into, these rules would also lead to the place of registration (Art. 17b para. 1 Introductory Law). It should, further, be noted that the CIEC Convention on the recognition of registered partnerships of 2007 has only been ratified by Portugal and Spain and has not entered into force.

2.3. LAW OF THE PLACE OF REGISTRATION

The law applicable to the property consequences of registered partnerships is the law of the State in which the partnership was registered (Art. 15 Proposal RP). Since the partnership was registered in Germany, German family law applies. Under German law registered partners live in the matrimonial property regime of a so-called “community of acquisitions”, which means a participation in acquisitions (§6 Life Partnership Act).

2.4. PUBLIC POLICY

If one assumes Italian jurisdiction: Could Italian courts invoke public policy? There is a public policy clause in the Proposal; the application of a rule of the law determined by the Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum (Art. 18 para. 1 Proposal RP). However, the application of a rule of the law determined by Proposal RP may not be regarded as contrary to the public policy of the forum

merely on the grounds that the law of the forum does not recognise registered partnerships (Art. 18 para. 2 Proposal RP). Recital 21 expressly states that the public policy clause may not be used to discriminate on the grounds of sexual orientation. This would be contrary to Art. 21 of the Charter of Fundamental Rights of the EU.

The fact that Italian law does not provide for registered partnerships is therefore not sufficient to trigger application of the public policy clause. The former Italian position that the recognition of a partnership registered abroad would contravene public policy (cf. Art. 16 PIL Act)⁵ no longer seems to be a sustainable position.

3. RECOGNITION OF DECISIONS

A German decision has to be recognised in Italy according to Arts. 21 and 22 Proposal RP. Differences in applicable law are no impediment to recognition. According to Art. 24 Proposal RP, the recognition and enforcement of a decision concerning the property consequences of a registered partnership may not be refused merely on the grounds that the law of the Member State addressed does not recognise registered partnerships or does not accord them the same property consequences.

Case 2: “The wealthy computer specialist” (Financial consequences)

The Dutchmen Alexander and Benjamin married in Uppsala (Sweden) in 2008. Then they moved to Utrecht (The Netherlands). Whereas Alexander was a well-paid computer specialist, Benjamin mainly studied Mexican and Mayan history at the university and took care of the household. Now Benjamin is contemplating a divorce suit and is interested in the financial consequences of divorce. Dutch law as well as Swedish law provide for same-sex marriage with the possibility of compensation upon the termination of the marriage.

Questions:

1. Which law would apply under the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes of 16 March 2011 (MP Proposal)?⁶

⁵ See BOSCHIERO, *Les couples homosexuelles à l’épreuve du droit international privé Italien*, *Rivista di diritto internazionale* 2007, 50 ff. Cf. also WAUTELET, in this book at pp. 151 f.

⁶ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 of 16 March 2011.

2. Would it make a difference under the Proposal if the spouses moved to Munich (Germany)? German family law provides for registered partnership but no same-sex marriage.

1. QUESTION 1: APPLICATION OF THE REGULATION PROPOSAL ON JURISDICTION, APPLICABLE LAW AND THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATTERS OF MATRIMONIAL PROPERTY REGIMES OF 16 MARCH 2011

1.1. JURISDICTION

Jurisdiction of the Dutch courts could be based on Arts. 4 and 5 of the MP Proposal.

1.2. MATRIMONIAL PROPERTY REGIME

According to Art. 1 para. 1 MP Proposal, the Regulation shall apply to matrimonial property regimes. The Regulation does not contain a definition of matrimonial property regimes. Recital 10 provides only that the Regulation covers issues in connection with matrimonial property regimes. Recital 11 adds that the scope of this Regulation should extend to all civil matters in relation to matrimonial property regimes, both the daily management of marital property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses. The property consequences of a divorce are matrimonial property issues.

1.3. MARRIAGE

Recital 10 lays down that the Regulation covers issues in connection with "matrimonial" property regimes. The Regulation does not define "marriage", Recital 10 taking explicit reference in this regard to national laws of the Member States. It is clear that a registered partnership is not a marriage in the sense of the MP Proposal since there will be a separate European Regulation for registered partnerships.

However, here the problem is to be solved for a same-sex marriage. It is stressed by the Communication of the Commission that the two proposals of Regulations

on matrimonial property regimes and on registered partnerships are gender neutral because, depending on the Member State, both marriage and registered partnerships may or may not be open to opposite-sex couples or to same-sex couples.⁷ Thus, the marital relationship can also be a same-sex marriage. Dutch law provides for a same-sex marriage.⁸ Here, a same-sex marriage has been entered into in Sweden. According to the Commission, the Proposal on Matrimonial Property should be applied. However, the exact approach to be followed is not clear.

1.4. IMPLICIT RULE PROVIDING FOR RECOGNITION OF PERSONAL AND FAMILY STATUS IN THE EU?

1.4.1. *Concept of a Gender Neutral Marriage*

One could argue that the concept of a gender neutral marriage in the Proposal is in principle an autonomous concept but is not totally independent of definitions in the national legal systems. It is thus left to the national systems whether a same-sex marriage exists. However, if the marriage was celebrated abroad, then the question of the recognition of such a marriage arises.

Based on European citizenship (Art. 20 TFEU) and the freedom of movement (Art. 21 TFEU), there is a trend in the case law of the ECJ establishing an implicit rule providing for recognition of personal and family status in the EU.⁹ There are examples for this in social security law (*Dafeki*¹⁰) and in the law of names (*Grunkin Paul*¹¹). This approach may also be used for the recognition of civil partnerships and same-sex marriages within the EU.

If one follows the approach that the European Union lacks a common detailed definition of “marriage”, it must be left to the Member States to define what a marriage is. Whether a marriage is validly concluded in Sweden should therefore be left to be determined by Swedish law.¹² In our case there are seemingly no problems. However, one weakness of the recognition approach is that it is not

⁷ See Communication (no. 2) p. 5 f. Cf. also WAUTELET, in this book at pp. 145–148.

⁸ See CURRY-SUMNER, Private International Law Aspects of Homosexual Couples: The Netherlands Report, *Electronic Journal of Comparative Law (EJCL)* 11.1 (May 2007) 5 f.

⁹ Cf. KUIPERS, Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, www.ejls.eu/5/68UK.pdf.

¹⁰ ECJ 2 December 1997 – C-336/942 – *Dafeki*, ECR 1997, I-6761.

¹¹ ECJ 14 October 2008 – C-353/06 – *Grunkin Paul*, ECR 2008, I-07639.

¹² The European Commission itself recognises a Dutch same-sex marriage as “marriage” for internal purposes.

based on precise connecting factors and does not establish a specific law which is competent to create the respective legal position.

1.4.2. National Public Policy

Another question is whether national public policy could bar recognition of same-sex marriages. Since Sweden and the Netherlands basically follow the same approach, there is no problem in our case. However, in the past national public policy clauses were sometimes used against same-sex marriages entered into abroad.¹³ Although it is for Member States to define the notion “marriage” (see Recital 10), it is not totally within their discretion to define the content of their public policy. There are limits of European Union law. Despite the fact that same-sex marriages are a politically sensitive question, the principle of non-discrimination in the Charter of Fundamental Rights of the European Union sets certain limits, particularly in its Art. 21 which states that any discrimination based on grounds such as, *inter alia*, sex or sexual orientation is prohibited.

1.4.3. “Downgrading” of the Marriage?

Member States which only provide for registered partnerships but not for same-sex marriages often use another technique of classification. For example, in the UK foreign same-sex marriages are recognised only in the form of registered partnerships.¹⁴ However, there are doubts if such a “downgrading” of same-sex marriages to registered partnerships is still allowed under the Council Regulation. Downgrading means that one does not fully recognise the effects of the foreign marriage.

1.5. PRELIMINARY QUESTION

Under the traditional approach there is also a preliminary issue whether there is a marriage. For matters of matrimonial property it has to be decided whether the claimant has actually been married or whether he or she is merely a partner. The laws governing the existence of civil partnerships are not matters of matrimonial property, and they should not be determined by the future matrimonial property

¹³ The German Administrative Court (Verwaltungsgericht, VG) Karlsruhe refused on the basis of the public policy exception to recognise a Dutch same-sex marriage between a Dutch and a Taiwanese national residing in Germany when the Taiwanese national applied as spouse of a migrant worker for a German residence permit under Art. 10 of Regulation 1612/68 (9 September 2004, *IPRax* 2006, 284 with note by RÖTHEL, 250).

¹⁴ See SCHERPE, Legal Recognition of Foreign Formalised Same-Sex Relationships in the UK, *International Family Law* 2007, 198 ff. – Cf. also WAUTELET, in this book at pp. 150, 165 f.

Regulation merely because the respective issues arise as preliminary questions in a matrimonial property matter.

It is true that a dependent solution of the preliminary question, i.e. the application of the conflict rules for matrimonial property, would lead to a greater harmony of decision in the fields covered by the Regulation. Nevertheless, divergences in the assessment of other issues should be avoided. The recognition of a civil partnership should rather be subject to the same law irrespective of whether the issue is litigated, for example, in the context of matrimonial property, maintenance proceedings or succession proceedings.

It may be argued, therefore, that in the absence of such general rules in the Proposals, preliminary questions should basically be treated as if they were principal questions. This would guarantee that issues of matrimonial property would be governed by the future Matrimonial Property Regulation irrespective of whether they arise in matrimonial property proceedings. This basic rule follows from the provision on the scope of application set forth in Art. 1 MP Proposal, but it should also apply to subjects not contained in that list. It is only in exceptional cases that the conflict rules applicable to matrimonial property may extend to preliminary questions.

The choice of law rules governing the celebration of a marriage in the Netherlands stem from the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages.¹⁵ This Convention, in force in the Netherlands, Luxembourg and Australia, entered into force on 1 May 1991. There is no definition of “marriage” in the Convention and it is disputed whether same-sex marriages are included.¹⁶ There are good arguments that the Convention is based on the traditional concept of marriage and that same sex marriages are excluded.¹⁷ If same-sex marriages do not fall within the scope of the 1978 Hague Convention, then the Dutch Private International Law (Marriage) Act would apply to such cases.¹⁸

1.6. DETERMINATION OF THE APPLICABLE LAW

There is a choice of law rule on the objective connection where no choice by the spouses has been made (Art. 17 MP Proposal). The law applicable to the matrimonial property regime shall be the law of the State of the spouses’ first

¹⁵ See CURRY-SUMNER, *EJCL* 11.1 (May 2007), 7.

¹⁶ CURRY-SUMNER, *EJCL* 11.1 (May 2007), 7 f.

¹⁷ See SIEHR, Family unions in private international law, *N.I.L.R.* 50 (2003) 419, 425 f.

¹⁸ CURRY-SUMNER, *EJCL* 11.1 (May 2007), 9.

common habitual residence after their marriage (Art. 17 para. 1(a) MP Proposal). Failing that, the law of the State of the spouses' common nationality at the time of their marriage applies (Art. 17 para. 1(b) MP Proposal).

Failing that, the law of the State with which the spouses jointly have the closest links, taking into account all the circumstances, in particular the place where the marriage was celebrated (Art. 17 para. 1(c) MP Proposal). Here the spouses' first common habitual residence after their marriage was in Sweden. Thus Swedish law applies.

2. QUESTION 2: MATRIMONIAL PROPERTY AFTER RELOCATION TO GERMANY

2.1. APPLICATION OF THE REGULATION PROPOSAL ON JURISDICTION, APPLICABLE LAW AND THE RECOGNITION AND ENFORCEMENT OF DECISIONS IN MATTERS OF MATRIMONIAL PROPERTY REGIMES

After a relocation to Germany, the Proposal on Matrimonial Property could still be applied. According to the Commission, same-sex marriages are covered. It is not necessary that the law of the forum (German law) also provides for a same-sex marriage. Relocation does not change anything.

2.2. APPLICABLE LAW

If the same-sex spouses change their habitual residence from one Member State to another, the spouses may easily change the law applicable to their matrimonial property regime by an agreement (Art. 16 MP Proposal). This is also the approach adopted in the recent Rome III Regulation on the law applicable to divorce and legal separation (Art. 5 Rome III Reg.).

There is a choice of law rule on the objective connection where no choice by the spouses has been made (Art. 17 MP Proposal). The law applicable to the matrimonial property regime shall be the law of the State of the spouses' first common habitual residence after their marriage (Art. 17 para. 1(a) MP Proposal). Here this was Sweden. Swedish law still applies.

Case 3: “The German/Dutch couple” (Dissolution/Divorce)

Jan, a Dutch national, and Hans, a German national, entered into a marriage in The Hague (The Netherlands). Two years later, Hans applies for divorce in the German local court of Münster (Germany). At the time of the application, Hans has maintained his habitual residence for one year in Münster (Germany), Jan in The Hague. According to Dutch law a marriage between persons of the same sex is valid. German law does not provide for marriage between persons of the same sex. However, under German law a registered partnership between persons of the same sex is possible. Such a partnership may be dissolved by a judgment of the local court. There is a German conflict rule in Art. 17b Introductory Law to the Civil Code. Under Dutch family law a divorce of the marriage is possible.

Questions:

1. Is Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIbis) applicable? Will the German court be able to exercise jurisdiction?
2. Would Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation be applicable in the future?
3. Which national law will the German court apply under the law as it stands now (cf. Art. 17b para. 1 S. 1 Introductory Law)?
4. Would it make a difference if, after a relocation of the couple to England, dissolution proceedings were introduced in Oxford (England)? Could an English county court assert jurisdiction and, if so, what law would be applicable? Under English law a divorce of an opposite-sex marriage and a dissolution of a civil partnership are possible. There are English conflict rules in section 212 et seq. Civil Partnership Act 2004.
5. Would it make a difference if, after a relocation of the couple to Sweden, dissolution proceedings were introduced in Stockholm (Sweden)? Could a Swedish court assert jurisdiction and, if so, what law would be applicable? Under Swedish law a same-sex marriage and divorce of such a marriage are possible. Sweden generally applies Swedish law to divorces in Sweden.

1. QUESTION 1: APPLICATION OF BRUSSELS IIBIS, JURISDICTION

1.1. BRUSSELS IIBIS

In Germany, as in the other European Union Member States, the Brussels *Iibis* Regulation is applicable.¹⁹ The Brussels *Iibis* Regulation applies in civil matters relating to divorce, legal separation or marriage annulment (Art. 1(a)). One could argue that also a *registered* partnership could be subject to a divorce. Insofar as the existence or dissolution of a life partnership is concerned, according to the dominant German view the European Brussels *Iibis* Regulation on jurisdiction and recognition is not applicable.²⁰ This seems to be also the dominant position in other Member States..²¹

However, in our case there is a *same-sex marriage*. One could argue that the concept of “marriage” is in principle an autonomous concept independent of definitions in the national legal systems.²² The remaining question, as yet unanswered, is whether same-sex marriages fall within the scope of this Regulation.²³ At the time of the drafting the Brussels *Iibis* Regulation a same-sex marriage was not known in European national family laws so that only a change of the concept based on systematic and teleological arguments could justify including same-sex marriages in the Regulation’s scope.

From a Dutch point of view, there is only one marital institution, which is open to couples regardless of their sex. Therefore, it is argued that to introduce a distinction would be discriminatory and contrary to the policy behind opening

¹⁹ Council Regulation (EC) No 2201/2003 of concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338.

²⁰ WAGNER, Das neue Internationale Privat- und Verfahrensrecht zur eingetragenen Lebenspartnerschaft, *IPRax* 2001, 281, 282; JAKOB, *Die Eingetragene Lebenspartnerschaft im Internationalen Privatrecht*, 2002, p. 269; VON HOFFMANN/THORN, *Internationales Privatrecht*, 9th ed., 2007, §8 No. 73k; BAMBERGER/ROTH(-HEIDERHOFF), *Bürgerliches Gesetzbuch*, 2nd ed., 2008, Art. 17b EGBGB No. 55; HOHLOCH, in: HORNDASCH/VIEFHUES (eds.), *Kommentar zum Familienverfahrensrecht*, 2nd ed. 2011, § 103 FamFG No. 6; PALANDT (-THORN), *Bürgerliches Gesetzbuch*, 70th ed., 2011, Art. 17b EGBGB No. 11.

²¹ PINTENS, Marriage and partnership in the Brussels IIa Regulation, *Liber memorialis Petar Šarčević*, 2006, pp. 335, 339 ff.

²² See BOGDAN, Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden, *Nordic J. Int.* 78 (2009) 253, 255; PINTENS (no. 21) pp. 335, 336 f.

²³ The Dutch State Committee on PIL considered the predecessor of the Brussels *Iibis* Regulation, the Brussels II Regulation, also to be applicable to same-sex marriage; see in more detail CURRY-SUMNER *EJCL* 11.1 (May 2007).

marriage to same-sex couples. Pursuant to such an understanding, Brussels IIbis is considered to be applicable.²⁴

In another context – a staff case – the ECJ determined some years ago that a registered partner is not to be understood as equivalent to a spouse in the context of European legislation.²⁵ However, the ECJ has yet to address the issue whether a same-sex couple legally and validly “married” in one Member State is entitled to be treated as married in other Member States. The gender-neutral approach in the new Proposals shows that there is an intention that same-sex marriages should not be treated differently from opposite-sex marriage under matrimonial law. It may be that under the influence of changes in substantive family law within the Member States the Court will also change its position.²⁶

However, the dominant approach in other countries still seems to be that only traditional marriage – union between a man and a woman – is included. Therefore the Regulation cannot be applied.²⁷ In the UK, provisions corresponding to the Brussels IIbis Regulation may be enacted.²⁸

1.2. GERMAN JURISDICTION RULES

In Germany there is the dominant view that a same-sex marriage cannot be considered to be a marriage in the sense of the jurisdiction rules. Instead it is treated like a civil partnership. However, in the German Family Proceedings Act there is a special provision on jurisdiction for partnerships²⁹ which can also be applied to same-sex marriages.³⁰ According to this provision, German courts have jurisdiction if one of the partners is a German (§103 Nr. 1 Family Proceedings Act) or one of the partners (plaintiff or defendant) has his habitual residence in Germany (§103 Nr. 2 Family Proceedings Act). Another basis for jurisdiction is that the partnership was registered in Germany (§103 Nr. 3 Family Proceedings Act). In our case one of the spouses (partners) has his habitual residence in Germany; therefore the German court is able to exercise jurisdiction.

²⁴ CURRY-SUMNER *EJCL* 11.1 (May 2007), 11.

²⁵ ECJ 31 May 2001 – *D and Kingdom of Sweden v Council of the European Union*, C-122/99P and C-125/99P, ECR 2001, I-4319.

²⁶ See BOGDAN, *Nordic J. Int.* 78 (2009) 253, 255.

²⁷ HORNDASCH/VIEFHUES (-HOHLOCH) § 103 FamFG No. 6.– Implicitly also local court (Amtsgericht, AG) Münster 20 January 2010, *StAZ* 2011, 211 = *IPRax* 2011, 269 with note MANKOWSKI/HÖFFMANN, 247.– Cf. also WAUTELET, in this book at pp. 149–151.

²⁸ Section 219 (3) Civil Partnership Act 2004.

²⁹ § 103 Family Proceedings Act (FamFG).

³⁰ HORNDASCH/VIEFHUES (-HOHLOCH) § 103 FamFG No. 6.

2. QUESTION 2: ROME III REGULATION (DIVORCE)

2.1. SCOPE OF COUNCIL REGULATION (EU) NO 1259/2010 IMPLEMENTING ENHANCED COOPERATION IN THE AREA OF THE LAW APPLICABLE TO DIVORCE AND LEGAL SEPARATION OF 20 DECEMBER 2010

2.1.1. “Divorce”

Application of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).³¹ The Regulation shall apply from 21 June 2012. It is based on a political agreement reached on international marriages between the Ministers of Justice of 14 Member States. The Regulation will apply to Austria, Belgium, Bulgaria, Germany, France, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

Art. 1 para. 1 defines the scope of the Regulation. It shall apply, in situations involving a conflict of laws, to divorce and legal separation.

2.1.2. What is “Marriage” under the Divorce Regulation (Rome III)?

Recital 10 of the Rome III Regulation provides that the substantive scope and enacting terms of this Regulation should be consistent with the Brussels IIbis Regulation. However, it should not apply to marriage annulment. The same recital lays down that the Regulation should apply only to the dissolution or loosening of marriage ties. The law determined by the conflict-of-laws rules of this Regulation should apply to the grounds for divorce and legal separation.

In Recital 30 there is a reference to the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, and in particular by Art. 21 thereof, which states, *inter alia*, that any discrimination based on any ground such as sex or sexual orientation shall be prohibited. The Regulation should be applied by the courts of the participating Member States in observance of those rights and principles.

The legislative history of the Regulation shows that it was initially developed to amend the Brussels IIbis Regulation. Under the Brussels IIbis Regulation, the prevailing view had been that only traditional marriage was included. In an earlier draft of the Rome III Proposal there was, on the initiative of Malta and Poland, a provision that left the concept of marriage to be dealt with by the

³¹ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343/10.

individual Member States.³² This is an argument for a narrow interpretation of the Regulation. Member States which provide for same-sex marriages could apply the rules of the Regulation by analogy.

A divergent application by the Member States should be avoided. At least for two nationals from Member States with same-sex marriage, there seems to be no real arguments against an application of the Regulation. Additionally, Art. 13 respects that there may be “differences in national law”; nothing in the Regulation shall oblige the courts of a participating Member State whose law does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation. However, this is only an exception. Additionally, the new Proposals with their inclusion of same-sex marriage in the concept of marriage are an argument for a wide application of the Regulation and an argument against a downgrading.

One could therefore come to the conclusion that the same-sex marriage of the couple is covered by the Rome III Regulation.

2.2. PRELIMINARY QUESTION

According to Art. 1 para. 2, the Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings: (a) the legal capacity of natural persons and (b) the existence, validity or recognition of a marriage.

Recital 10 sets out that the preliminary questions such as legal capacity and the validity of the marriage, and matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures should be determined by the conflict-of-laws rules applicable in the participating Member State concerned. It is not clear whether the same approach should be followed for same-sex marriages and if the forum has a possibility to decide on the recognition of this kind of marriage.

As mentioned above, there are some doubts whether “downgrading” is still allowed under the Council Regulation. It is, however, not excluded that German courts would still adopt such an approach.

³² See Art. 7a of the Draft. Now Recital 26 provides that when the Regulation refers to the fact that the law of the participating Member State whose court is seised does not deem the marriage in question valid for the purposes of divorce proceedings, this should be interpreted to mean, *inter alia*, that such a marriage does not exist in the law of that Member State. In such a case, the court should not be obliged to pronounce a divorce or a legal separation by virtue of this Regulation.

3. QUESTION 3: DIVORCE OF A MARRIAGE OR DISSOLUTION OF A REGISTERED PARTNERSHIP IN GERMANY?

3.1. DIVORCE OF A MARRIAGE OR DISSOLUTION OF A REGISTERED PARTNERSHIP?

There is an application for a divorce. The German court has to apply a conflict rule. However, there are two German conflict rules. One deals with the divorce of marriages (Art. 17 Introductory Law), the other deals with the dissolution of civil partnerships (Art. 17b Introductory Law). Which is applicable?

Some legal systems allow persons of the same sex to establish a full marriage which has exactly the same effects as a marriage of heterosexual persons.³³ Yet the legal effects of such a relationship exceed, however, the effects of a life partnership under German law.

For the characterisation (“qualification”) of such unions, several alternatives exist. One could categorise them as marriages according to German private international law (Art. 13 Introductory Law).³⁴ However, a pre-condition to this approach would be a different functional notion of marriage in private international law than is found in German internal law, dropping the requirement of heterosexuality.³⁵ As a consequence, the personal laws of the partners would decide on the effects of entering of a partnership. Against exceeding effects of the applicable foreign law one could, if necessary, resort to German public policy (Art. 6 Introductory Law).³⁶ A celebration of such a “real” marriage involving a

³³ In five Member States, marriage is open to both opposite-sex and same-sex couples (The Netherlands since 2001 [Art. 1:30 Civil Code]; Belgium since 2003 [Art. 143 ff. Civil Code]; Spain since 2005 [Art. 44 Spanish Civil Code]; Sweden since 2009 [Ch. 1 § 1 Marriage Act] and Portugal since 2010 [Art. 1577 Civil Code]).

³⁴ RÖTHEL, *Registrierte Partnerschaften im internationalen Privatrecht*, *IPRax* 2000, 74, 76; GEBAUER/STAUDINGER, *Registrierte Lebenspartnerschaften und die Kappingsregel des Art. 17b Abs. 4 EGBGB*, *IPRax* 2002, 275, 277; THORN, *The German Conflict of Law Rules on Registered Partnerships*, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 159, 161; JAKOB (no. 20) p. 285; COESTER, in: *Münchener Kommentar zum BGB*, vol. 10, 5th ed., 2010, Art. 17b EGBGB No. 48; *AnwaltKommentar (-GEBAUER)*, *AnwaltKommentar BGB I*, 2005, Art. 17b EGBGB No. 18 f. – Contra HAUSMANN, *Überlegungen zum Kollisionsrecht registrierter Partnerschaften*, *Festschrift Henrich*, 2000, pp. 241–251; ANDRAE, *Internationales Familienrecht*, 2nd ed., 2006, No. 825.

³⁵ JurisPK/RÖTHEL, *juris Praxiskommentar BGB*, vol. 6, *Internationales Privatrecht*, 2010, Art. 17b EGBGB No. 12.– In analogy to Art 13 para. 1 PALANDT/THORN Art. 17b EGBGB No. 1, 12.– Undecided Appellate Court (Oberlandesgericht; OLG) Köln 5 July 2010, *StAZ* 2010, 264; Local court Köln 17 December 2009, *StAZ* 2010, 114.

³⁶ Doubting GEBAUER/STAUDINGER, *IPRax* 2002, 277. Cf. also JAKOB (no. 20) p. 232, 285 f.

German partner (or involving German partners) would fail because the personal law of at least one of the participants does not allow it. The better approach under existent law seems to be, however, that such a relationship cannot be regarded as a marriage from the very outset because the required difference of the sexes is lacking.

However, if the recognition of a foreign same-sex marriage as a marriage in the sense of German private international law fails, one has to ask if it then could be recognised at least as a life partnership in the sense of German law. From the point of view of the existing German law, not a same-sex relationship as such but only the exceeding effect is offensive. It would be inconsistent if foreign life partnerships were generally recognised in Germany, whereas a relationship with potentially exceeding effects would find no recognition at all. This is an argument for the recognition of the same-sex marriage at least as a life partnership in the sense of Art. 17b Introductory Law.³⁷ However, as mentioned above³⁸ there are some doubts whether downgrading is still allowed under the Council Regulation.

At the same time there is also a preliminary question: Does the prerequisite of a marriage or partnership exist? The correct approach is disputed. According to one view, marriage in German conflict law has to be understood in a broad manner that it encompasses also a same-sex relationship. According to this view the national laws of Jan and Hans have to be applied (Art. 13 para. 1 Introductory Law). Under Dutch law there is a valid marriage. Under German law the marriage would be void ab initio. A divorce would be not possible, only a declaratory judgment stating that there has been a void marriage. The majority of authors, however, argues that since German matrimonial law does not recognise same-sex marriages but does recognise partnerships with similar effects, a civil partnership should be recognised. Therefore the conflict rule for registered partnerships should be applied.³⁹

³⁷ In this sense also Federal Fiscal Court (Bundesfinanzhof; BFH) 30 November 2004, *IPRax* 2006, 287; Appellate Court Zweibrücken 21 March 2011, *StAZ* 2011, 189, 190; Local court Münster 20 January 2010, *StAZ* 2010, 211; MünchKomm(-COESTER) No. 146; HENRICH, Kollisionsrechtliche Fragen der eingetragenen Lebenspartnerschaft, *FamRZ* 2002, 137, 138; VON SACHSEN GESSAPHE, Le partenariat enregistré en droit international privé allemand in: Institut suisse de droit comparé (ed.), *Aspects de droit international privé des partenariats enregistrés en Europe*, 2004, 9, 19 f.; MünchKomm(-SIEHR) Art. 14 EGBGB No. 143; STAUDINGER/MANKOWSKI, *Internationales Eherecht*, 2011, Art. 13 EGBGB No. 177a, Art. 17b EGBGB No. 22. Similarly (analogy to Art. 17b para. 4 Introductory Law) WASMUTH, *Eheschließung unter Gleichgeschlechtlichen in den Niederlanden und deutscher ordre public*, *Liber amicorum Gerhard Kegel*, 2002, pp. 237, 242 ff. – Cf. also Administrative Court Berlin 15 June 2010, *StAZ* 2010, 372 = *IPRax* 2011, 270 with note MANKOWSKI/HÖFFMANN, 247.

³⁸ See Case 2, question 1.

³⁹ Local court Münster 20 January 2010, *StAZ* 2011, 211.

3.2. APPLICABLE LAW

According to Art. 17b para. 1 sent. 1 of the Introductory Law, the dissolution is governed by the substantive provisions of the country in which the life partnership is registered. The registration of the same sex marriage (treated like a partnership) was in the Netherlands. Therefore the dissolution follows Dutch law. Subsequently, according to Dutch law the divorce can be declared (Art. 1:151 Dutch Civil Code).⁴⁰ However, it is also argued (unconvincingly) that one has to be consequent also in the application of substantive law, so that only a “dissolution” of the partnership can be ordered.⁴¹

4. QUESTION 4: DIVORCE OF A MARRIAGE OR DISSOLUTION OF A REGISTERED PARTNERSHIP IN ENGLAND?

In English law there is no same-sex marriage. There is however a special English conflict rule for civil partnerships. Some registered partnerships abroad (overseas relationships) are recognised as “specified relationships” (Section 212, 213 Civil Partnership Act 2004).⁴² Schedule 20 of the Civil Partnership Act 2004 lists various types of relationships and legal regimes which exist in other countries and have legal consequences similar to those of civil partnerships, such as a registered partnership in Denmark and the like. The list also includes marriage in Belgium and the Netherlands (both countries where marriage is available to same-sex partners). In our case, as the Dutch same-sex marriage is included in this list the overseas relationship is treated as a civil partnership in the sense of English law (Section 215 Civil Partnership Act 2004).

Under English law the marriage will be treated as a civil partnership.⁴³ This means there is a certain downgrading of the relationship.⁴⁴ Such a treatment is problematic. One could argue that this amounts to discrimination against the marital relationship. But it is, nevertheless, the existing law. The dissolution of the partnership as such follows English law. There may be a dissolution of the partnership on the ground of irretrievable breakdown (Section 37 (1)(a), 44 Civil Partnership Act 2004).

⁴⁰ Local court Münster 20 January 2010, *StAZ* 2011, 211; ANDRAE, Personenstandsrechtliche Behandlung einer gleichgeschlechtlichen Eheschließung, *StAZ* 2011, 97, 103.

⁴¹ MANKOWSKI/HÖFFMANN, Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?, *IPRax* 2011, 247, 252 f.

⁴² Civil Partnership Act 2004. See Explanatory Notes No. 415, 416. Cf. also NORRIE, *Journal of International Private Law* 2 (2006) 137, 161 ff.

⁴³ See Schedule 20 of the Civil Partnership Act 2004.

⁴⁴ See SCHERPE, *International Family Law* 2007, 198 ff.– Cf. also WAUTELET, in this book at pp. 165 f.

There are rules on jurisdiction in Section 219 ff. Civil Partnership Act 2004. They are based on the assumption that the Brussels *Ibis* Regulation is not applicable. However, there is a special legal basis for English provisions on jurisdiction which are in line with the Brussels *Ibis* Regulation (Section 219), the so-called “section 219 regulations”.

5. QUESTION 5: DIVORCE IN SWEDEN

Would it make a difference if, after a relocation of the couple to Sweden, dissolution proceedings were introduced in Stockholm (Sweden)? Could a Swedish court assert jurisdiction and, if so, what law would be applicable?

5.1. JURISDICTION OF THE SWEDISH COURT

In Sweden there is same-sex marriage. The Swedish courts have jurisdiction. Jurisdiction may be based on Brussels *Ibis* or on national Swedish law.

5.2. APPLICABLE LAW

Under Swedish law a same-sex marriage and divorce of such a marriage are possible. The Dutch same-sex marriage will be recognised as a marriage. Swedish courts generally apply Swedish law to divorces in Sweden.⁴⁵ There is an exception only if both spouses are foreign nationals and neither has been habitually resident in Sweden for a year or longer.⁴⁶ Sweden does not take part in the enhanced cooperation in international divorce law (Rome III). The Swedish court will apply Swedish law according to Swedish private international law.

5.3. SUMMARY

The German and the English approaches have in common that there is only a partnership available in national law. However, there is a difference between the German and the English approach. In Germany there is a downgrading only in the application of the conflicts rule. The Dutch substantive law will be applied. The English approach, however, means that with the application of English

⁴⁵ See Ch. 3 §4 para. 1 Act on Certain International Legal Relationships in respect of Marriage and Guardianship (1904:26 s. 1) (Lag (1904:26 s.1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap). – Cf. also WAUTELET, in this book at pp. 145 f., 161 f.

⁴⁶ Ch. 3 §4(2) Act on Certain International Legal Relationships in respect of Marriage and Guardianship.

partnership law the application of foreign matrimonial law is also substantively rejected. Swedish and Dutch law follow the same approach concerning same-sex marriages. The Dutch marriage will be recognised as a marriage. However, the Swedish court will apply Swedish rather than Dutch law to the divorce.

Case 4: “Cost of living in Berlin” (Maintenance)

The British nationals Andrew and Brian entered into a registered civil partnership in London (England). Later Andrew and Brian moved to Berlin (Germany) where they maintained their habitual residence. Subsequently, Brian moved to Amsterdam (The Netherlands). In July 2011 Andrew, who is still a student, files a maintenance suit in a Berlin local court against his partner.

Questions:

1. Is Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations applicable?
2. Is the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations applicable? Which national maintenance law is applicable?

1. QUESTION 1: APPLICATION OF COUNCIL REGULATION (EC) NO 4/2009 ON JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF DECISIONS AND COOPERATION IN MATTERS RELATING TO MAINTENANCE OBLIGATIONS OF 18 DECEMBER 2008

1.1. APPLICABILITY

The Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations is applicable since 18 June 2011.⁴⁷ Maintenance obligations between registered

⁴⁷ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ EU 2009 L 7/1.– See FERRAND, The Council Regulation (EC) No 4/2009 of

partners are expressly excluded by the Proposal on Property Consequences (Art. 1 para. 3 lit. c Proposal RP). Recital 10 of Proposal RP expressly states that the Maintenance Regulation applies.

1.2. MAINTENANCE OBLIGATION

The scope of application is defined in Art. 1 para. 1 Maintenance Regulation. According to this provision the Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity. The idea behind this is to guarantee equal treatment of all maintenance creditors. For the purposes of the Regulation, the term “maintenance obligation” should be interpreted autonomously. Maintenance generally depends on the need of a creditor and the ability to pay of the debtor.

1.3. FAMILY RELATIONSHIP

There is no definition of family relationship (Art. 2 Maintenance Regulation). Recital 21 makes clear that the rules on conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based. The establishment of family relationships continues to be covered by the national law of the Member States, including their rules of private international law. It is argued that claims based on registered partnerships are included.⁴⁸ The English registration therefore opens the way for the application of the Regulation.

2. QUESTION 2: APPLICATION OF THE HAGUE PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS OF 23 NOVEMBER 2007

2.1. APPLICATION OF THE HAGUE PROTOCOL

Within the European Union, the rules of the Hague Protocol shall apply provisionally from 18 June 2011, the date of application of the Maintenance

18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in: CAMPUZANO DÍAZ/CZEPÉLAK/RODRIGUEZ BENOT/RODRÍGUEZ VÁZQUEZ (eds.), *Latest Developments in EU Private International Law*, Antwerp, 2011, pp. 83 ff.

⁴⁸ GRUBER, Die neue EG-Unterhaltsverordnung, *IPRax* 2010, 128, 130 with further references.

Regulation, if the Protocol has not yet formally entered into force by that date.⁴⁹ This means that the Hague Protocol applies.⁵⁰

2.1.1. *Maintenance Obligation*

The Hague Protocol determines the law applicable to maintenance obligations (Art. 1 para. 1 Hague Protocol). It covers particularly the existence of an obligation (Art. 11 Hague Protocol). The Protocol is of universal application (Art. 2 Hague Protocol).

2.1.2. *Family Relationship*

The Hague Protocol speaks of “family relationships” (Art. 1 para. 1 Hague Protocol). It leaves the application to same-sex-partners open. It is argued that States which do not recognise such a partnership are allowed to not apply the Protocol.⁵¹ From a German point of view, a classification of an English registered civil partnership as a family relationship seems to be appropriate.⁵²

2.2. APPLICABLE LAW

According to the Hague Protocol the habitual residence of the claimant is determinative (Art. 3 para. 1 Hague Protocol). In our case habitual residence is in Germany. Therefore, German law applies.

Case 5: “Consequences of a traffic accident in Germany” (Succession)

Sissy and Nelly are two Austrian nationals from Vienna, where their civil partnership has been registered. Nelly dies in a traffic accident in Frankfurt (Germany) where both previously lived. Under Austrian and German succession law the surviving partner of a civil partnership becomes a legal heir.

⁴⁹ Article 4 para. 1 Council Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (OJ 2009 L 331/17).

⁵⁰ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ EU 2009 L 331/19.

⁵¹ BONOMI, The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, *YbPrIntL* 10 (2008), 333, 339 f.

⁵² GRUBER *IPRax* 2010, 128, 130; RAUSCHER(-ANDRAE), *Europäisches Zivilprozess- und Kollisionsrecht* IV, 2010, HUntStProt Art. 1 No. 7.

Questions:

1. What would be the result under the European Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession of 2009?
2. What would be the result for the estate of the deceased Austrian partner under German private international law (cf. Art. 17b para. 1 sent. 2 Introductory Law)? According to Austrian private international law the applicable law for succession depends on the nationality of the deceased.

1. QUESTION 1: RESULT UNDER THE EUROPEAN SUCCESSION PROPOSAL

1.1. JURISDICTION RULES

Succession rights of a registered partner will not be covered by the Proposal on Property Consequences (Art. 1 para. 3 lit. e Proposal RP). However, the Regulation Proposal on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession could be applicable.⁵³

A German court, as a court of a Member State, should apply the Succession Proposal. The Proposal applies to courts and judicial authorities which carry out judicial functions (Art. 3 Succession Proposal). The court of the last habitual residence of the deceased has jurisdiction (Art. 4 Succession Proposal). This means that Austrian courts will have jurisdiction. However, jurisdiction can also be based on the presence of property, at least for protective measures (Art. 15).

1.2. APPLICABLE LAW

One law applies to the whole estate (all movable and immovable property), from the opening of the succession to the final transfer. There is freedom of choice. A person may choose the law of his nationality to govern his succession (Art. 17 Succession Proposal). If there has been no choice of law by the deceased there will be an objective connection. The general rule is the application of the law of the last habitual residence of the deceased (Art. 16 Succession Proposal). There is a wide scope afforded to the applicable law, and it also covers administration of

⁵³ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM (2009) 154 final, 2009.

the estate. The formal validity of wills is not covered; in this regard, the Hague 1961 Convention applies to the sixteen Member States which have ratified it.

In the Succession Proposal there is also a public policy clause. The application of a rule of the law determined by the Regulation may be refused only if such application is incompatible with the public policy of the forum (Art. 27 para. 1 Succession Proposal). However, German and Austrian law follow the same approach and there is no problem in applying Austrian law.

1.3. PRELIMINARY QUESTION

In matters of succession, the outcome of proceedings very often depends on issues arising in different areas of the law. It has to be decided whether the alleged heir has actually been married to the deceased or whether he or she is only a partner. The laws governing civil partnerships are not matters of succession, and they should not be determined by the future Succession Regulation merely because the respective issues arise as preliminary questions in a matter of succession. It is true that a dependent solution of the preliminary question, i.e. the application of the conflict rules of the *lex hereditatis*, will lead to a greater harmony of decision in the fields covered by the Regulation. On the other hand, divergences in the assessment of other issues should be avoided. The recognition of a civil partnership should rather be subject to the same law irrespective of whether the issue is litigated in the context of maintenance proceedings or succession proceedings. It may be argued, therefore, that in the absence of such general rules, preliminary questions should basically be treated as if they were principal questions. This would guarantee that issues of succession would be governed by the future Succession Regulation irrespective of whether they arise in succession proceedings. This basic rule follows from the exclusions listed in Art. 1 para. 3 Succession Proposal, but it should also apply to subjects not contained in that list. It is only in exceptional cases that the conflict rules applicable to succession may extend to preliminary questions. This means that the preliminary question has to be answered according to German private international law. The place of registration is determinative.

2. QUESTION 2: RESULT FOR THE DECEASED AUSTRIAN PARTNER UNDER GERMAN PRIVATE INTERNATIONAL LAW

In German private international law, questions regarding an individual's entitlement to inherit from a civil partner are not regarded as legal effects of the

partnership.⁵⁴ The law applicable is determined by the choice of law rules that govern inheritance. According to these rules the nationality of the deceased is decisive (Art. 25 para. 1 Introductory Law). Since the deceased Nelly was Austrian, Austrian law is applicable. There is no renvoi since Austrian private international law uses nationality as a connecting factor also for the succession right of a registered partner (§28 para. 1 in conjunction with §9 para. 1 PIL Statute).⁵⁵ Under Austrian succession law the surviving registered partner of a civil partnership becomes a legal heir.⁵⁶

Case 6: “The end of a PACS” (Succession)

The Belgian national Boris and the French national François entered into a *pacte civil de solidarité* (PACS) in Paris. François dies. François had his domicile in Paris but also had a bank account with a considerable sum of money in Germany. Boris asks whether he has any claims under succession law. Under French law a partner to a PACS has no succession rights. Under German law the registered partner becomes a legal heir. Can Boris rely on this (cf. Art. 17b para. 1 sent. 2 Introductory Law)?

1. REGULATION PROPOSAL ON JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS IN MATTERS OF SUCCESSION OF 14 OCTOBER 2009

Proposal RP applies to all forms of registered partnerships (cf. Art. 2 lit. b Proposal RP). A partnership registered in France in the form of a *pacte civil de solidarité* (PACS) may be between persons of the opposite sex or persons of the same sex, and both kinds of partnership will be covered by the proposal on the property consequences of registered partnerships.⁵⁷ Partnership contracts are expressly mentioned in Art. 2 lit. e, f Proposal RP). However, succession rights are not covered by the Proposal (Art. 1 para. 3 lit. e Proposal RP). For such rights, the Regulation Proposal on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession is applicable.

⁵⁴ SIEHR, *N.I.L.L.R.* 50 (2003) 419, 430.

⁵⁵ TRAAR, *Internationale Aspekte der eingetragenen Partnerschaft*, *iFamZ* 2010, 102, 103.

⁵⁶ § 537a in conjunction with § 737 Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*).

⁵⁷ See Communication (supra no. 2).– Cf. also WAUTELET, in this book at pp. 181–183.

2. DECEASED FRENCH PARTNER UNDER GERMAN PRIVATE INTERNATIONAL LAW

2.1. APPLICATION OF THE LEX SUCCESSIONIS

In German private international law, questions of one partner's entitlement to inherit from the other partner are not regarded as legal effects of the partnership. The consequences of a life partnership in succession law are primarily governed by the applicable law determined according to the general provisions of international succession law (Art. 17b para. 1 sent. 2 half-sentence 1 Introductory Law). Therefore, the *lex successionis* according to Art. 25 Introductory Law is determinative.⁵⁸ This reference leads in principle to the personal law of the deceased (Art. 25 para. 1 Introductory Law).⁵⁹ The law of the place of registration is not referred to. The application of the same law to succession claims of the surviving same-sex partner and claims of third parties avoids tensions between the legal positions of several involved persons as regards succession.⁶⁰ Since in our case the deceased François was a Frenchman, French law is applicable.

2.2. PRELIMINARY QUESTION

How one should determine questions regarding the existence of a life partnership is disputed. Whereas some authors always answer it independently (i.e. according to Art. 17b para. 1 sent. 1 Introductory Law),⁶¹ others want to refer to the conflict-of-laws rule of the foreign law governing the main question at least for the dissolution of a life partnership (i.e. according to the private international law of the *lex successionis*).⁶² In our case, no problems arise since there was a registration in France.

2.3. RENVOI

The principle of nationality in international succession law applies subject only to a renvoi (Art. 4 para. 1 Introductory Law). Therefore, it must always be examined if the foreign law determines the applicable law in a different manner, e.g. with a reference to the domicile or the *lex rei sitae*. This can lead to the

⁵⁸ SIEHR, *N.I.L.R.* 50 (2003) 419, 430; VON HOFFMANN/THORN § 8 No. 73g.

⁵⁹ Apart from this, within the limits of Art. 25 para. 2 Introductory Law, German law can be chosen as the applicable succession law for domestic immovable property.

⁶⁰ Cf. FRANK, *MittBayNot* 2001 SH 42.

⁶¹ PALANDT(-THORN) Art. 17b EGBGB No. 3.

⁶² HENRICH, *FamRZ* 2002, 137, 143; MünchKomm(-COESTER) Art. 17b EGBGB No. 59.

splitting of an inheritance for movables and immovables.⁶³ If necessary, a special determination of the applicable law for foreign immovable property according to Art. 3a para. 2 Introductory Law (“Einzelstatut bricht Gesamtstatut”) also takes place.⁶⁴ According to the dominant opinion, the German personal law of the deceased gives way if the succession law of the country in which immovable property is located governs these immovables because of their location (*lex rei sitae*). This is, for example, the case in France.⁶⁵ Therefore, the succession to immovable property in France will be determined by French law. According to this law, the same-sex partner cannot become an heir.⁶⁶ In our case, which concerns only movable property, there is no renvoi. Under French private international law for movables the domicile of the deceased is determinative.⁶⁷ The domicile of François was in France. Therefore French law is applicable.

2.4. MODIFICATION OF FOREIGN LAW

2.4.1. The Principle

The *lex successionis* also determines the pre-conditions of testate and intestate succession and the existence of a compulsory portion in the testator’s estate. According to German law, the surviving same-sex partner is a legal heir (§10 para. 1 Life Partnership Act). If, similar to German law, the determined foreign law grants a legal succession right in the same-sex partner, this result remains unchanged. For the application of the respective national succession law, however, it has to be determined by interpretation whether a certain life partnership under foreign law can be regarded as a life partnership in the sense of the norms of succession law. Such a “substitution” has been rejected because of the more minimal legal effects of the French PACS for §10 of the German Life Partnership Act.⁶⁸ The increase of the share in the estate by one-fourth pursuant to §1371 para. 1 German Civil Code is also to be characterised as a question of matrimonial property law, which is governed by the law of the place of registration (Art. 17b para. 1 sent. 1 Introductory Law). Therefore, a share determined by foreign succession law may be increased by one-fourth.⁶⁹ However, under French law there is no such right.

⁶³ Cf. FRANK, *MittBayNot* 2001 SH 42.

⁶⁴ Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 32, 55.

⁶⁵ AUDIT/D’AVOUT, *Droit international privé*, 6th ed., 2010, No. 887.

⁶⁶ SÜSS, *DNotZ* 2001, 173; FRANK, *MittBayNot* 2001 SH 43; HENRICH, *FamRZ* 2002, 137, 143.

⁶⁷ See AUDIT/D’AVOUT No. 889.

⁶⁸ SIEHR, *N.I.L.R.* 50 (2003) 419, 430; MünchKomm(-COESTER) Art. 17b EGBGB No. 61; Anwaltkommentar(-GEBAUER) Art. 17b EGBGB No. 36.

⁶⁹ In more detail BAMBERGER/ROTH(-LORENZ) Art. 25 EGBGB No. 56; MünchKomm(-COESTER) Art. 17b EGBGB No. 65 ff.

2.4.2. *Lack of Succession Rights under French Law – Modification to Prevent Discrimination?*

However, there is a special rule in German PIL to prevent discrimination if succession rights are totally denied.⁷⁰ If the life partnership grants no legal succession right, Art. 17b para. 1 sent. 1 applies *mutatis mutandi* (Art. 17b para. 1 sent. 2 half-sentence 2 Introductory Law). This leads to the national law of the place of registration. Because of the reference to the national law, only a renvoi is excluded.⁷¹ In our case the registration has been in France. French law has only restricted effects and there will be no modification.

The provision against discrimination does not override, however, the provisions on the determination of the *lex successionis*. Therefore, neither a renvoi nor the principle of giving priority to a special conflict-of-laws rule for particular types of property (“Einzelstatut bricht Gesamtstatut”, Art. 3a para. 2 Introductory Law) is excluded. For example, the succession of French immovable property is governed by the *lex rei sitae*, i.e. French law. Art. 17b para. 1 sent. 2 Introductory Law leaves the applicable law for succession unchanged. The French national law, according to which the partner of a PACS is not granted a right of succession, will not be modified.⁷² The same is true for movable property.

⁷⁰ BUSCHBAUM, Kollisionsrecht der Partnerschaften außerhalb der traditionellen Ehe, *RNotZ* 2010, 73, 90 f.; HENRICH *FamRZ* 2002, 137, 144; BAMBERGER/ROTH(-HEIDERHOFF) Art. 17b EGBGB No. 35.

⁷¹ JURISPK(-RÖTHEL), Art. 17b EGBGB No. 38. – Cf. also MARTINY, in this book at p. 204.

⁷² FRANK, *MittBayNot* 2001 SH 43; SÜSS, *DNotZ* 2001, 175; GEBAUER/STAUDINGER, *IPRax* 2002, 279. Undecided STAUDINGER/MANKOWSKI Art. 17b EGBGB No. 66. – Cf. also MünchKomm (-COESTER) Art. 17b EGBGB No. 58.

PART FOUR
EUROPEAN LAW ASPECTS



THE RIGHT TO PRIVATE AND FAMILY LIFE, THE RIGHT TO MARRY AND TO FOUND A FAMILY, AND THE PROHIBITION OF DISCRIMINATION

Bea VERSCHRAEGEN

1. INTRODUCTION¹

Although several countries have introduced legislation recognising registered partnerships (Denmark,² followed by Norway,³ Sweden,⁴ Finland,⁵ Iceland,⁶ Greenland,⁷ the Netherlands,⁸ Belgium,⁹ some of the autonomous regions of

¹ The first edition of BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, was published in 2003. The main developments since then shall be analysed briefly.

² RING/OLSEN-RING, Dänemarks Vorreiterrolle bei der Etablierung des Instituts einer registrierten (Lebens-)Partnerschaft in Europa, *ZRP* 1999, 459; SCHERPE, Zehn Jahre registrierte Partnerschaft in Dänemark. Zur Novellierung des Gesetzes von 1989, *DEuFamR* 2000, 32; IDEM, Erfahrungen mit dem Rechtsinstitut der registrierten Partnerschaft in Dänemark, *FRP* 2001, 439.

³ Lov om registrert partnerskap, 30 April 1993, no 40.

⁴ Lag om registrerat partnerskap, 2 June 1994, SFS 1994: 1117.

⁵ Laki rekisterördystä parisuhteista, 9 November 2001/950.

⁶ Lög um staðfesta samvist, 12 June 1996, no 87.

⁷ Since 1996, the Danish law on registered partnerships is also valid in Greenland. Royal Executive Order 320 of 26 April 1996.

⁸ Act of 5 July 1997, *Staatsblad* 1997, no 324.

⁹ Wet over de wettelijke samenwoning – Loi sur la cohabitation légale, Act of 23 November 1998, *Belgisch Staatsblad* 12 January 1999, for the German version see the Royal Decree of 28 October 1999, *Belgisch Staatsblad* 3 March 2000; PINTENS, Partnerschaft im belgischen und niederländischen Recht, *FamRZ* 2000, 69; SOSSON, Recent evolutions (or revolutions) in Belgian family law, in: *The International Survey of Family Law*, 2010 edition, pp. 51, 52 f.

Spain,¹⁰ Germany,¹¹ Luxembourg,¹² Switzerland,¹³ the United Kingdom,¹⁴ the Czech Republic,¹⁵ Hungary,¹⁶ Ireland,¹⁷ Slovenia,¹⁸ France¹⁹ and Austria²⁰) so far no uniform picture is apparent.²¹

Some variations in these laws derive from the respective (national) matrimonial laws as well as the laws governing (the consequences of) divorce on

¹⁰ Among others: Aragon, Ley relativa a parejas estables no casadas, 26 May 1999, 255 *Boletín Oficial de las Cortes de Aragón*; Katalonien, Llei 10/1998, de 15 de juliol, d'unions estables de parella, 10 July 1998, 309 *Bulleti Oficial del Parlament de Catalunya* (BOPC) 24738; Navarra, Ley foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables, *Boletín Oficial de Navarra*, 7 July 2000, 82.

¹¹ BGBI I 2001, 266, amended several times since. See Act to Amend the Life Partnership Act (Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts) of 15 December 2004, which amended and extended the Life Partnership Act and other acts. It entered into force on 1 January 2005 (BGBI I 2004/69). Further amendments followed, most recently in: BGBI I 2007, 3189, 3192, effective as of 1 January 2008. See, e.g., KAISER, Die eingetragene Lebenspartnerschaft – Status und Personenstand, *StAZ* 2006, 65; BRUNS/KEMPER, *LPartG – Handkommentar*, 2nd ed. 2005.

¹² Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats, *Mémorial A*, n°143.

¹³ Bundesgesetz (Federal Law) vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare, *BBl* 2004, no 25, 29 June 2004, 3137; see i.a. HAUSHEER, Die eingetragene Partnerschaft in der Schweiz, *FamRZ* 2006, 246.

¹⁴ Civil Partnership Act 2004; FREEMAN, United Kingdom law and the gay with special reference to gay marriages, in: BASEDOW ET AL. (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (2000) 173; RÖTHEL, Ein Rechtsinstitut für gleichgeschlechtliche Lebensgemeinschaften in Großbritannien: Civil Partnership Act 2004, *FamRZ* 2006, 598; HARPER/DOWNS/LANDELLS/WILSON, *Civil Partnership. The new law*, 2005; SUTHERLAND, What has a Decade of Devolution done for Scots Family Law?, in: *The International Survey of Family Law*, 2009 edition, pp. 389, 413 f with further references.

¹⁵ See HRUŠAKOVÁ, Tschechisches Gesetz über die registrierte Partnerschaft, *FamRZ* 2006, 1337; KRÁLIČKOVÁ, Czech Family Law: The Right Time for Re-Codification, in: *The International Survey of Family Law*, 2009 edition, pp. 157, 166 f with further references.

¹⁶ See as to the annulled Act 2007: WEISS, Gesetz über die registrierte Partnerschaft in Ungarn, *FamRZ* 2008, 1724; WEISS, Neues zur Regelung der registrierten Partnerschaft in Ungarn, *FamRZ* 2009, 1566; as to the new Act No XXIX 2009 SZEIBERT, Maintenance of Former Spouses, Registered Partners and Cohabitants in Hungary According to the Existing Rules and in the New Civil Code, in: *The International Survey of Family Law*, 2010 edition, pp. 179, 180 f.

¹⁷ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, No 24 of 2010. As to foreign registered partnerships recognised by Ireland see Civil Partnership (Recognition of Registered Foreign Relationship) Order 2010, S.I. No 649 of 2010.

¹⁸ Registration of Same Sex Partnership Act (Registrirana istospolna partnerska skupnost), *OJ of the Republic of Slovenia* No. 65/2005.

¹⁹ The original PACS has been transformed into a real registered partnership by law of 23 June 2006, L. no 2006–728, *JO* 24 June 2006, 9513; D. no 2006–1806 and no 2006–1807 of 23 December 2006, *JO* 31 December 2006, 20375; see i.a. FULCHIRON, *Le nouveau Pacs est arrivé*, p. 1621; DE BENALCAZAR, *Eloges de la raison juridique ou la remontée des enfers*, *Dr. Famille* 2007, 2.

²⁰ Eingetragene Partnerschaft-Gesetz (EPG), *BGBI* I 2009/135.

²¹ See VERSCHRAEGEN, *Gleichgeschlechtliche "Ehen"*, 1994; IDEM, Nichtehele Partnerschaft – Eine rechtsvergleichende Einführung. Jahrestagung der wissenschaftlichen Vereinigung für

which they are based. However, there seems to be a reluctance to grant same-sex partners (comparable) access to adoption and assisted reproductive technology (ART). Moreover, the relationships are generally limited to *two* individuals of the same sex, although some countries include also partnerships for two persons of different sexes. In every instance they are based on the principle of *monogamy*.

These models range from *contract law* with effects on the civil status and closely resembling marriage²² (such as the “Pacte civil de solidarité” [PACS] in France²³) to designs governed by the *law on property rights* and the *law on partnerships and corporations* (e.g. in Hungary,²⁴ Slovenia,²⁵ the Czech Republic²⁶ and Belgium²⁷). Various legal institutions involving the concept of partnership that change the civil status of the persons concerned are also contemplated.

Familienrecht, 3.–6. Juni 1999, *FamRZ* 2000, 65–69; IDEM, Gleichgeschlechtliche Beziehungen im Spiegel des Rechts, *DEuFamR* 2000, 64–75; IDEM, The right to private life and family life, the right to marry and to found a family, and the prohibition of discrimination, in: BOELE-WOELKI/FUCHS (eds.), *Legal recognition of Same-Sex Couples in Europe*, 2003, pp. 194–211; IDEM, “Family Members”, “The right to family life” and “Family reunification”, in: LØDRUP/MODVAR (eds.), *Family life and human rights*, 2004, pp. 919–941; IDEM, Sollen Homoehen möglich sein?, in: ACKERL/LEHNER/SACHSLEHNER (eds.), *Wissen! Antworten auf unsere großen Fragen*, 2006, pp. 333–334; IDEM, Legal Protection of lifestyles and family forms – A European Overview, in: KAPPELLA/RILLE-PFEIFFER/RUPP/SCHNEIDER (eds.), *Family Diversity. Collection of the 3rd European Congress of Family Science*, 2010, pp. 379–390, all with further references.

²² See MALAURIE/FULCHIRON, *La famille*, 4th ed. 2011, pp. 179 ff, 184 f with further references.

²³ Cf. FERRAND, Das französische Gesetz über den pacte civil de solidarité, *FamRZ* 2000, 517; IDEM, Die Rechtsstellung gleichgeschlechtlicher Partnerschaften in Frankreich, in: BASEDOW ET AL. (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, 2000, p. 113; IDEM, Das französische Gesetz über den PACS (Pacte civil de solidarité), *FRP* 2004, 335; BATTES, Bericht über die Entscheidung des französischen Verfassungsrats zur Verfassungsmäßigkeit des Gesetzes über die registrierte Partnerschaft (Pacte Civil de Solidarité), *DEuFamR* 2000, 53; SCHREIBER, Erfahrungen mit Lebenspartnerschaften am Beispiel Frankreichs, *FRP* 2001, 442; WINKLER V. MOHRENFELS, Der Pacte civil de solidarité: ein Modell für das deutsche Familienrecht?, in: *Festschrift Hans Jürgen Sonnenberger*, 2004, p. 155; FERRAND/FRANCOZ-TERMINAL, Entwicklungen im französischen Familienrecht 2006–2007, *FamRZ* 2007, 1499.

²⁴ Registered cohabitation confers very few benefits.

²⁵ See ZADRAVEC, Slowenien: Gleichgeschlechtliche Partnerschaft, *StAZ* 2007, 214; NOVAK, Slowenien hat die gleichgeschlechtlichen Partnerschaften rechtlich gleichgestellt, *FamRZ* 2006, 600; ŽNIDARŠIČ, Die Erbfolge der gleichgeschlechtlichen Partner in der Republik Slowenien, *FamRZ* 2007, 1511.

²⁶ See HRUŠAKOVÁ, Tschechisches Gesetz über die registrierte Partnerschaft, *FamRZ* 2006, 1337.

²⁷ See RENCHON, L'avènement du mariage homosexuel dans le Code civil belge, *Revue de droit international et de droit comparé* 2004, 169.

The Netherlands,²⁸ Belgium,²⁹ Spain,³⁰ Norway,³¹ Sweden,³² Portugal³³ and Iceland³⁴ have introduced same-sex marriage. Sweden, Norway and Iceland have as a consequence abolished registered partnership.

Few countries permit adoption (e.g. Denmark,³⁵ Norway,³⁶ Netherlands,³⁷ Sweden,³⁸ England and Wales,³⁹ Scotland,⁴⁰ Belgium,⁴¹ Iceland,⁴² Spain⁴³), adoption of stepchildren (i.a. Germany,⁴⁴ and Finland⁴⁵) and assisted reproduction (e.g. Norway) by same-sex couples. Norway has introduced a new “same-sex marriage” package which includes joint adoption and access to

- ²⁸ Law of 21 December 2000, Stb 2001, 9 (Wet Openstelling Huwelijk), amending Art. 1:30 BW.
- ²⁹ “Wet tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek – Loi ouvrant le mariage aux personnes de même sexe et modifiant certaines dispositions du Code civil, *Belgisch Staatsblad* 28 February 2003; PINTENS, Gleichgeschlechtliche Ehen in Belgien, *StAZ* 2003, 321; STERCKX, A propos de la loi ouvrant le mariage aux personnes de même sexe, *Journal des tribunaux* 2003, 434.
- ³⁰ Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, BOE n 157, 2 July 2005; MARTÍN-CASALS/RIBOT, The Postmodern Family and the Agenda for Radical Legal change, in: *The International Survey of Family Law*, 2008 edition, pp. 411, 414 f with further references.
- ³¹ See Aslan/Hambro, New Developments and Expansion of Relationships covered by Norwegian Law, in: *The International Survey of Family Law*, 2009 edition, pp. 375, 377 f.
- ³² See Singer, Equal Treatment of same-sex couples in Sweden, in: *The International Survey of Family Law*, 2010 edition, pp. 393, 398 with further references.
- ³³ Lei Nº 9/2010 de 31 de Maio – Permite o casamento civil entre pessoas do mesmo sexo, *Diário da República 1ª Série A* – Nº 105 | 31 de Maio de 2010, 1853, in force since 5 June 2010.
- ³⁴ Frumvarp til laga um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög). *Lagt fyrir Alþingi á 138. löggjafarþingi* 2009–2010, in force since 27 June 2010.
- ³⁵ In 1999 step-child adoption, in 2010 also joint adoption. See § 4 of the Partnership Act.
- ³⁶ Law of 12 June 2008, in force since 1 January 2009: step-child adoption and joint adoption.
- ³⁷ As per law of 21 December 2000, *Staatsblad* of 11 January 2001.
- ³⁸ Step-child adoption and joint adoption since 2003, see SFS 2002: 769; JÄNTERÄ-JAREBORG, Schweden: Adoption für eingetragene Partner, *FamRZ* 2003, 349; BOGDAN, Internationale Aspekte der schwedischen Gesetzesnovelle über die Adoption von Kindern durch eingetragene Lebenspartner, *IPRax* 2002, 534.
- ³⁹ 2002 Adoption and Children Act, in force since 30 December 2005.
- ⁴⁰ Adoption and Children Bill 2006.
- ⁴¹ Art. 343(1) Belgian Civil Code; law of 18 May 2006, *Belgisch Staatsblad* 20 June 2006, 31.128; PINTENS, Reformen im belgischen Familienrecht, *FamRZ* 2006, 1312; SOSSON, Recent evolutions (or revolutions) in Belgian family law, in: *The International Survey of Family Law*, 2010 edition, pp. 51, 54 f.
- ⁴² Step-child adoption and joint adoption since 2006, see www.ilga-europe.org/home/guide/country_by_country/iceland/important_improvements_in_gay_and_lesbian_rights_in_iceland (visited 6 May 2011).
- ⁴³ This is implied by the opening up of marriage to same-sex couples, see MARTÍN-CASALS/RIBOT, The Postmodern Family and the Agenda for Radical Legal Change, in: *The International Survey of Family Law*, 2008 edition, pp. 411, 419 with further references.
- ⁴⁴ Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts (LPartÜbG) of 15 December 2004, *BGBI* I, 3396: Introduction of step-child adoption (§ 9 para. 7 LPartG).
- ⁴⁵ Since 2009, step-child adoption is possible. See § 9 of the Act on Registered Partnerships 950/2001 (Laki rekisteröidystä parisuhteesta), amended 15 May 2009. Amendment available at: www.finlex.fi/fi/laki/alkup/2009/20090391 (visited 6 May 2011).

medically assisted reproduction.⁴⁶ As can be observed, disparities are in great part due to differences regarding the consequences attached to such marriages.

Obviously, different patterns are evident that only have similar effects to some extent. For conflict lawyers⁴⁷ as well as for the individuals concerned, this is a real challenge.⁴⁸ Legal uncertainty as to which law will apply to the relationship and as to whether such relationships will be recognised in other countries is considerable.⁴⁹ In times of high individual mobility, there is an urgent need for conflict rules in order to ascertain the applicable law (such as with respect to couples of different nationality or different domiciles). Legal issues arise not only at a private law level (e.g. recognition of a partnership⁵⁰ and enforcement of maintenance claims in another country, matrimonial property rights and entitlements to an estate), but also at a public law level (e.g. family reunion, residence permit, pension rights adjustment), and, in most instances, clarification is distinctly lacking. Practitioners, however, are increasingly confronted with these issues; thus, there is a general call for legislators to act.

2. INTERNATIONAL COMMISSION ON CIVIL STATUS

The *International Commission on Civil Status*⁵¹ (CIEC) elaborated a Convention on the Recognition of Registered Partnerships, which was signed in 2007. The Secretary General Professor Paul LAGARDE and myself as the then president of

⁴⁶ Lov om endringer i ekteskapsloven, barnelova, adopsjonsloven, bioteknologiloven mv. (felles ekteskapslov for heterofile og homofile par) Ot.prp.nr.33 (2007–2008), Innst.O.nr.63 (2007–2008) og Besl.O.nr.91 (2007–2008). Odels- og lagtingsvedtak hhv. 11. og 17 juni 2008. Fremmet av Barne- og likestillingsdepartementet. The law, effective as of 1 January 2009, repeals the Registered Partnership Act (Lov 30 april 1993 nr. 40 om registrert partnerskap).

⁴⁷ On current conflict of law rules and issues see, i.a. HAUSMANN, Überlegungen zum Kollisionsrecht Registrierter Partnerschaften, in: *Festschrift Dieter Henrich*, 2000, p. 241; JAKOB, Die eingetragene Lebenspartnerschaft im internationalen Privatrecht, 2002.

⁴⁸ See e.g. BOELE-WOELKI, The Legal Recognition of Same-Sex Relationships within the European Union, 82 *Tul. L. Rev.* 2007–2008, p. 1949.

⁴⁹ Regulations are less spread in the south of Europe than in the north, and the coverage is denser in the west than in the centre and east. The great diversity causes problems for which private international law, i.e. the system aiming to solve conflicts of laws in cross-border cases, has yet to find solutions. Thus, *England and Wales* for their jurisdictions have drawn up a list of lifestyles and family forms that are granted equal status with the “registered partnership”. Surprisingly, this list includes the French PACS which, several reforms later, has yet to achieve an effect on the individual’s civil status.

⁵⁰ See e.g. RÖTHEL, Anerkennung gleichgeschlechtlicher Ehen nach deutschem und europäischem Recht, *IPRax* 2006, 250; WINKLER v. MOHRENFELS, Die gleichgeschlechtliche Ehe im deutschen IPR und im europäischen Verfahrensrecht, in: *Festschrift Tugrul Ansay*, 2006, p. 527.

⁵¹ Commission Internationale de l’Etat Civil (CIEC). See e.g. VERSCHRAEGEN, Die Internationale Zivilstandskommission: Stillstand und Fortschritt (in 2 parts), *Österreichisches Standesamt (ÖStA)* 2002, 38–43, and *ÖStA* 2002, 57–60.

the Commission experienced the difficulties when we tried to reach a consensus among the Member States. The result was necessarily a compromise, and the status table reflects the hesitation of the CIEC with regard to the recognition of registered partnerships: Only **Spain** ratified the Convention, and **Portugal** signed it.⁵² During the elaboration of the Convention, the topic of “registered partnerships” was a “hot issue.” Hence, there was no room left to discuss same-sex marriage. In the first years of this millennium same-sex marriage was, indeed, not yet an urgent issue to be dealt with.

The goal of the CIEC – Convention on the Recognition of Registered Partnerships⁵³ – is to solve civil status problems that arise when individuals are registered in another state, or whose registered partnership has been dissolved or annulled in another state. In such instances, the formation, dissolution and annulment of the registered partnership shall be recognised. The recognition of the validity does not imply the recognition of all its effects; only the civil status according to the *state of registration* shall be recognised.

3. COUNCIL OF EUROPE – EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

As is widely known, discussions on the harmonisation of family law in Europe have been recurrent for many years. The case law of the European Court of Human Rights (ECtHR; Strasbourg Court) is an indicator of the extent to which family law has been harmonised by the Court by establishing *minimum* standards. However, the case law has not always been consistent. Some cases were surprisingly innovative, others rather cautious. Different articles of the ECHR have been invoked, among them: The right to marry and to establish a family (Art. 12 ECHR), the right to private life and to family life (Art. 8 ECHR), and the prohibition of discrimination (Art. 14 ECHR). Harmonisation in these areas is enhanced by the autonomous interpretation of the rights to be protected, the creation of positive State duties, and the rising importance of European standards in order to restrict the margin of appreciation of the Member States. The ECtHR interprets the ECHR in an evolutive-dynamic way and thus takes into account economic and social changes. This allows for a continuous development of the protection of human rights.

“Family” is an *autonomous* notion. Although the right to marry is protected by Art. 12 ECHR, marriage is not the only factor which is decisive when it comes to the definition of “family.” Family also includes the relationship of children to their

⁵² As of 10 April 2011.

⁵³ Convention No 32: Convention sur la reconnaissance des partenariats enregistrés, signed in Munich on 5 September 2007. On the website available at www.ciec1.org/ListeConventions.htm, whereby only the French version is official.

parents and to relatives, as well as to other individuals having a close relationship to the child, and *vice versa*. However, child matters have traditionally been excluded from the scope of registered partnerships and same-sex marriages by the national legislators themselves. It is only in the last couple of years that considerable amendments were introduced, e.g. by allowing adoption, and to a lesser extent artificial insemination. Art. 8 ECHR does not only protect against arbitrary interference by the State, but also imposes a positive duty on the State to enable family life. Such duties may include the duty to enact new legislation or the duty of State organs to protect and to support family relationships, especially when the family members are living separately. They may also include State intervention.

The ECtHR also examines whether a *European standard* is established; either by looking at international treaties, parliamentary recommendations or recommendations of the committee of ministers or, as the case may be, by comparing the relevant rules and decisions of the Member States in order to determine whether there is a certain degree of consensus. Art. 14 ECHR becomes relevant when there is no objective and adequate justification for unequal treatment. However, the margin of appreciation in this area is quite considerable, except regarding unequal treatment of legitimate and illegitimate children or of husband and wife, or unequal treatment on the basis of sexual orientation or religion.

A decision of the ECtHR issued in 2008, according to which a homosexual person must not be denied the adoption of a child solely because of his/her homosexual orientation (*E.B./France*)⁵⁴ reversed the *Fretté/France* decision issued in 2002⁵⁵ and lead to discussions in those countries that have so far refused even stepchild adoption. As mentioned before, **Austria** introduced registered partnerships in 2010. The Act provides, however, for an express prohibition of adoption.⁵⁶ This amounts to a violation of the prohibition of discrimination on grounds of sexual orientation.⁵⁷

Compared to the debate raging on adoption, the public discussion of medically assisted reproduction is rather low-key, quite possibly, due to the fact that individuals affected by restrictive laws go abroad (e.g. to **Denmark**) to get inseminated. Usually, access to assisted reproduction is granted only to married women. **Belgium, the Netherlands, Norway, Sweden, the United Kingdom and Spain** constitute exceptions.

⁵⁴ *E.B./France* (individual application no 43546/02): The applicant, living in a same-sex relationship, wanted to adopt a child in France. This was refused on the grounds that the child would not have a paternal referent and that her partner's role was unclear. From this it was to be concluded that the child's welfare was not clearly ensured. The ECHR in its decision of 22 January 2008, found a violation of Art. 14 ECHR.

⁵⁵ ECtHR, decision of 26 February 2002, *Fretté/France* (2002) ECHR 2002-I.

⁵⁶ § 8 para. 4 EPG.

⁵⁷ See also: GUERRERO, Gleichgeschlechtliche Familien. Ausblick auf die EGMR-Judikatur zur Stiefkindadoption für gleichgeschlechtliche Paare im österreichischen Kontext, *juridikum* 4/2010, 391.

As to the case law, the *Goodwin* decision⁵⁸, decided in 2002, was a land-mark case on the right of transsexuals to marry.⁵⁹ The Court argued that 1. Surgery is supported by the National Health Service, but the condition lacks legal recognition; 2. The condition is internationally recognised, treatment is provided along with social and legal recognition of the new sexual identity; 3. The very essence of the ECHR is to protect the human dignity and freedom, including that of transsexuals; 4. The terms of Art. 12 ECHR cannot be restricted to the determination of gender based on purely biological criteria, hence, such tests of congruent biological factors can no longer be decisive in denying legal recognition to change of gender; 5. The argument that transsexuals can legally marry a person of their former opposite sex is artificial; 6. Although fewer countries permit marriage of transsexuals in their assigned gender than countries that recognise change of gender itself, this is no argument in favour of the margin of appreciation to include an effective bar on the right to marry. The ECtHR concluded that there is no justification for barring a transsexual from enjoying the right to marry under any circumstances. Hence, individuals who are genetically of the same sex can get married, because it is not only the mere biological sexual features of a person at the time of birth that matter, but rather, social reality.⁶⁰ Interestingly, the ECHR relied i.a. on case law from New

⁵⁸ ECtHR, decision of 11 July 2002, *Goodwin/UK* (2002) 35 EHRR 18.

⁵⁹ Facts of the case: Goodwin was a post-operative male to female transsexual. She claimed having problems and facing sexual harassment at work during and following her gender-re-assignment. She experienced difficulties concerning her national insurance contributions. Legally, she was still a man, so she had to pay national insurance longer than “real” women. She also alleged that the fact that she kept the same National Insurance number has meant that her employer had been able to discover that she previously worked for him under another name and gender, with resulting embarrassment and humiliation. She complained, in particular, about her treatment in relation to employment, social security and pensions and her inability to marry.

⁶⁰ The ECtHR-decision cited in recital 55, 97 ff (see also 82, 84) two court decisions of New Zealand and Australia respectively, which were mentioned in the written observations of *Liberty in Sheffield and Horsham/UK*, judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, 2021 § 35: *Attorney-General/Otauhu Family Court* [1995] 1 NZLR 60 and *Re Kevin* [2001] FamCA 1074 where transsexual persons’ assigned sex was recognised for the purposes of validating their marriages: In the latter case, Mr Justice Chisholm held: “I see no basis in legal principle or policy why Australian law should follow the decision in *Corbett*. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to development in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society... Because the words ‘man’ and ‘woman’ have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person’s sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person’s gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the

Zealand and Australia, which indicates that international developments rather than the “European cultural heritage” serve at least in this context as a proper source to determine the proper definition of “sex” as required for marriage in the sense of Art. 12 ECHR and, hence, to determine to a certain degree the essence of marriage as such. Biological factors prevalent at birth are not of primary importance in the context of marriage. If they were, post-surgical transsexuals who marry a person of their former (chromosomal) opposite sex would conclude a same-sex marriage. Thus, transsexuals would be severely limited in exercising their right to marry, once they had been surgically reassigned their new sex.⁶¹

Therefore, the ECtHR put the emphasis on a person’s biological, psychological and physical characteristics at the time of marriage.

Consequently, the capacity to procreate does not form an integral part of marriage. However, the ECtHR did not in principle question the man/woman dichotomy as a pre-requisite for marriage. It merely changed the definition of when a man is to be considered a man, and when a woman is to be considered a woman. Nonetheless, by conceding that chromosomal factors, which remain the only unchangeable biological sexual features, play a minor role in determining “sex” at the time of marriage, the ECtHR has recognised the flexibility of definitions of what “sex” really implies. It has also held that social reality plays a considerable role in this area.

Homosexual individuals are defined by their sexual orientation; they are neither hetero- nor transsexual. They have no other option than to form same-

question can be resolved by reference solely to the person’s psychological state, or by identifying the person’s ‘brain sex’. To determine a person’s sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person’s biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person’s life experiences, including the sex in which he or she was brought up and the person’s attitude to it; the person’s self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person’s biological, psychological and physical characteristics at the time of the marriage... For the purpose of ascertaining the validity of a marriage under Australian law the question whether a person is a man or a woman is to be determined as of the date of marriage...” Recital 57, 103 (see also 85): “As regarded the eligibility of post-operative transsexuals to marry a person of sex opposite to their acquired gender, Liberty’s survey indicated that 54% of Contracting States permitted such marriage (Annex 6 listed Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey and Ukraine), while 14% did not (Ireland and the United Kingdom did not permit marriage, while no legislation existed in Moldova, Poland, Romania and Russia). The legal position in the remaining 32% was unclear.”

⁶¹ ECtHR, decision of 11 July 2002, *Goodwin/UK* (2002) 35 EHRR 18. In Recital 99, the Court holds: “The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.”

sex relationships; the opposite-sex requirement thus presents a real and insurmountable obstacle to their right to marry. Considering the conclusions of the ECtHR in *Goodwin*, which indicate that sexuality can be fluctuating, the question that comes to mind is whether “sex” for the purpose of Art. 8 ECHR carries the same meaning and connotations as it does for traditional concepts of marriage (in terms of the man/woman requirement). It thus remains to be seen whether marriage of same-sex partners can be denied by the ECtHR in the long run. As to the legal recognition of such unions, the international and European scenes have changed considerably. It seems, using the arguments of the ECtHR, “that (there is) clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance ... but of legal recognition of ... same-sex unions”. Further, looking at the arguments of the ECtHR on the striking of balance and margin of appreciation left to the Member States, the Court appreciates that although “fewer countries permit the marriage of transsexuals in their assigned role than recognise the change of gender itself” this would not support “an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation,” because that “would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry.” The ECtHR found “no justification for barring the transsexual from enjoying the right to marry under any circumstances.”⁶² The question now is what could constitute a justification for barring homosexuals from enjoying the right to marry under any circumstances. The activities within the EU will definitely play a very important role in this context.

The *Schalk & Kopf* case was decided in 2010.⁶³ The ECtHR was asked to decide whether the ECHR guarantees a right for same-sex couples to enter into marriage. At the time the couple brought their case, Austrian law did not yet provide for registered partnerships. A law recognising and regulating same-sex partnerships was introduced on 1 January 2010. As mentioned before, child related matters are excluded, and adoption is expressly forbidden. Aside from this, the registered partnership broadly mirrors marriage.

At the time when the application was lodged (2004), Schalk and Kopf (a homosexual couple) argued that they had no option at all. They could neither opt for registered partnership nor for same-sex marriage. However, in 2010, Austria introduced “registered partnerships.” Thus, the ECtHR had an easy case to decide. However, important questions remain unanswered. In same-sex relationships, partners do not make the argument that they live as partners of different sex – as transsexuals do –, they rather argue that their same-sex relationship does not differ from relationships of persons of opposite biological

⁶² See Recital 103.

⁶³ *Schalk & Kopf/Austria*, Application no 30141/04, judgment of 24 June 2010, final 22 November 2010.

sex and they therefore must be treated alike. As with transsexuals, the cause for their condition could and has not been established. So in the light of *Goodwin*, in which living as persons of different sex was important, in same-sex cases, the parallels between transsexuals can or perhaps should be drawn: Both share the fact that they cannot have common offspring (but in certain countries they may jointly adopt), and surely, there is family life in the sense of Art. 8 ECHR.⁶⁴ A final similarity between transsexual and same-sex relationships is the relevance of a changing social and legal reality. In the light of these changes, the reference to the possibility of homosexuals to marry a person of a different sex might amount to arbitrariness.

As things currently stand:

- a male-to-female transsexual can marry a (chromosomal) man (and vice versa);
- a female-to-male transsexual can marry a (chromosomal) woman (and vice versa);
- a lesbian can marry a man (and vice versa);
- a homosexual can marry a woman (and vice versa);
- a lesbian can marry a female-to-male transsexual (and vice versa);
- a homosexual can marry a male-to-female transsexual (and vice versa).

The following can be observed: In the *I/UK* case, decided in 2002,⁶⁵ the ECtHR stated that Art. 12 ECHR secures the fundamental right of a woman and a man to marry and the right to found a family. But the second aspect is not a condition of the first, and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision. Therefore, the *I/UK* case may deliver an argument in favour of couples who cannot conceive children – e.g. transsexuals – or, from a sexual orientation point of view: homosexuals. In *Goodwin*, the ECtHR said that a person's sex at birth is not as important as social reality.

As long as the ECtHR looks at the mere *status* afforded by the law to same-sex couples – in most cases “registered partnership” instead of “marriage” – it seems to leave a great margin of appreciation to the Contracting States and, hence, a considerable scope of action. But the case becomes more difficult when looking at the *substance* of all the statutes on registered partnerships. By way of recent example, the Austrian law regarding same-sex couples mirrors to a large extent marriage law. Refusal of marriage in the formal sense of the word seems to require, at least to a growing extent, salient arguments.

⁶⁴ *Schalk & Kopf/Austria*, Application no 30141/04, judgment of 24 June 2010, final 22 November 2010, Recitals 94, 91. See also: GUERRERO, *juridikum* 4/2010, pp. 319, 392–95.

⁶⁵ *I/UK* (2002) ECHR 592.

This leads to a further issue: Adoption by a homosexual single person. In *EB/France* (2008) a lesbian woman wished to adopt a child, which was refused by the French authorities. The Court found that her sexual orientation indeed had played an implicit, decisive role when denying her the right to adopt a child. From a methodological point of view, the following is interesting: The ECHR does not, as such, guarantee the right to adopt a child. French law accords the right to single persons to adopt a child. Hence, French law, by allowing single-parent-adoptions (as many other States incidentally also do), goes further than the Convention. The ECtHR conceded that French domestic law was more generous than the ECHR. However, the facts of this case still entered the ambit of the relevant article. If domestic law creates a right in the broad context of Art. 8 ECHR, even if the ECHR does not require it to do so, that State must grant the right without discrimination. French law did not require, and possibly could not require, that a single person might only envisage a heterosexual partner or would only desire to live together with a person of different sex. Since the sexual orientation of the applicant had implicitly played a role in the *EB/France* case, the applicant was discriminated against.

Interestingly, the best interest of the child, which usually is a decisive factor in adoption cases, was of no real concern at this stage, although EB's partner had explicitly claimed to be against this adoption and stated not to be willing to assume any responsibility at all.

With regard to *joint adoption* by same-sex partners, the ECtHR has not said one word and, indeed, in this case, did not need to do so. But it is certain that the question of whether the adoption is in the best interest of the child must always be decided on a case-to-case-basis. This remains an area in which States enjoy full discretion.

As in the other countries, there has been no fundamental discussion on what a "family" or "family relationships" should entail, and how the new formalised types of cohabitation could be incorporated in the overall structure of family law without distorting its inner logic and consistency. Rather, there appears to be a consensus that some regulation is necessary, regardless of the shape it could take.

4. EUROPEAN UNION

4.1. LEGAL FRAMEWORK

LORD DENNING once stated: "When it comes to matters with a European element, EC-law is like an incoming tide. It flows back into the estuaries and up to the rivers. It cannot be held back."⁶⁶

⁶⁶ *Bulmer/Bollinger* (1974) 3 WLR 202, per DENNING MR.

This also holds true for the influence of EU law on family law. The Brussels IIbis Regulation⁶⁷ must be applied in matters of jurisdiction, recognition and enforcement as of 1 March 2005.⁶⁸ However, it does not apply to same-sex relationships. Some directives have entered into force dealing with free movement of persons⁶⁹ and family reunification,⁷⁰ in which spouses and registered partners are regarded as family members.⁷¹ However, this depends on whether the *host state* provides for rules on registered partnerships. If the host state does not do so, then registered partners need not be treated as family members. The clear consequence is that no EU State is required to introduce rules on registered partners. Despite this, the European Parliament strongly relies on this policy in various resolutions against discrimination of homosexuals. The new EU Regulation on Maintenance⁷² does not explicitly address same-sex marriages. The same holds true for the Divorce Regulation (“Rome III”) of 20 December 2010.⁷³ However, two recent proposals open up new dimensions:

- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes,⁷⁴ and
- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.⁷⁵

The first proposal is a gender-neutral proposal aimed at heterosexual and same-sex marriages alike. It is complemented by the second proposal on the property

⁶⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing the Regulation (EC) No 1347/2000, *OJ* No L 338, 23 December 2003, 1.

⁶⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* L 338, 23.12.2003 (Brussels IIbis Regulation).

⁶⁹ Directive 2004/38, on the Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/66/EEC, *OJ* 2004 L 158, 77.

⁷⁰ Council Directive 2003/86, on the Right to Family Reunification, *OJ* 2003 L 251, 12.

⁷¹ See e.g. VERSCHRAEGEN, *Familienzusammenführung in Europa. Zur Bekämpfung von Schnecken, Wühlmäusen und allzu ungestümen Wucherern*, in: *Festschrift Theodor Öhlinger*, 2004, pp. 603–617 with further references.

⁷² Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 10.1.2009 L 7, 1.

⁷³ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* 2010 L 343, 10.

⁷⁴ COM(2011) 126/2 of 16 March 2011.

⁷⁵ COM(2011) 127, 2 of 16 March 2011.

consequences of registered partnerships. Hence, where a Member State does not provide for same-sex marriage, only the first Regulation will apply, and it will solely apply to heterosexual marriage. If that State has enacted provisions on registered partnerships, the second Regulation will apply to these partnerships. Neither proposal envisages a unification of substantive law in the respective area. However, the proposals supplement the CIEC-Convention by which the recognition of the validity of the registered partnership does not imply the recognition of its effects with the exception of the civil status.

The proposal⁷⁶ for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation of 2008 might imply a setback. Recital 17 of the Preamble states: “While prohibiting discrimination, it is important to respect other fundamental rights and human freedoms, including the protection of private and family life and transaction carried out in that context ... The Directive is without prejudice to national laws on marital or family status, including on reproductive rights.” Art. 1 lays down a framework for combating discrimination on the grounds of i.a. sexual orientation. Art. 3 para. 2 provides: “This Directive is without prejudice to national laws on marital or family status and reproductive rights”. Thus the EU leaves it up to the Member States to provide for statutes on registered partnerships or same-sex marriages. This is well-known within the EU; the ECtHR takes the same position. However, if an EU Member State has statutes allowing such partnerships, it must treat other EU nationals as it treats its own.

4.2. CASE LAW

In the case law of the European Court of Justice (ECJ, Luxembourg Court), the principle of *free movement of persons* plays a significant role.⁷⁷ But there are also other relevant provisions. The *Tadao Maruko* decision⁷⁸ concerned a dispute between Mr. Maruko and the German Theatre Pension Institution (*Versorgungsanstalt der deutschen Bühnen*), relating to the refusal by the latter to recognise Mr. Maruko’s entitlement to a widower’s pension as part of the survivor’s benefits provided for under the compulsory occupational pension scheme of which his deceased life partner had been a member. It would have paid benefits if Mr. Maruko had been a spouse of the deceased, but did not do so due to the fact that the case at hand involved a same-sex partnership. Hence, the ECJ had to interpret the Social policy – Equal Treatment in Employment and

⁷⁶ COM(2008) 426 final of 2 July 2008.

⁷⁷ Art. 20 para. 2 (a) Treaty on the Functioning of the EU (TFEU).

⁷⁸ *Tadao Maruko/Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, decided on 1 April 2008; see also: GRAUPNER in this book at pp. 274–278.

Occupation Directive 2000/78.⁷⁹ Recital 22 of the preamble to the Directive states that the Directive is without prejudice to national laws on marital status, and that the benefits depend thereon. Surely, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States. Community law does not detract from that competence. However, the Member States in the exercise of that competence must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination. Recital 22 cannot affect the application of the Directive, and occupational pension schemes fall within the scope of the Directive 2000/78. The ECJ argued that the aim of the Directive is to combat certain forms of discrimination, including discrimination on grounds of sexual orientation. Art. 2 of the Directive (principle of equal treatment) means that any direct⁸⁰ or indirect discrimination⁸¹ is prohibited. In view of the harmonisation of marriage and life partnership under German law, which the ECJ regards as a gradual movement towards recognising equivalence as a consequence of the rules introduced by the law on life partnerships and the following amendments, the ECJ concluded that same-sex partners were placed in a situation comparable to that of spouses with regard to survivor's benefits as in the present case. Since the entitlement to these survivor's benefits is restricted to spouses and is denied to surviving life partners, life partners are treated less favourably than surviving spouses in this matter. According to the ECJ, this constitutes a *direct discrimination* on grounds of sexual orientation within the meaning of the Directive.

This is just one example of how the prohibition of discrimination is applied within the EU. Thus, it is reasonable to conclude that even when the proposal⁸² for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation clearly states that it is without prejudice to national laws on marital or family status, including reproductive rights, discrimination is not permissible. Consequently, although EU Member States have competence with regard to matters of marriage and family status, they must, when exercising their competence, comply with EU law and, in particular, with the principle of non-discrimination. In view of any harmonisation of marriage and registered partnership, this "movement towards recognising equivalence as a consequence of ... rules introduced" by national law shall not lead to treating registered

⁷⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* 21 December 2000 L 303, 16.

⁸⁰ Direct discrimination occurs where a person is treated less favourably than another person who is in a comparable situation.

⁸¹ Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

⁸² See above n 76.

partners less favourably than spouses, because this might be tantamount to a direct discrimination on grounds of sexual orientation within the meaning of the proposed Directive. Therefore, more cases will undoubtedly follow.⁸³

5. SUMMARY

When evaluating the development of the case law of the ECtHR as well as national legislation, a decisive reduction of the States' margin of appreciation can generally be observed. This is especially true with regard to custody and adoption, to contact rights of unmarried couples, and increasingly also to questions where sexual orientation comes into play. Some Contracting States of the Council of Europe read the respective decisions from a minimalistic point of view and simply wait until the ECtHR declares that they have violated the ECHR; others discover in the case law surprising statements of the ECtHR and push for reform. This approach, of course, also depends very much on the issue at stake. By and large, the margin of appreciation of the Member States has been narrowed down gradually, and in some areas of law, such as child protection, a certain degree of harmonisation can be observed.

With respect to the EU, the principle of free movement of persons and the prohibition of discrimination on the ground of i.a. sexual orientation will become increasingly important. This coincides with a continuous introduction of various national statutes on registered partnerships and/or same-sex marriages (and subsequent amendments) by a range of Member States.

Obviously no specific number of States is required in order to convince both the ECtHR and the ECJ, but an increasing network of different rules that pushes the development described above forward. There is political pressure, but there is also economic pressure. And the least one can say is that in all cases we are dealing with persons that wish to assume responsibility for one another.

To a growing extent, EU legal acts on jurisdiction, applicable law, recognition and enforcement with the goal to introduce clarity in certain categories of cross-border cases avoid a direct confrontation with the Member States altogether in that the acts do not directly touch upon national substantive law. However, the Member States are compelled to comply with EU law and shall not discriminate against other EU nationals.

⁸³ See ECJ, C-147/08, *Jürgen Römer/Freie und Hansestadt Hamburg*, decided on May 10, 2011: The ECJ held that if the partnership is reserved to persons of the same sex and if it is in a legal and factual situation comparable to that of marriage; a supplementary retirement pension paid to a partner in a civil partnership, which is lower than that granted in a marriage, may constitute discrimination on grounds of sexual orientation. See the following contribution by GRAUPNER, in this book at pp. 279–282.

COMPARING PEOPLE OR INSTITUTIONS?

Sexual Orientation Discrimination and the Court of Justice of the European Union

Helmut GRAUPNER

1. HUMAN RIGHTS BACKGROUND

1.1. AUTONOMY AND NON-DISCRIMINATION

According to the European Court of Human Rights (ECtHR), the very essence of the European Convention of Human Rights (ECHR) is respect for human dignity and freedom and the notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life.¹ Safe-guarding that respect has to be based upon present-day conditions and obligations arising therefrom have to be satisfied at all times.² Previously dominant attitudes may, therefore, not serve as justification for a lack of such respect today. What is more, States must actively remove the negative effects which may materialise today as a result of such former attitudes.³

The ECtHR accepts that sexual autonomy is central to the concept of private life⁴ and it considers discrimination on the basis of sexual orientation to be unacceptable.⁵ Moreover, it deems such discrimination to be equally serious

¹ *Christine Goodwin v United Kingdom* para. 90; *I v United Kingdom* para. 70.

² *L and V v Austria* para. 47; *SL v Austria* para. 39; *Wessels-Bergervoet v Netherlands* para. 52–4.

³ *Wessels-Bergervoet v Netherlands* para. 52–4.

⁴ *L and V v Austria* para. 36; *SL v Austria* para. 29; *Woditschka and Wilfling v Austria* para. 26–29; *Ladner v Austria* para 22–24; *Dudgeon v United Kingdom* para. 41, 52; *Norris v Ireland* para. 35–8; *Modinos v Cyprus* para. 17–24; *Laskey Jaggard and Brown v United Kingdom* para. 36; *Lustig-Prean and Beckett v United Kingdom* para. 82; *Smith and Grady v United Kingdom* para. 90; *ADT v UK* para. 21; *Fretté v France* para. 32; *Sutherland v UK* para. 57.

⁵ *Salgueiro da Silva Mouta v Portugal* para. 36; *EB v France*.

as discrimination on the basis of race, colour, religion and sex.⁶ In the case of distinctions based upon sex or sexual orientation, the margin of appreciation is narrow and the Court requires particularly striking reasons for such distinctions to be justified.⁷ Measures whereby a difference in treatment is based upon considerations of sex or sexual orientation can only be justified if they are necessary for the fulfilment of a legitimate aim. In addition, 'necessary' in this context does not have the flexibility of expressions such as 'useful', 'reasonable', or 'desirable'.⁸ If reasons based solely on considerations pertaining to sexual orientation are advanced in defence of a disparate treatment, this constitutes discrimination.⁹

Predisposed bias on the part of a heterosexual majority against a homosexual minority cannot, as the ECtHR has repeatedly held, amount to sufficient justification for interference with the rights of homosexual or bisexual people, any more than similar negative attitudes towards those of a different race, origin or colour.¹⁰ Society can be expected to tolerate a certain inconvenience to enable individuals to live in dignity 'in accordance with the sexual identity chosen by them'.¹¹

The ECtHR held that the right to private life protects self-determination as such and that sexuality and sexual life are at the core of the fundamental right to protection of private life.¹² State regulation of sexual behaviour constitutes an interference with the right to private life and such interference can be justified only if they are demonstrably necessary to avert damage being caused to others, namely if there is a pressing social need for the restriction of the right and if proportionality between the aims pursued and the means employed is ensured. The attitudes and moral convictions of a majority cannot, as such, justify interference with the right to private life, or with other human rights.¹³ It would be incompatible with the underlying values of the Convention if the

⁶ *Lustig-Prean and Beckett v UK* para. 90; *Smith and Grady v UK* para. 97; *Salgueiro da Silva Mouta v Portugal* para. 36; *L and V v Austria* paras. 45, 52; *SL v Austria* paras. 37, 44; *Woditschka and Wilfling v Austria* para. 29; *Ladner v Austria* para. 24; *Karner v Austria* para. 37.

⁷ *L and V v Austria* para. 45; *SL v Austria* para. 37; *Woditschka and Wilfling v Austria* para. 29; *Ladner v Austria* para. 24; *EB v France*; *Kozak v Poland*; *P.B. & J.S. v Austria* para. 38; *Schalk & Kopf v Austria* para. 97; *J.M. v UK*.

⁸ *P.B. & J.S. v Austria* para. 42; *Karner v Austria* para. 41; *Dudgeon v UK* para. 51; *Norris v Ireland* paras. 41–6; *Modinos v Cyprus* para. 25.

⁹ *Kozak v Poland* para. 92; *Alekseyev v RUS* para. 108; *Kiyutin v RUS* paras. 63, 73.

¹⁰ *Lustig-Prean and Beckett v UK* para. 90; *Smith and Grady v UK* para. 97; *L and V v Austria* para. 52; *SL v Austria* para. 44; *Woditschka and Wilfling v Austria* para. 29; *Ladner v Austria* para. 24.

¹¹ *Christine Goodwin v UK* para. 91; *I v UK* para. 71.

¹² *Schüth v Germany* para. 53; *Obst v Germany* para. 39.

¹³ *Dudgeon v UK*; *Norris v Ireland*; *Modinos v Cyprus*; *ADT v UK*; *L and V v Austria*; *SL v Austria*.

exercise of Convention rights by a minority group were made conditional on these rights being accepted by the majority.¹⁴

1.2. A DUTY TO PROTECT

The Convention guarantees not just negative rights to freedom from state intervention but also positive rights ensuring (active) protection of these rights against the State as well as in relation to other individuals. States have the duty to act in cases of interference with the right to (sexual) self-determination and to personal development, including the right to establish and maintain relations with other human beings.¹⁵

2. PRE-MARUKO ECJ-CASE-LAW

The *Court of Justice of the European Communities (ECJ)*¹⁶, however, in two cases had rejected the claims of same-sex couples to equal treatment. In *Grant v South West Trains Ltd* (1998), a lesbian employee of a railway company claimed that she was refused free tickets for her female partner despite the fact that her male colleagues received a certain allocation of tickets for their unmarried female partners. The ECJ did not find any discrimination on the basis of sex or sexual orientation. Art. 13 EC Treaty as amended by the Treaty of Amsterdam¹⁷ prohibiting discrimination on the basis of sexual orientation had not yet entered into force at the time. In *D and Kingdom of Sweden v Council of the European Union* (2001) an employee of the Council of Ministers of the European Union complained that he was refused the 'household allowance' for his registered partner (under Swedish law), a payment which employees with a married partner received. The ECJ found that this amounted neither to discrimination on the basis of sex nor on the basis of sexual orientation. A registered partnership would be fundamentally different from marriage, it said.

The EU legislator reacted quite quickly to both judgments. After *Grant* it enacted Directive 2000/78/EC banning discrimination on the basis of sexual orientation in employment situations. Furthermore, as a consequence of *D and Kingdom of Sweden* the EU staff regulations have been amended with a prohibition against discrimination based on considerations relating to sexual orientation. In addition, registered partnerships have been put on the same footing as marriage

¹⁴ *Alekseyev v RUS* para. 81.

¹⁵ *Zehnalová & Zehnal v CZ*; *Schiith v Germany*; *Obst v Germany*.

¹⁶ This Court has been succeeded by the *Court of Justice of the European Union* as part of the reforms introduced in the aftermath to the Treaty of Lisbon.

¹⁷ Signed 2 October 1997, entered into force 1 May 1999, (1997) OJ C 340/308.

with one notable exception, namely if the specific partners are not able to enter into marriage only. If they are in a position where marriage is an option, then that option must be taken in order to avail of full protection.¹⁸

3. THE CASE *TADAO MARUKO*

Mr *Hans Hettinger* was a costume designer. For 45 years he was member of Vddb, an organisation responsible for the regulation of the pension scheme of employees of German theatres. For 45 years he had paid fees to Vddb, as had his heterosexual colleagues. For 13 years prior to the initiation of proceedings, he lived in a loving and stable intimate partnership with Mr *Tadao Maruko*. When Germany introduced the possibility to register such partnerships in 2001, they were among the first couples to do so. Mr Hettinger died in 2005. The Vddb, according to its statutes, granted benefits to surviving partners of deceased members to married partners only and refused to pay a widower's pension to Tadao Maruko. Mr Maruko took legal action in the Bavarian Administrative Court of Munich¹⁹ and this court referred the case for a preliminary ruling to the ECJ. It posed two questions: Is there a direct discrimination? And if yes, would it be justified by recital 22 of Directive 2000/78/EC?

Recital 22 states: "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon." The Vddb & the government of the United Kingdom in their written submission argued that, due to the terms of recital 22, unequal treatment of married couples and registered couples would fall outside the scope of the Directive.

3.1. *TADAO MARUKO'S ARGUMENT*

Mr Maruko however advanced an argument to the effect that recital 22 is not reflected in the operative part of the Directive and therefore cannot restrict its scope. It merely underlines that the EU has no competence to legislate on matters of family law.

Furthermore, Mr Maruko argued that provisions allowing for the payment of such benefits that are exclusively restricted to married couples always constitute a *direct* discrimination. He thereby sought to rely on to the ECJ's case law on sex discrimination which established the rule that distinctions based on pregnancy

¹⁸ Art. 1 (d) (1) and Appendix VII Art. 1 (2) lit c Staff Regulations of Officials of the European Communities http://ec.europa.eu/civil_service/docs/toc100_en.pdf; 25 August 2010.

¹⁹ BayrVG München M 3 K 05.1595.

are always distinctions based on sex and therefore constitute a direct discrimination because only women (and no man) can get pregnant.²⁰ Analogously, under German law, only different-sex couples (as opposed to same-sex couples) can marry.

In addition, Mr Maruko argued that he was the subject of an *indirect* discrimination. As long as marriage is forbidden for same-sex partners, the criterion of marriage always is just “apparently neutral”, and puts homosexuals “at a particular disadvantage.”²¹ If pay is made contingent upon a condition which same-sex couples can never fulfil, that is to say 100% of non blood-related opposite-sex couples can marry whereas no non blood-related same-sex couples can marry, the condition of marriage must be dropped for same-sex couples. This is the case as long as marriage is not available as an option for same-sex couples, a decision which rests utterly within the competence of the Member State. Thus Mr Maruko asked the Court to follow its previous jurisprudence in *K.B.* (2004). In *K.B.* an opposite-sex couple could not qualify for a survivor’s pension as the British law at the time did not allow opposite-sex couples with a post-operative transgender partner to marry. The ECJ held that such couples have to be exempted from the marriage requirement as long as marriage is not available.

3.2. THE SUBMISSIONS MADE BY THE EUROPEAN COMMISSION AND THE ADVOCATE GENERAL

The European Commission and Advocate General Dámaso Ruiz-Jarabo Colomer denied the existence of a direct discrimination arguing that the statutes of VdB made a distinction on the basis of marital status and not sexual orientation.

They qualified the refusal to grant a widower’s pension to Mr Maruko as an indirect discrimination with no apparent justification. This conclusion was, however, made under the assumption that, under national law, a registered partnership is equivalent to a marriage meaning that it has substantially the same effects.

Accepting such an assumption would lead to the strange, and perhaps even somewhat absurd, result that the lesser discrimination exhibited in Member States

²⁰ *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (1990). Likewise the ECJ has held that distinctions based upon the criterion of “being entitled to a retirement pension” constitutes direct discrimination on the basis of age (*Ole Andersen* 2010) and, if pension ages are different for women and men, also on the basis of sex (*Christine Kleist* 2010) as this criterion cannot be separated from age (*Ole Andersen* para. 23) or sex (*Christine Kleist* paras. 30f).

²¹ See the definition of indirect discrimination in Art. 2 para. 2 lit. b of Directive 2000/78/EC.

with a marriage-equivalent registered partnership would be outlawed, whereas the (arguably) more serious discrimination (prevalent in Member States without registered partnership or with a form of registered partnership inferior to marriage) would remain admissible. This would be the result notwithstanding that in both cases the parties involved were subjected to the same kind of unequal treatment.

The difference between the arguments of Mr Maruko on the one hand and of the Commission and the Advocate General on the other is grounded in the use of different comparative parameters. It ultimately boils down to what constitutes the comparative parameters. Marriage vs. registered partnership or opposite-sex couples vs. same-sex couples? Should abstract legal institutions be compared or actual individuals in their specific situations of life in which they are subject to disadvantageous treatment?

3.3. THE JUDGMENT

On 1 April 2008, the Grand Chamber of the ECJ delivered its judgment. The Court ruled that *Recital 22* cannot affect the application of the Directive as it is not reflected in the operative part of the Directive and therefore cannot restrict its scope. This recital should merely serve to underline that the EU has no competence to legislate on matters of family law.²²

What is more, the ECJ held that the treatment amounted to a *direct* discrimination to the extent that registered partners can be said to be "in a comparable situation" to married partners.²³ This ruling of the Court reflects the definition of direct discrimination in Art. 2 para. 1 lit. a Directive 2000/78/EC where direct discrimination is described as a situation "...where one person is treated less favourably than another ... in a comparable situation". Direct discrimination can only be justified under Art. 4 para. 1 ("genuine and determining occupational requirement").

The key-issue is the *comparable situation*. When is there a comparable situation and therefore a direct discrimination? Formally the ECJ held that the determination of a "comparable situation" is the task of the national court and it referred this matter back to the national court.²⁴

Nevertheless, the Maruko judgment contains substantive criteria relevant to the application of the comparability-test by national judges. The issue to be assessed

²² Paras. 59f.

²³ Paras. 70–73.

²⁴ Paras. 72f.

is “comparability“, not “identity“.²⁵ Such “comparability” has to be assessed “so far as concerns that survivor’s benefit“.²⁶ Not all differences between registered and married couples can be said to be decisive, but only those which concern the benefit at issue before the judge. The ECJ established an *individual-specific comparison* with the “situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the VddB“.²⁷ Individual employees under the specific pension scheme must be compared, not abstract institutions.

In its reference to the ECJ, the national court used the following two criteria for the comparison of marriage and registered partnership: both partnerships are (a) formally entered into for life and (b) constitute a union of mutual support and assistance. The ECJ in its judgment repeatedly and explicitly quoted these criteria²⁸ and at no stage throughout the course of its judgment did the Court indicate an objection to them.

Indeed, the operative part of the judgment states: “The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation *such as that at issue in the main proceedings* ... [following the description of the legislation at issue]“ (emphasis added). This is worthy of comparison to the operative part of the judgment in *Palacios* (2007): “The prohibition of any discrimination on grounds of age ... must be interpreted as not precluding national legislation *such as that at issue in the main proceedings*, ...[following the description of the legislation at issue], *where* ...[follow criteria which the national court has to apply in determining compatibility with community law]” (emphasis added). Whereas in *Palacios* the preclusion of legislation such as that at issue is made contingent upon further criteria, this was not the case in *Maruko*.

4. THE REACTION OF GERMAN HIGH COURTS

Since the decision in *Maruko* was handed down, German higher courts have not been particularly receptive of the holdings of the ECJ. In one decision following the delivery of the opinion of the Advocate General and one even after the judgment of the ECJ, the Federal Administrative Court (Bundesverwaltungsgericht)²⁹ and the Federal Constitutional Court (Bundesverfassungsgericht)³⁰ found no discrimination in a situation where civil servants with a registered partner were

²⁵ Para. 69.

²⁶ Para. 73.

²⁷ Ibid.

²⁸ Paras. 62, 69.

²⁹ 2 C 33.06, 15 November 2007.

³⁰ 2 BvR 1830/06, 6 May 2008.

excluded from receiving a family allowance for civil servants³¹, although such a payment was made available to married civil servants. This is the case even in situations where the civil servant in a registered partnership had to maintain their partner and even when they raised children in the partnership whereas married civil servants were entitled to the payment of the allowance even when their spouse earned more than them and even when the couple was childless.

Both courts rejected the concept of comparability between registered partnership and marriage, and reasoned that (a) registered partnerships and marriage were not identical (relying, for instance, on differences regarding social benefits for civil servants, in tax legislation and joint adoption), (b) that complete or general equalisation of the two institutions was neither created nor intended by the legislator and (c) that it would be irrelevant that civil law maintenance-obligations in marriage and registered partnership are identical. The Federal Constitutional Court even added that (female?) spouses typically were in need of alimony by their partner, while registered partners were not.

5. THE SOLUTION

Only one year later the Federal Constitutional Court (Bundesverfassungsgericht)³² reversed its own (and the Federal Administrative Court's) prior case-law³³ and established a principle of strict scrutiny for distinctions based on sexual orientation.³⁴ "Protection of marriage" alone, the court now said, is no justification for such distinctions and "promotion of the family" is a legitimate aim but is not restricted to married partners.³⁵ The number of children (2,200) in registered partnerships (13,000) the Court recognised as not "negligible"³⁶ and it postulated that there must be "serious differences" between marriage and registered partnership.³⁷ In addition, such differences must be related to the social benefit in question and to its aim and purpose.³⁸ Finally, the assessment of differences must not be based upon abstract considerations but upon the concrete reality of everyday life.³⁹

³¹ According to § 40 para. 1 n. 1 BBesG.

³² 1 BvR 1164/07, 7 July 2009; available at: www.bundesverfassungsgericht.de.

³³ Para. 112.

³⁴ Paras. 85, 88.

³⁵ Para. 100, 103.

³⁶ Para. 113.

³⁷ Para. 93.

³⁸ Paras. 86, 100.

³⁹ Paras. 112, 114, 115.

The Court explicitly makes clear⁴⁰ that marriage and registered partnerships do not differ regarding (a) the existence of an unlimited legally binding union of mutual support and assistance, (b) maintenance obligations and (c) the need for alimony. As the payment of benefits to surviving partners constitute a substitute for alimony,⁴¹ the Court concluded that registered partners are entitled to the same survivor's pension as married partners.

After this decision of the Federal Constitutional Court, the VddB withdrew its appeal against the judgment of the Bavarian Administrative Court, which, prior to the decision of the Constitutional Court, had already granted the pension on the basis that it is a substitute for alimony and that there are no differences between married and registered partners and the necessity of receiving an alimony. Hence, Tadao Maruko received the surviving partner's pension.

6. THE CASE JÜRGEN RÖMER

After Maruko a new case on employment (pension) discrimination on the basis of sexual orientation arose for decision by the CJEU: *Römer v City of Hamburg*.

Mr Römer has a registered partner and was in receipt of a lower retirement pension than (former) employees of the city of Hamburg who were married. Married pensioners received the higher pension even if their spouse had a higher income and even if the couple never raised children. Moreover, in a similar factual constellation to Maruko, registered partners received the lower pension even if they had to maintain their partner and even if the couple raise(d) children.

This case provided the ECJ with the opportunity to react quickly to the resistance of German higher courts against its Maruko judgment and to specify or even extend the scope of the Maruko-judgment (and rule beyond comparability, on indirect discrimination).

6.1. THE OPINION OF THE ADVOCATE GENERAL

Advocate General Niilo Jääskinen, in his opinion of 15 July 2010, confirmed the interpretation of *Maruko* as outlined above (3.1.). Legislation on marriage and family-law rests in the competence of the Member States, but if a Member State excludes same-sex couples from marriage, employment benefits must not be

⁴⁰ Paras. 102, 111–113.

⁴¹ Paras. 116, 119.

restricted to married couples. This would otherwise constitute a *direct* discrimination, as long as the legal position of married couples and registered couples is comparable and it would amount to an *indirect* discrimination, if (a) the legal position of married couples and registered couples is not comparable, or (b) no registration is available at all (for same-sex couples).

Protection of marriage and the family as such is not a valid justification for discrimination,⁴² the Advocate General underlined. This is also not the case if (as in Germany) such protection is enshrined in a national constitution, as Union law supersedes also national constitutional law.

The Advocate General stressed that the prohibition of discrimination on the basis of sexual orientation is a *general principle of Union law*⁴³ and therefore this prohibition is not restricted to periods subsequent to the entry into force of Directive 2000/78/EC, rather it takes full effect before this date. Equal treatment and compensation can therefore be claimed with retroactive effect to the point at which the particular discrimination began.

6.2. THE JUDGMENT

The Grand Chamber of the CJEU delivered its judgment on 10 May 2011. It confirmed the interpretation of *Maruko* as outlined above (3.3.). Legislation on marriage and family-law rests in the competence of the Member States, but if a Member State excludes same-sex couples from marriage, employment benefits must not be restricted to married couples. This would otherwise constitute a *direct* discrimination so long as the legal position of married couples and registered couples is comparable.

As in *Maruko*, the Grand Chamber ruled that the test of comparability is the task of the national judge, that the criteria *must* be *comparable* (not identical) situations and the comparison has to be *specific and concrete* (not global and abstract).⁴⁴ The Court added that comparability has to be established in light of the *benefit concerned*, that the focus has to be on *relevant* rights and obligations and that such relevance has to be determined according to the *purpose* and *conditions* for the benefit at issue. The Court made clear that comparison “must not” consist of an overall comparison between marriage and registered

⁴² Paras. 106–111.

⁴³ Paras. 129–133.

⁴⁴ Para. 42.

partnership.⁴⁵ *People (couples) are to be compared, not abstract legal institutions.*

The relevant rights and obligations for a partner-supplement to a retirement pension, the Court continued, are mutual *care and support*⁴⁶ and those obligations are incumbent both on life partners and on married spouses since the creation of registered partnership.⁴⁷

The Grand Chamber confirmed that the goal of the protection of marriage and the family in a national constitution as such is not a valid justification for discrimination, as Union law supersedes also national constitutional law.⁴⁸ The *principle of equal treatment*, the Court said, derives from international instruments and from the constitutional traditions common to the Member States. In making this statement the Court referred to Directive 2000/78/EC, recitals 3 and 4: “right of all persons to equality before the law and protection against discrimination”.⁴⁹ Directive 2000/78/EC did not create this principle of equal treatment but has the sole purpose of laying down, in that field, a general framework (legal remedies, burden of proof, affirmative action etc.)⁵⁰ for combating such discrimination.⁵¹ In this context, it is implicit in the judgment⁵² that the prohibition of discrimination on the basis of sexual orientation is a *general principle of Union law*.⁵³

The ECJ made clear that victims of discrimination, like Mr Römer, need not wait for consistency of national law with European law.⁵⁴ They can claim their right to equal treatment and courts have to set aside any conflicting provision of national law.⁵⁵

6.2.1. Retroactive Effect

The Grand Chamber, however, stressed that this is the case only if the discrimination at issue falls within the scope of Union law.⁵⁶

⁴⁵ Paras. 42–43.

⁴⁶ Paras. 46–51.

⁴⁷ Para. 48.

⁴⁸ Paras. 37, 51.

⁴⁹ Para. 59, also *Mangold* para. 74; *Küçükdeveci* para. 20; *Sayn-Wittgenstein* para. 89.

⁵⁰ See *Mangold* para. 76.

⁵¹ See Art. 1; paras. 38, 59.

⁵² Para. 59; see *Mangold* para. 75 (arg. “thus”).

⁵³ Explicit for age in *Mangold* para. 75, & *Küçükdeveci* para. 21.

⁵⁴ Para. 64.

⁵⁵ Para. 64; also *Mangold* para. 77.

⁵⁶ Para. 60.

A discrimination falls within the scope of Union law under the following conditions:

- (a) with the *expiry of the transposition-period* for (here) Directive 2000/78/EC (Art. 13 EC, now Art. 19 TFEU, and the general principle alone cannot result in a discrimination within the scope of Union law).⁵⁷
- (b) *voluntary* (partial or general) *implementation* of (here) Directive 2000/78/EC (before the end of the transposition-period).⁵⁸
- (c) the creation of *new discriminatory regulations* after entry into force of the Directive. Even prior to the expiry of the transposition-period Member States must refrain from any measures seriously compromising the result prescribed by a directive,⁵⁹ or
- (d) the discrimination takes place *in an area (already) within the scope of application of Union law* (due to other Union acts then Directive 2000/78/EC).⁶⁰ This also applies to discrimination outside the realm of employment (for example areas such as asylum, criminal law etc., which are regulated by Union-law). Then again in these areas there is no framework such as the one established by Directive 2000/78/EC. Only the general principle of prohibition of discrimination (on sexual orientation) applies to sexual-orientation discrimination in such areas outside employment.

In *Römer* only (a) applied. So it was only with the expiration of the transition period of Directive 2000/78/EC that the discrimination at issue (regarding partner-supplements to retirement pensions) came within the scope of Union law. Union law therefore entitles Mr Römer to assert his right to equal treatment and hence to receive compensation only dating back to 3 December 2003.⁶¹

6.2.2. Indirect Discrimination

The ECJ also in *Römer* (contrary to the opinion given by the Advocate General) remained silent on the issue of *indirect discrimination*. So the prohibition of discrimination of same-sex couples outside the area of comparability remains an issue for future judgments. This may be an issue, for example, in Member States without a registered partnership for same-sex couples or with a form of registered partnership inferior to marriage). In the meanwhile challenges to such discrimination can rely on the persuasive opinion of the Advocate General in *Römer* when seeking to advance their claims.

⁵⁷ Paras. 61, 62; *Bartsch* paras. 16, 18; *Küçükdeveci* para. 25.

⁵⁸ Para. 63; *Bartsch* para. 17.

⁵⁹ *Mangold* para. 67; *Inter-Environnement Wallonie* para. 45.

⁶⁰ See *Mangold* paras. 51, 64, 75, “fixed-term work” according to Directive 1999/70.

⁶¹ Para. 64.

7. ANNEX

Court of Justice of the European Union

- Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* C-427/06 (2010)
- Christine Kleist v Pensionsversicherungsanstalt* C-356/09 (2010)
- D and Kingdom of Sweden v Council of the European Union* C-122/99P and C-125/99P, ECR I-4319 (2001)
- Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* C-177/88 (1990)
- Félix Palacios de la Villa v Cortefiel Servicios SA* C-411/05 (2007)
- Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* C-208/09 (2010)
- Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark* C-499/08 (2010)
- Inter-Environnement Wallonie* C-129/96 (1997)
- Jürgen Römer v Freie und Hansestadt Hamburg* C-147/08 (2011)
- K.B. v National Health Service Pensions Agency* C-117/01 (2004)
- Lisa Grant v South-West Trains Ltd* C-249/96 ECR I-621 (1998)
- Ole Andersen v Region Syddanmark* C-499/08 (2010)
- Seda Küçükdeveci v Swedex GmbH & Co KG* C-555/07, OJ C63/4 (2010)
- Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* C-267/06, ECR I-1757 (2008)
- Werner Mangold v Rüdiger Helm* C-144/04 (2005)

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- Alekseyev v Russia* (ECtHR), App 4916/07; 25924/08; 14599/09 (judgment of 21 October 2010)
- Bączkowski v Poland* (ECtHR) App 1543/06 (judgment of 3 May 2007)
- BB v United Kingdom* (ECtHR) App 53760/00 (judgment of 10 February 2004)
- Beck Copp and Bazeley v United Kingdom* (ECtHR) App 48535/99, 48536/99 and 48537/99 (judgment of 22 October 2002)
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- HG and GB v Austria* (ECtHR) App 11084/02 and 15306/02 (judgment of 2 June 2005)
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- Kozak v Poland* (ECtHR) App 13102/02 (judgment of 2 March 2010)
- L and V v Austria* (ECtHR) App 39392/98 and 39829/98 (judgment of 9 January 2003)
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MIGRATION RIGHTS AND SAME-SEX COUPLES IN EU LAW: A CASE STUDY

Helen TONER

1. INTRODUCTION

The background to this topic is in many ways positive. EU law has traditionally strengthened the rights of the migrant family, ensuring that the family unit can stay together when moving across borders within the EU. In fact, whenever rights of residence have been granted to migrant EU citizens to stay in another EU Member State, rights have also always been granted to immediate family members to migrate and stay with them. The issue has not been the basic one of facilitating the movement of the family unit by requiring Member States to make generous provisions for residence rights in their national legislation, but has instead been the recognition, within this existing protection of registered partners, unmarried and same-sex couples, and, increasingly, any children involved. This chapter will explore many of the themes addressed in the chapter of the previous edition of this book,¹ but significantly updated and revised to take account of the most recent developments around this area – of which there are many.

2. HISTORY AND CURRENT SITUATION

Regulation 1612/68² originally set out the core definition of family, which covers spouses and minor children, with dependent adult children and ascending relatives also provided for. *Netherlands v Reed*³ in the mid 1980s indicated that the concept of ‘spouse’ did not embrace unmarried couples and was a reference to a legal marriage, at the time only possible between a man and woman in all Member States. But it was clear from this that the company of an unmarried

¹ TONER, Immigration Rights of Same-Sex Couples in EC Law, in: BOELE-WOELKI/FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 178–193; and indeed more fully in TONER, *Partnership Rights, Free Movement and EU Law*, 2005.

² OJ L 257/2 of 19 October 1968.

³ Case 59/93.

partner residing in the same State was something that the individual could claim on *equal terms* with the nationals of the Host State – i.e. if Dutch nationals were able to sponsor a partner, migrant UK or other EU citizen nationals should be able to do so equally.

Further, in the 1990s some cases began to explore the concepts of equal treatment and challenge various situations where opposite-sex unmarried couples were treated differently from same-sex couples, although in the context of employment benefits rather than migration rights. *Grant v Southwest Trains*⁴ was one such case, in which the equal pay concept of *sex* discrimination was used to attempt to challenge the restriction of employment benefits to unmarried couples of the *opposite* not the same sex. The challenge failed on the basis that there was no *sex* discrimination as male and female same-sex couples would face the same treatment. *D & Sweden v Council*⁵ occurred after registered partnerships had been introduced by some Member States, and was the first attempt to assert the equality in EU law of a formally registered partnership with marriage. Despite a strong equality with marriage in the national Swedish law under which it was established, the claim failed. The comparability between marriage and registered partnership was denied and the general principle of equal treatment failed to assist the claim.

Alongside this, in the early 1990s general rights of residence for pensioners, students and self-sufficient EU citizens were established, which made it easier for those in relationships with other EU citizens to have their partners and children migrate with them. For example, the claim in *Reed* would probably not now be presented as a request for a family residence permit (and indeed probably would not be contested at all) as the British partner would have had independent rights of free movement as a Member State National and, after the Maastricht Treaty, as an EU citizen, if independently self-sufficient or provided for by the partner. But third country national sponsors, non-migrant EU citizens, and non-EU citizen partners and children in LGBT families remain vulnerable.

2.1. LEGISLATIVE COMPROMISE AND CURRENT PROBLEMS

In 2004, the law on EU citizens' migration rights was clarified and updated and to some extent extended. Directive 2004/38⁶ was passed and had to be implemented by 2006. This was an ideal opportunity to examine and clarify the

⁴ Case C-249/96.

⁵ Case C-122/99.

⁶ OJ L 158/77 of 30 April 2004.

concept of ‘family’ – but the result was a compromise which did not deliver as much for same-sex couples as many had hoped.⁷

In Article 2 of the Directive ‘Spouse’ was left undefined, even though there was some serious discussion about whether same-sex spouses should be included or not. By this time, the first same-sex marriages had been celebrated in the Netherlands, but the question was too sensitive and contentious to be addressed explicitly in the legislation.

At this time, registered partnerships were also appearing in political discussion and legislative programmes, and many Member States were considering their position and introducing legislation. These did get a mention in the new legislation but, again, the compromise reached provides little by way of additional concrete protection. Registered partners are included as ‘family members’ in Art. 2, and the rights accorded to partners are the same as spouses, but only if certain conditions are met. This makes it unlikely that any couple would actually be able to assert residence rights using this provision in a situation where they are unable to do so in any event under national law. The main beneficial consequence of this is likely to be less in terms of *entry and residence* and more in terms of securing the partner’s position as a ‘family member’ in terms of *other* rights elsewhere in the Directive such as work, equal treatment, continued rights of residence etc. Rights are only recognised for those who enter into a partnership under the legislation of an EU Member State (not a third country) and only in *Host* Member States in which legislation treats registered partnership as equivalent to marriage. This will almost always be where there is (or has been if it has subsequently been replaced by same-sex marriage) a registered partnership scheme already in the Host State, and it seems unlikely that we would find any State treating registered partnership as equivalent to marriage without granting residence rights for a non-national partner in some form or other. It is possible that a strong interpretation of this might allow to challenge restrictions and conditions placed upon such rights and to assert a position similar to that of spouses under Directive 2004/38 if the provision in national law is less generous than this. An alternative where there is no registered partnership but ‘the legislation’ of the Host State treats registered partnership as equivalent to marriage would be in a State where a registered partnership as such not recognised, that State perhaps having favoured same-sex marriage, but such a partnership from another State would be treated as a marriage by the legislation of that State. It is unlikely that they would face problems of entry and residence arising from their relationship being a same-sex one. Perhaps the only situation that could be addressed is if a ‘weak’ registered partnership moved from one State to another one in which there was a stronger model of registered

⁷ See TONER, above n 1, and various publications from ILGA-Europe.

partnership, or perhaps a couple trying to ameliorate their position by using Community law rights rather than less generous settlement rights available to registered partners under national law. Moving from a Host State of origin in which there is a registered partnership scheme to a Host State in which there is not, therefore, (or in which there is but it is clearly weaker and not equivalent to marriage), these rights do not apply.

Unregistered couples fare even worse, even if they can prove they are in a 'durable relationship' which is 'duly attested'. These are dealt with under the provisions relating to 'other family members' in Art. 3 of the Directive and the obligation here is only to facilitate entry and residence, in accordance with national law. It is not at all clear what this 'facilitation' means, even though the Member States are exhorted to consider applications carefully and provide a reasoned decision for any refusal. The first time this appears to have been litigated was in the UK in *McCollum*,⁸ (under the previous legislation, Regulation 1612/68, which also used the term 'facilitate'), but the suggestion that the concept of facilitation gave rise to any directly effective rights for an unmarried same-sex partner was rejected. After further litigation in a slightly different context (extended family members, such as cousins and in-laws), this question, along with others, has recently been referred to the ECJ in *Rahman*.⁹ This case will provide some answers as to whether the obligation to 'facilitate' is essentially procedural or whether it embraces any substantive obligation to make some kind of provision for these 'other family members' in national legislation. Although the family relationships involved in *Rahman* are different, involving brother, half-brother, and nephew of the third country national spouse of the EU citizen, the answers to this particular question will be of significance for the implementation of Directive 2004/38 in those Member States still lacking proper provision for those in unmarried durable partnerships to make requests for entry and residence.

Third country nationals fare even less well in this respect. Even though their situation as immigration sponsors of family members is now addressed in Directive 2003/86,¹⁰ in several respects it is less favourable than that pertaining to migrant EU citizens. One of these respects is the recognition of 'non-traditional' relationships. For those in a legally celebrated and valid same-sex marriage, again there is no clarification of whether 'spouse' will embrace their relationship, and those in informal unregistered relationships or even in registered but non-marital partnerships are dependent on the discretion of the Host State.

⁸ [2001] EWHC (Admin) 584.

⁹ Case C-83/11.

¹⁰ OJ L 251/12 of 3 October 2003.

So there remain some real issues to be resolved, including the cross-border recognition of marriages, and indeed registered partnerships when this is not already provided for in the Host Member State. The language of ‘facilitation’ is hazy and unclear and has not yet been of any real assistance. The message from the legislation passed in 2003 and 2004 is clear – there is considerable reluctance to use EU law to push sceptical and reluctant Member States too far along the road of recognition of such relationships until they are ready and willing to adopt such measures in national law. The expansion of the EU into the territory of central, eastern and southern Europe (for example including Poland and Malta), countries still with strong Roman Catholic traditions and conservative views on such matters, and less extensive recognition of unmarried and same-sex relationships, has certainly contributed to the caution. It is interesting to note that all the Member States that ILGA-Europe point out as having recently introduced restrictions on recognition of same-sex partners are from the 2004 or 2007 accessions.¹¹

2.2. SOME EXAMPLES?

This results in a number of difficult situations, primarily involving EU citizen-third country national relationships. For example, take the couple I met in the course of a trip to a wedding some years ago: a very classic ‘free movement’ case, one might have thought. The German-US couple, happily married in the Netherlands for several years, found themselves unable to move to Austria when the German national was offered a job there, because the Austrian authorities would not recognise the spousal relationship with the US citizen for the purposes of granting entry and work permits. Why not? Because the US citizen in question was of the same gender as the German national. A similar case arose in Germany in 2004, with an EU citizen-third country national marriage, and it was rejected.¹² Another case is reported to have arisen in Luxembourg and some recognition was eventually granted, to the extent of permitting residence for the spouse of the Belgian national involved. Clearly, such cases are not highly exceptional anomalies, but rather are going to become increasingly common. There seems to be little consistency here, with some Member States accepting such marriages as marriages (Czech republic, possibly France in some cases), while others (UK, and, following a more recent case, Germany¹³) would recognise such unions as civil partnerships, others have no provision, and yet others (Poland, Bulgaria, Latvia, Estonia, Romania and Hungary) have

¹¹ ILGA-Europe *Contribution to the Green Paper* COM(2010) 747 (2011), at p 10.

¹² Verwaltungsgericht Karlsruhe, 9 September 2004.

¹³ *German court rules in partial favour of marriage recognition*, <http://ilga.org/ilga/en/article/mtFnouD1e6>.

introduced constitutional provisions seeking to confine marriage to opposite-sex unions and ensure categorically that no marriage entered into lawfully in another State between two individuals of the same sex could be recognised as a marital relationship.¹⁴ Transnational recognition of registered partnerships face similar issues, with difficulties in States which have no domestic registered partnership scheme, and even sometimes cumbersome and frustrating delays in keeping recognition arrangements up to date in States which have introduced registered partnership and have no objection in principle to cross-border recognition. Where no registered partnership scheme exists there may well be some route of entry for unmarried couples in immigration law,¹⁵ but this is not yet universal. It is not yet clear whether the language of ‘facilitation’ will eventually be recognised as imposing a requirement to have some such provision where there is not already, although an answer to this is awaited in the pending *Rahman* case.

The Commission has monitored the application of the Directive¹⁶ and although it does concede that the definition of ‘family’ is not entirely unproblematic, it does not appear that any gaps here whereby unmarried couples being refused residence or couples seeking to move and rely on their same-sex partnership civil status (whether marriage or registered partnership) being recognised from one State to another are particularly high on its agenda. The Commission confined itself to the observation that 13 States embrace ‘full free movement’ for same-sex couples, but this laconic and quite possibly dubiously accurate assessment, and its failure to engage with the position of those States who do not ensure full free movement for such couples, has been heavily criticised by ILGA-Europe. Further Commission guidance on the proper implementation of the Directive¹⁷ is very sketchy on this point and although it mentions recognition of marriages, it does so simply ‘in principle’, does not explicitly mention the issue of same-sex marriages, and certainly falls far short of a clear exhortation or guidance to Member States that such marriages *should* be recognised. A consultation has now been opened on the broader question of ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’,¹⁸ but again, as before, the Commission does not seem to address head-on the issues involved here. For example, there is no explicit mention at all of the cross-border recognition of the validity same-sex marital relationships, and the only mention of registered partnership appears to be the possibility of a change of surname involved after such a partnership is entered

¹⁴ See further, ILGA-Europe’s response to the consultation on the portability of civil status, COM(2010) 747, pp. 11–16.

¹⁵ The UK for example, provided immigration rights for unmarried same-sex couples in 1997 some years before introducing a registered partnership scheme in 2004.

¹⁶ COM(2008) 840.

¹⁷ COM(2009) 313.

¹⁸ COM(2010) 747.

into! Of course confusion and problems may ensue consequent on problems with recognition of names, but there are far wider and more problematic issues than this involved. A curious exception to this trend is the Proposal for a regime of recognition and enforcement of decisions concerning property consequences of registered partnerships¹⁹ alongside that applicable to marriage.²⁰

The aim of the rest of this updated chapter is not so much to record a snapshot of the detailed situation of migration rights for married, registered or unmarried same-sex couples in each of the 27 Member States,²¹ but to paint a broader picture of how the underlying concepts of equality, family, free movement and citizenship which operate as ‘higher level’ principles have changed in recent years and what (if anything) these might be able to do to enable and facilitate litigation or lobbying around these areas.

3. CONTEMPORARY PERSPECTIVES?

So, what (if anything) may have changed in recent years, and what are the contemporary developments that are shaping law, practice, and policy in this area? The EU Charter of Fundamental Rights, as well as new developments (both in the EU and ECHR contexts) in thinking about equality, citizenship, and family, are changing the legal landscape significantly and rapidly.

3.1. EU CHARTER ON FUNDAMENTAL RIGHTS

The EU Charter of Fundamental Rights is intended to ‘make more visible’ certain rights recognised as general principles of law. Equal treatment on various grounds (including, explicitly, sexual orientation), the right of persons to marry, respect for family and private life, and the EU citizen’s right to move and reside throughout the territory of the Union all are mentioned. Many of these are already embraced by Member States and indeed by the EU legal order through the specific rights enumerated in the ECHR, but the Charter may give added legal weight to these arguments in litigation and lobbying, especially subsequent to the Treaty of Lisbon giving it legal effect. Most helpfully, it may be persuasive in moving towards distinctive EU interpretations of rights such as respect for family life in Art. 8 ECHR or combinations of rights such as the right to marry together with respect for family life and/or equality on the grounds of sexual

¹⁹ COM(2011) 126.

²⁰ COM(2011) 127.

²¹ Interested readers will find further details both in other chapters of this book and for example on the website of ILGA-Europe and in their various publications.

orientation. This kind of argument might be particularly attractive for example where either the wording of rights used by the EU Charter itself is subtly different or the legal context is different. Such issues are immediately apparent even in the overall context with which this chapter is concerned, such as the wording of the right of ‘persons’ to marry, or the context of free movement of EU citizens and the importance of securing the reality of that right in the face of unjustified or disproportionate obstacles to its exercise, or the principle of ‘mutual recognition’. Issues may certainly also arise probing whether consensus on particular issues within the 27 EU Member States has moved to a greater extent than within the wider council of Europe framework, and might justify a different ‘balance’ of what is seen to be acceptable justification for interference with protected rights in particular situations. Again, the context of same-sex relationships and parenting is undoubtedly one in which the EU ‘block’ as a whole, whose fundamental rights principles may be seen to be enshrined in the Charter, may be anticipated to be moving somewhat faster than the wider Council of Europe membership. The ECJ has already shown itself willing, in *Association Belge des Consommateurs Test-Achats and Others*,²² to draw on the Charter to underline the central significance of fundamental rights, in that case gender equality. Moreover, it used this to annul what looked like a fairly clear political compromise contained in the Directive²³ on a contentious high profile question, the possibility for Member States to permit continuation of differential insurance premiums for men and women even when based on actuarial calculations. Whilst the parallels are far from exact, it is an interesting window offering insight into the potential of the Charter.

3.2. ECHR CASE LAW ON EQUALITY – *KARNER v AUSTRIA*²⁴

This case concerned the possibility of differentiating between unmarried opposite-sex and same-sex couples in terms of succession to tenancy rights to the apartment (the ‘home’ in which the couple lived) which had been held by one of them, to the other, the decease of the original tenant. We can perhaps see this case as slightly equivocal, as it did not take the potentially significant step of recognising that same-sex couples could be protected by the concept of ‘family life’ (see further on this below). But it did make clear for the first time that differentiating between same-sex and opposite-sex unmarried couples in the enjoyment of other convention rights is suspect under Art. 14 ECHR, not just discrimination against a gay or lesbian *individual* on that basis. Thus it is the actual relationship not just the individual that is protected in isolation from his

²² Case C-236/09.

²³ Art. 5(2) of Directive 2004/113.

²⁴ Case 40016/98.

or her partnership. Not only that, but ‘weighty’ reasons may be required for justification of such different treatment. Protection of the traditional family may be a permissible reason to defend such different treatment, but it will now be an uphill battle to establish this and it is made clear that this kind of argument cannot and should not be used to justify any and every difference between same-sex and opposite-sex couples. On the facts of the case, the ‘protection of the traditional family’ and marriage could not justify differential tenancy succession protection, a potentially significant issue in an environment in which rental is a significant proportion of long-term housing tenure. This certainly emphasises the point that all unmarried and unregistered couples must presumptively be treated equally, however, it still leaves open the extent to which marriage itself (and registered partnership, if applicable) may be privileged beyond unregistered relationships.

3.3. ECJ CASE LAW ON EQUALITY: *MARUKO* CASE²⁵

Discrimination between registered partnership and marriage is in question here, revisiting some of the questions first raised in *D & Sweden v Council*²⁶ and offering a significant opportunity to clarify and develop the EU legal order’s approach to such issues under its concept of equality. The case concerned the pension rights of a survivor on the decease of his registered partner, which were less generous than would have been the case for a widow or widower, survivor of a heterosexual marriage on decease of his or her spouse. There was some interesting conceptual discussion about whether differentiating between registered partnership and marriage could be seen as direct or indirect discrimination on the grounds of sexual orientation. The Advocate General’s opinion in this case considers the discrimination to be *indirect* not direct, but in the Court of Justice Judgment itself the concept of *direct* discrimination is used to challenge the different treatment of the marriage and same-sex partnership – lessening the scope for any justification of the unequal treatment. Yet there is a twist to this judgment which confirms that deference to national legislative solutions in this area still exists. Indeed, having established the proposition of equal treatment, the extent to which subtle differences in national legislation will be able to survive challenge is a critical and central one, which will have a profound impact on the continuing scope for discretion enjoyed by Member States in constructing details of any legislative registered partnership scheme. The concept of direct discrimination on the grounds of sexual orientation only applies if the marriage and registered partnerships are ‘comparable’, and this is primarily an issue to be determined by the National Court. Some States reached

²⁵ Case C-267/06.

²⁶ Above n 5.

a legislative solution in which registered partnership does not follow a pattern derived from and closely mirroring marriage rights, such as France with its PACS legislation. In such States, it will not necessarily be easy (although theoretically possible) to assert separate rights that have not already been included in the package made available in national law. The German 'life partnership' itself when it was introduced conferred notably less generous rights and obligations than marriage, although it has now been amended to strengthen it and bring it generally more into line with marriage under German law. One significant issue underlying the applicant's success in this case was the 2004 amendments to the German law, including a confirmation in the statutory social security old age pension code of equal treatment of survivors of marriage and life-partnerships,²⁷ but this was not reflected in the particular occupational pension scheme in question.

Much however will depend on what is meant by 'comparable', and a close reading both of the case in all its stages, of subsequent case law, and of the domestic legislation in question and its context, is necessary. The case, when read closely, does seem to leave some room for believing that the Court may well confirm and move towards quite a narrow concept of 'comparability' of the relationship for the particular purposes in question. Applying this to even the weakest of registered 'life partnerships', it is highly arguable that they imply a community of co-habiting life together which would arguably make marriage and these partnerships comparable for purposes of any kind of legal regulation (such as migration control) which might hinder or interfere with setting up a common home to pursue such a life together. An intriguing confirmation of this might be found in the PACS system, which apparently allows those who 'se sont PACSés' to request re-allocation in public service jobs such as schools in their partner's locality.²⁸

*Römer*²⁹ is an interesting follow up to this, and is worth examining with this in mind. This case involved the situation of a surviving pensioner who had (after retirement) entered into a civil partnership with his long-term partner when the German Life Partnership law entered into force. The Hamburg state employee pension scheme provides for a different rate for married pensioners, but this was not extended to those in continuing civil partnerships. Perhaps unsurprisingly, the couple concerned were unhappy with this and challenged the refusal to allocate the 'married' pension rate. This raises all sorts of questions about the methodology of determining whether the situations are 'comparable', triggering the protection of the equal treatment principle. It is open for consideration

²⁷ Case C-267/06, paras. 68–71.

²⁸ This has given rise to rumours of teachers in particular entering into PACSes of convenience not for immigration purposes but for internal relocation purposes from one area to another.

²⁹ Case C-147/08.

whether the determination will be made on the basis of an assessment of the particular individual situation affected. In this particular instance it would be necessary to examine the characteristics of the relevant relationship and the mutual obligations involved against the backdrop of the situation pertaining to pension payments. Or is a rather more abstract, generalised approach to be preferred. Such an approach would entail a sweeping ‘all or nothing’ approach resulting in the comparability or equivalence of the relationship being either asserted or rejected on the basis of generalised considerations. The court confirms quite a nuanced and detailed inquiry into the equivalence of the individuals’ situation.³⁰ Thus, in the case at hand, a pensioner with a spouse to whom s/he is still married, as well as with respect to partners who are still living in a registered partnership, both constellations still exhibit the same need for an income and display mutual obligations of support regarding the spouse or registered partner respectively. There is no relevant justifiable difference capable of providing an adequate basis for a distinction being made in the pension payments.³¹ This certainly gives ample scope for argumentation along the same lines in other situations, and the argument that the comparability of registered life partners and married couples in terms of the expectation of a common shared life together indicates precisely the same need for recognition within immigration regulations seems a compelling one. That being the case, it may certainly call into question the continued differentiation in Directive 2004/38 between marriages and registered partnerships. Moreover, it raises a delicate question concerning the continued deference evident at EU level towards host State national legislation on the issue of the existence of rights for, and the equal treatment of, registered partnerships vis-à-vis marriage in the context of free movement as a fundamental freedom and the rights pertaining to the regulation of immigration.

3.4. FAMILY LIFE: *SCHALK & KOPF v AUSTRIA*

So what then can we say about family life? There has been some reluctance to accept that same-sex couples enjoy ‘family life’ for the purposes of Art. 8 of the ECHR. This has denied both the symbolic recognition and the practical protection it would provide to those in same-sex relationships. Yet, again, there is a recent development that can be examined in the case of *Schalk & Kopf v Austria*.³² This well-known case involved marriage rights for couples of the same sex under Art. 12 ECHR. The Court answered the question in perhaps an unsurprising way, indicating that Art. 12 did not require a Member State to open marriage to couples of the same sex. It is however rather more interesting than

³⁰ Case C-147/08, paras. 42–43.

³¹ Case C-147/08, paras. 46–48 and 49–51.

³² Case 30141/04.

this conclusion might suggest at first sight, for several reasons. The first is concrete, the others for what it might possibly indicate as regards the future. The first thing to note is an unequivocal recognition that same-sex couples enjoy ‘family life’ together under Art. 8 ECHR.³³ This doesn’t address everything of course, as we shall see later, but it is a significant recognition nonetheless. The consequences are potentially helpful in recognising the relationships between same-sex partners, and possibly their children too, in the context of being a family unit that enjoys family life together which *may* constrain the State’s exercise of its border control and immigration powers over non-nationals. Another potentially interesting point, although very far from established, is that it leaves open the intriguing question of whether and to what extent a marriage between two individuals of the same sex entered into lawfully in one country could be seen to benefit from any protection, mutual recognition or ‘portability’ when the couple travel elsewhere. The Court is far from suggesting that Art. 12 ECHR *requires* marriage for same-sex couples, but it is clear that marriage of same-sex couples is not entirely outside the scope of Art. 12. Cross-border recognition of marriages lawfully entered into, and the possibility of either denying that these are marriages at all, or that ‘public policy’ in a heterosexual-marriage-only State requires or permits the denial of recognition to such unions, are surely bound to arise and to raise questions under Art. 8 and possibly Art. 12. Finally, could the day ever come when a same-sex couple could assert not the right to marry but to ‘found a family’ by suggesting that the time might come one day when this could be seen to embrace the *right* to some kind of recognition of an alternative family form, outside marriage if necessary, such as registered partnership? Or alternatively and probably more realistically, could this kind of argument be embraced under Art. 8 and Art. 14 together? This would be a less radical step than suggesting that same-sex couples could be included within the *right to marry* as such, and still seems a long way off, but perhaps might have been brought a small step closer in this case. In contrast to the issue of cross-border recognition which was not mentioned, this issue was explicitly argued and discussed by the Court. The Strasbourg court did not consider itself compelled to answer in the particular case³⁴, as Austria had introduced such Registered Partnership legislation since the complaint was made. Any answer to that question therefore remains for future consideration. The Court confined itself to consideration of whether there was any identifiable breach of Convention rights in not introducing such legislation sooner than 2009, or in the remaining differences between registered partnership and marriage, and determined quite firmly on both points that Austria had not exceeded the margin of appreciation available to it.

³³ Case 30141/04, para. 94.

³⁴ Case 30141/04, para. 103.

3.5. ... AND ITS LIMITATIONS

The significance and utility of establishing family life under Art. 8 in the context of migration control, however, should not be hastily overestimated, and to understand why we must explore in more detail the past history and present use of Art. 8 ECHR. It is by no means a guaranteed route to settlement, even for the closest family members. The reasons for this flow from the *Abdulaziz* case³⁵ and the balance it struck between the recognition of the sovereignty of the State over immigration control and the right of family members to respect for their family life by way of allowing communal residence together in the same State. The balance has always been stacked more towards state sovereignty over migration control and residence of non-nationals, and less towards protecting the natural instinct of the family to wish to set up and maintain a common home together. The facts of *Abdulaziz* were focused on discrimination, as it was more difficult to gain entry for a husband than a wife, and possibly (although to a much lesser extent) on the fact that these individuals were not in fact citizens of the UK but foreign nationals who had settled or were settling in the UK and wished their husbands to join them. The claim only succeeded on the basis of sex discrimination and the court made it clear that it started from the proposition that there was no 'general obligation' for a State to recognise the right of a bi-national married couple to choose their country of residence: at least where there were no insuperable obstacles to establishing family life elsewhere. This has made it slow indeed to recognise any obligation for the State to facilitate residence for marital partners beyond what is already established in the immigration rules and regulations in national law. The first cases involved deportations of those already settled, and it was only in *Netherlands v Sen*³⁶ that a more generous approach seemed to be taken to establishing the possible use of Art. 8 as a 'sword' i.e. to establish entry and residence rights, rather than a 'shield' i.e. to resist deportation of those already resident facing removal on the grounds of public policy, criminal convictions, or security. This case involved a child, the first to be born to the family, who had remained in Turkey for several years while her parents set up home in the Netherlands and added two other children to the family, both born and raised in the Netherlands but of Turkish nationality. On taking the case to the ECHR, it was held that the refusal to allow settlement for the first child was disproportionate and a violation of Art. 8.

The consequence of this for married couples is that although marriage (and most or all civil partnerships) assume a degree of mutual obligations and community of life of the couple shared together, Art. 8 ECHR in and of itself does not start from a position of *requiring* contracting states to recognise a *general* obligation

³⁵ Case 9214/81.

³⁶ Case 31465/96.

to permit the non-national spouse of a national or settled resident to settle with them. This has allowed a range of requirements to be imposed on, and obstacles to be placed in the way of, non-national spouses seeking settlement, with somewhat limited prospects of success in using Art. 8 alone to challenge such requirements, either as matters of general policy or in individual cases. Something more may well be required, such as (for example) arguments of discrimination between different genders in settlement policy. It may well therefore be the case that sex discrimination or sexual orientation discrimination between different unmarried couples in settlement policy may violate Art. 8 and Art. 14 together, but it is not *yet* clear whether such an argument could prevail in challenging the reservation of settlement rights to married (or married and registered) partners to the exclusion of all unmarried partners.

3.6. FREE MOVEMENT RATIONALE FOR MIGRATION RIGHTS

The result of this has been that, often, EU law has been a more attractive and fruitful method of challenging immigration regulations of Member States and the way they are applied in particular cases. Often this is done under secondary law, as there are clear and generous rights available, now consolidated under Directive 2004/38. As we have seen, attempts, such as in *Reed*, to engage in extensive interpretation of the rather restrictive concepts of family that are used here have not always met with much success. But more recently there have been some intriguing and interesting cases which go further than this. These cases rely directly on the fundamental freedoms enshrined in EU law – freedom to move and reside in another Member State, primarily started for economic purposes with free movement of workers. *Carpenter*³⁷ indicates how this might work and chip away further at the edges of the State's control over family migration. The story behind *Carpenter* is not a desperately unusual one, involving a second marriage where the children of the first marriage lived with their father and his second wife. She was a Philippine national and had overstayed her visa. As a result of this she was unable to regularise her position immediately and as a spouse seeking residence she was expected to return to her own State of origin to seek entry clearance which might take some time and possibly considerable expense. Indeed she was threatened with a deportation order which would make settlement more difficult. The chances of challenging such restrictions on family migration and settlement rights directly as an interference with family life under Art. 8 ECHR alone are not necessarily great, and indeed it is a case that I often use to illustrate the possibility of developing distinctive EU law principles in a number of ways. The first is to challenge the assumptions of Art. 8 ECHR as they

³⁷ Case C-60/00.

might apply or be understood to apply in EU law (I have done this conceptually in some detail in my book).³⁸ The argument here, simply put, is that there is no place for such a restrictive concept of respect for family life, when balanced with migration control, in EU law which revolves centrally around facilitating and enabling the choice of the EU citizen of where to live and recognises that the presence of certain core family members is indispensable to bring that about. The second, more direct, method of doing this is portraying the refusal of residence to the spouse as an obstacle to the exercise of one of economic fundamental freedom such as the economic freedom to provide services, as was necessary in *Carpenter* to establish a link to Community law in the first place. The reasoning is somewhat laconic and it is difficult to discern exactly what the Court means, but the message is clear. Even for those outside the strict scope of secondary legislation, the right to be accompanied by presence of close family members might be asserted on the basis of primary treaty free movement provisions, and the Host State may be called to justify the necessity and proportionality of any interference with that right.

3.7. CITIZENSHIP DISCOURSE

What has really breathed life into this however, is the concept of citizenship. I will start with a more detailed consideration of EU citizenship before examining briefly the possibility that some similar arguments may be filtering up through national court systems in the UK in some recent cases involving family residence rights of UK citizens in the UK, also embracing arguments based on Art. 8 ECHR. *Baumbast*³⁹ and *Chen*⁴⁰ show how these arguments can be made based on EU citizenship, and we can deal with these briefly as they may well be familiar to many readers. But the recent 2011 case of *Zambrano*⁴¹ is potentially more profound and radical than either of these and deserves more concentrated attention.

The link between citizenship and migration is an obvious and well established one in EU law, one of the major and most significant rights in question attached to EU citizenship being the right to ‘move and reside freely throughout the territory of the Member States’. The secondary legislation provides for the family members of migrant EU citizens – especially (but not only) if they are dependent on the primary migrant. Yet there is one gap that was not specifically addressed and seemed unclear – the reverse of that, where the primary EU citizen migrant

³⁸ TONER, above n 1.

³⁹ Case C-413/99.

⁴⁰ Case C-200/02.

⁴¹ Case C-34/09.

is (or could be, with support from relatives) self-sufficient but is dependent on the non-national family member in the ascending line. The paradigm case of this of course is the infant EU citizen with a third country national parent. Such an EU citizen cannot realistically stay in any Host State without the State recognising the residence of at least one parent. *Baumbast* and *Chen* recognise this, first (*Baumbast*) in the context of the children of a former worker who are resident under secondary law (at the time, Directive 1612/68), and next in *Chen*, where there is no other source of residence right for the child other than directly as a self-sufficient EU citizen (if provided for by parents). *Chen* recognised this right of residence but left somewhat open the question of whether this could be used to assert a right not just of residence but also the right to work to provide the means to make the child self-sufficient. In *Chen* the family was involved in a business and the father worked in China, so there was no need of work in the UK to provide for the child. These all concerned minor, dependent, children. But the rationale seems clear enough: an analogy with *Carpenter* that the presence and co-habitation of one's spouse/life partner in the same Host State is necessary to make a reality of the right of the primary migrant to move and reside in the chosen Host State. This is indeed the rationale behind the enactment of the secondary legislation on family reunification. All of these cases however involved an EU citizen resident in a Host State other than that of their own nationality.

3.8. ZAMBRANO – A NEW PERSPECTIVE ON CITIZENSHIP AND FAMILY RESIDENCE RIGHTS?

The most recent development in this saga is fascinating and potentially revolutionary, for it challenges very directly the previous restrictions on the scope and reach of EU law and uses citizenship to do so. The potential here is to engage EU law far more systematically and routinely with the so-called 'internal situation': the EU citizen in his or her own Member State. Such arguments have succeeded before but as something of an exception rather than routine. Member States have thus felt themselves (correctly) to be constrained far less in respect of family reunification rights when their own nationals seek to sponsor family members. This has given rise to a number of well-known 'migration routes' between the neighbouring Member States with fairly similar linguistic and cultural settings such as UK and Ireland, France and Belgium, Denmark and Sweden, in order to take advantage of more generous EU immigration rights. These are often cases involving married couples seeking to evade stricter public policy restrictions or age and financial conditions attached to spousal entry under national law, but similar migratory routes and re-location decisions may well be made by same-sex couples finding themselves unable to sponsor their partner in their State of origin or current habitual residence.

*Zambrano*⁴² challenges this orthodoxy. The Zambrano family (with their eldest and at the time only child) sought refuge in Belgium from Colombia, but were not accepted to be refugees. They were, however, not actually expelled from Belgium due to the humanitarian situation and continuing violence in Colombia. They remained in Belgium for a time and in due course two more children were born. These two children were not registered as Colombian citizens and acquired Belgian nationality. Perhaps the omission to register was deliberate, in the knowledge that the children would acquire Belgian nationality, but no point seems to be taken about this. Whatever the situation under Colombian law regarding the children's options to acquire Colombian citizenship, the validity of their Belgian citizenship does not seem to be seriously questioned. The Zambrano parents then sought to regularise their situation in Belgium on the basis of their Belgian children's nationality, and after initial attempts failed, they sought to use EU law to do so. The case then, drawing on *Chen*, and *Baumbast*, but facing the formidable obstacle of counteracting the 'internal situation' argument which had already been put once, unsuccessfully, since the introduction of the new status of EU citizenship,⁴³ went to the ECJ. The result was surprising. It was held that indeed the status of EU citizenship of the child could enable the parents (seemingly both in this case) to assert the right to remain in Belgium and the right to be granted a work permit.

The rationale behind this is as follows: "In those circumstances Art. 20 TFEU precludes national measures which have the effect of depriving citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as EU Citizens... A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect... It must be assumed that such a refusal would lead to a situation where those children, citizens of the union, would have to leave the territory of the union in order to accompany their parents ..."⁴⁴

Here it is worth noting two things. First, the focus on citizenship and second the family context in which this took place. The focus on citizenship is intriguing and shatters the link between EU law and *migration to* or at least *presence in* a Member State other than that of nationality of the EU citizen, which has always been so crucial to avoid the case being judged to fall outside the scope of EU law protection as involving a 'purely internal situation'. This potentially means that *domestic* immigration control could be more fundamentally threatened by this line of thinking and argumentation than previously. Second, it is also vital to

⁴² Above n 41.

⁴³ *Uecker&Jaquet*, Joint cases C-64/96 and C-65/96.

⁴⁴ Case C-34/09, paras. 42–44.

note the familial context in which this takes place. The family relationship in question is a parent-child not a spousal or partnership relationship. There is a degree of vulnerability and sheer necessity in the presence of a parent or other adult to care for a minor child (particularly a very young infant) in a way which is not necessarily the case in the adult spousal or life-partner relationship. Plenty of adults live alone or chose to live ‘semi-detached’ from their partners or spouses for periods of time because of work or family commitments in multiple locations. It is important to separate these two arguments.

3.9. DIFFERENTIATING *ZAMBRANO*, WIDENING OR LIMITING ITS EFFECT?

Zambrano is clearly a landmark judgment, yet one which many Member States (their immigration authorities and interior ministries in particular) find deeply troubling and controversial. It has very swiftly given rise to further litigation, and there will be significant pressures from some quarters to limit or contain the impact of the judgment, particularly in relation to its potential effect on so-called ‘internal situations’. And yet it may well be possible to overcome these obstacles and suggest that *Zambrano*, and the line of thinking behind it, may be of some relevance to the question at hand here, that of ‘non-traditional’ partnership relationships and families. What is instantly recognisable is some parallel between this and *Carpenter*⁴⁵ which did in fact involve a spousal relationship. The court in *Carpenter* accepted with little fuss that the threatened deportation of the wife could interfere with the husband’s freedom to provide services. Is it stretching it too far to suggest that the interference with the very core of the rights granted by EU citizenship involved in refusing residence to one spouse or partner would be any less destructive or prejudicial to the continued residence of the other? It would, arguably, be just as likely to prejudice the continuing presence of the EU citizen partner as would the absence of a parent – one only has to think of the couple who could not gain a spousal residence and work permit in Austria for the US national husband and decided to forego the possibility of that move. The argument seems compelling, but the more recent judgment of *McCarthy*⁴⁶, the first follow-up to *Zambrano*, indicates that serious caution may be necessary. This was a case in which a UK resident dual UK-Irish national sought to use EU law rights to ameliorate her third country national husband’s position and to assert a right of residence under EU law to allow him to remain, in circumstances in which this would not be permitted under UK immigration rules. It seems likely that this may have been due to maintenance requirements as Mrs McCarthy did not work, had not worked in the past, and

⁴⁵ Above n 37.

⁴⁶ Case C-434/09.

was reliant on benefits. The claim failed, on the basis that Mrs McCarthy's position as a dual UK-Irish national who had never lived anywhere else but the UK and was seeking to secure a residence right for her husband did not give any sufficient link to EU law, either under the Directive 2004/38, or directly under Art. 20 of the TFEU (as it had done for the children in *Zambrano*). The case is differentiated from *Zambrano* in part on the basis that the applicant was not (1) being deprived of the substance of her rights as an EU Citizen by, (2) effectively being required to leave the territory of the EU. These two are slightly separate, but do appear to be linked, although it is not entirely clear whether they are to be seen as cumulative, alternative, or whether the second is to be seen as a sub-set of a more general principle, the first. Quite why the McCarthy family is less at risk of having to leave the EU territory in order to continue family life together than the Zambrano family is not clear. Indeed the practical obstacles to the Zambrano family returning to Colombia amidst continuing civil unrest precluding their forced return seem, if anything, more formidable than the McCarthys relocating to Jamaica. Perhaps the point might be that there is nothing preventing Mrs McCarthy from working abroad in another EU State with her husband accompanying her? However, as the Court was willing to accept the necessity for the Zambrano parents to be permitted to work in Belgium to allow them to provide for their infant EU citizen children then could this not equally also apply in any other EU Member State, and undermine the assertion that the Zambranos otherwise face exile from the entire territory of the EU? We are then left with the possibility that the difference comes down to the 'separability' of married partners (permitted, McCarthy) and not parents and infant children (not permitted, Zambrano).

There are therefore certainly some indications that the presence (or absence) of a spouse might not be treated in the same way as a parent. *McCarthy* and *Zambrano* do indeed seem to sit uneasily together, and it is not clear whether the judgment in *McCarthy* will be narrowly confined to the 'dual nationality' and 'internal situation' issues at hand in that case. The next follow up to *Zambrano*, which pursues the theme of the 'internal situation', is *Dereci*.⁴⁷ The case involves (amongst others) what appear to be two 'classic' internal situation cases involving non migrant EU-TCN married couples, one with children and one without. The judgment in *Dereci* underlines the need for caution in relation to the possibilities of judicial interpretation of partnership rights. In the context of the 'internal situation' the court distinguishes marital partnerships from the situation of the dependent infant in *Zambrano*, and suggests that, without more, the separation of the married couple due to national immigration law in the Member State of nationality does not prevent the genuine enjoyment of the substance of the rights of EU Citizenship by requiring the individual to leave the territory of the EU

⁴⁷ Case C-256/11.

altogether. It is quite possible however, that if some of the concepts were raised *not* in the classic heterosexual marriage but internal-situation case as we see in *Dereci*, but in a more traditional cross border free-movement but *registered partner or unmarried partner* case, that the line of reasoning might proceed differently.

3.10. WHAT'S IN A NAME – OTHER EU CITIZENSHIP CASES?

Other cases might give rise to a slightly different although related argument. In a number of cases, confusion over names has arisen, particularly but not always in the case of dual nationals resident in the Member State of one of these nationalities but facing potential confusion and difficulties with the registration of names or surnames, as legal practices on matters such as acquisition of surnames from parents, recognition of indicators of nobility and spelling differ from State to State. These cases give rise to the interesting proposition that the concept of citizenship could, in principle, be invoked to protect against national measures which impede the exercise of free movement rights (*Garcia Avello*,⁴⁸ *Grunkin & Paul*,⁴⁹ *Sayn-Wittgenstein*,⁵⁰ see also *Runevič-Vardyn and Wardyn*⁵¹). This is certainly a logical progression of previous case-law, most clearly and controversially articulated by AG Jacobs in *Pusa*,⁵² but the contours of it and how it might apply in particular situations remains an open matter. In *Pusa* itself, after the AG's clear but very broad proposition of 'unjustified burdens' on the exercise of the right to move and reside freely being prohibited by EU citizenship, the Court in fact preferred to make an argument more on the basis of deterrence of migration due to being less favourably treated by the State of nationality for having done so.

Where there is no question that an acceptable 'sufficient link' to EU law by movement and settlement in another Member State is indeed present, such a principle could surely be invoked to argue in favour of a presumption that the refusal to grant residence rights to any life partner (whether unmarried, registered or same-sex married) would be a serious interference with these rights that required justification. Cases providing clear evidence of deterrence and choices made not to migrate precisely because of such refusals could be called in aid of such a proposition. It could even be used to argue in favour of the recognition of other effects of a marriage or registered partnership, not just entry to the Host State for the third country national involved, or in favour of cross-

⁴⁸ Case C-148/02.

⁴⁹ Case C-353/06.

⁵⁰ Case C-208/09.

⁵¹ Case C-391/09.

⁵² Case C-224/02.

border recognition of certain parental rights and obligations. These issues can also cause considerable inconvenience and trouble for the families concerned, even though they may not be as serious as the basic fact of entry and residence in the Host State. It is difficult to argue that the ‘disappearance’ of one’s marital or other civil partnership status, or the relationship with one’s parent or child, could fail to have consequences across all sorts of areas that are equally or more inconvenient than, for example, in *Grunkin & Paul*, bearing a different surname in two different Member States. I put forward a similar argument some years ago, which these subsequent cases seem to corroborate and support, although it is perhaps far from watertight in each new context. It is however also worth cautioning on two points. First, the degree of inconvenience sufficient to be classed as a legal interference with the Treaty rights of free movement and residence is still not entirely clear. This is certainly still a dynamic area of law in which the extent of citizens’ rights and Member States’ obligations remain open to question and litigation for further clarification. In some cases, such as *Runevič-Vardyn and Wardyn*, part of the complaint is dismissed on this ground, i.e. that there is no relevant sufficient interference with such rights. Second, the name recognition cases do leave some considerable room for justification, including in *Sayn-Wittgenstein* the policy of non-recognition of nobility, including aristocratic forms of address and names, etc., and in *Runevič-Vardyn and Wardyn*, the preservation of official national language and traditions. There may therefore still be some scope for justification of restrictive policies on recognition of ‘non-traditional’ family forms for such reasons, although the extent to which ‘traditions’ which conflict with equality on the grounds of sexual orientation will continue to be accepted remains contentious.

3.11. INSPIRATION FROM NATIONAL LAW?

Despite the challenges and uncertainties, the combination of close family relationships and citizenship may be a powerful one both conceptually and practically to avoid such ‘constructive deportation’ or exile to other Member States or indeed out of the EU entirely, of individuals where they are unable to secure residence rights for their closest family members. Two cases from the UK, *Aguilar Quila*,⁵³ and *ZH (Tanzania)*⁵⁴ demonstrate this. On a conceptual level, they both fix quite strongly on citizenship and the closeness of the family relationship. Practically, perhaps *Aguilar Quila* is of more interest as it concerns a partnership relationship whereas *ZH* was concerned with the best interests of the (British national) child whose non-national mother was facing removal from the UK. The case concerned a young married couple, one British and one Chilean. They married young, before the young bride was 18. The rules on

⁵³ [2010] EWCA Civ 1482.

⁵⁴ [2011] UKSC 4.

spousal settlement were changed shortly after they married but before she turned 18, and the change involved increased age before an individual could sponsor or be sponsored as a spouse. Previously this was 18, but was raised to 21. This was in order to avoid or reduce the number of forced marriages, of which (the government argued) many were in this age group. The couple tried to use Art. 8 ECHR to challenge the application of this new age limit to them. It was accepted by all concerned that their marriage was genuine and there was no question of it being forced in any way. In the first instance, the claim was rejected on the basis that Art. 8 did not prohibit such regulations and this decision (to raise the age from 18 to 21) was within the 'margin of appreciation' of the contracting states under the Convention. Part of the rationale for this was the starting point of the Strasbourg jurisprudence that there is no 'general obligation' under Art. 8 that requires the State to respect the free choice of matrimonial residence of a couple one of whom lacks pre-existing nationality of or right to reside in the chosen Host State. The young couple therefore had to choose whether to live together in Chile until they reached the age of 21, or for Mrs Aguilar to remain to begin her chosen degree programme in the UK immediately, but separate from her husband (apart from visits) until they both reached the age of 21. In the Court of Appeal however there was quite a different result. On appeal, the argument based on Art. 8 ECHR succeeded, with some interesting comments about the juxtaposition of marriage, family life, and what might be called 'constructive exile' from one's country of citizenship through forced choice between staying alone and following a non-national spouse elsewhere. The judgment was confined to the individual case and the court did not directly undermine the validity of the entire rule in abstract terms.

The argument that marriage and family life imply that co-habitation in the same State should *presumptively* not be precluded by law is a powerful one. Despite the problems flowing from *Abdulaziz* and the other cases in mounting an argument for a *general* obligation to respect the choice of matrimonial residence, the court is much more willing to travel along this line of thinking than it has been before. In doing so, for the majority, it does seem significant that one of the partners concerned in each case was a UK national, despite the reluctance of the third member of the Court of Appeal to draw this conclusion. It is a combination of the marriage, the respect for the family life that this has initiated between the couple, and the protection of the citizenship right of the UK national against 'constructive deportation' and having to choose between remaining in their state of nationality and living with their spouse that seems so influential for the majority. The case took a different emphasis in the Supreme Court [2011] UKSC 45, however, downplaying the significance of citizenship and denying that the *Abdulaziz* case supported such a line of reasoning, but taking a very robust approach to the protection of the family life established by the marriage and a sceptical approach to the evidence presented that the interference with this

through immigration law imposing the age limit in question was a necessary and proportionate response to the issue at hand (forced marriages). It is certainly a strong protection of family life, but in considering any wider implications the fact that this family life was established by a marriage must be noted.

3.12. *METOCK*: THE CLEAREST CONFIRMATION?

In *Metock*,⁵⁵ the Court perhaps comes the closest that it has to confirming this line of reasoning. The case involved several failed asylum seekers in Ireland who had never been lawfully resident in any EU Member State but sought to regularise their position to remain in Ireland with their migrant EU Citizen spouses. Previously, in *Akrich*,⁵⁶ the Court had appeared to accept that Community free movement law did not apply to *first entry of a family member to an EU Member State* and thus Member States were not precluded from imposing a condition of previous lawful residence somewhere in the EU before recognising such rights. The court in *Metock* rejected this conclusion, even going so far as to say quite explicitly that it needed to be re-considered. The case is clearly portrayed as one of free movement not national immigration control and the underlying reasoning of the Court is highly pertinent here.

Paragraphs 60–64 read as follows:

“In the second place, the above interpretation of Directive 2004/38 is consistent with the division of competences between the Member States and the Community.

It is common ground that the Community derives from Articles 18(2) EC, 40 EC, 44 EC and 52 EC – on the basis of which Directive 2004/38 inter alia was adopted – competence to enact the necessary measures to bring about freedom of movement for Union citizens.

As already pointed out in paragraph 56 above, if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.

Consequently, within the competence conferred on it by those articles of the Treaty, the Community legislature can regulate the conditions of entry and residence of the family members of a Union citizen in the territory of the Member States, where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State.

The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.”

⁵⁵ Case C-127/08.

⁵⁶ Case C-109/01.

We have here a very clear articulation that leading a 'normal family life' in the Host Member State is a very significant issue for EU law, and that non-recognition of residence for close family members such as a spouse precludes such 'normal' family life and is a serious interference with rights of movement and residence throughout the EU. This undoubtedly articulates the underlying rationale for Directive 2004/38. The case focuses on the scope of Directive 2004/38 and confirms that this legislation validly covers such situations of first entry. The argument here admittedly seems rather more ambitious, seeking to turn directly to the Treaty Articles to confront restrictive national legislation which may indeed even seem to be in conformity with compromise enshrined in the text of Directive 2004/38. Nonetheless, it sets out clearly the thinking behind this line of reasoning. It adds considerable weight to the suggestion that non-portability of partnerships, marriages and parental ties, particularly but not necessarily confined to entry and residence of such third country national family members is both something that the EU has competence to address, and even that Member States can and should be called upon to justify with compelling reasons of public interest. It is certainly true that family law remains under the control and competence of individual Member States, but it would certainly seem that the time has long passed when Member States may use this as a reason to deny that EU law may impose certain obligations upon them in the way they exercise this competence.

4. CONCLUSION

The trajectory towards full free movement rights for same-sex couples (and any children involved) in the EU legal order has been a long and complex one. The situation is more favourable than it was at the time of writing the first edition of this book, but much still rests on the national law of the State *to which* the family wish to migrate and the extent to which it is willing to adapt. At the same time, it becomes steadily more and more complex, with numerous issues of recognition of marriages, relationships and parental ties in all sorts of contexts from tax to social and child welfare, to healthcare and inheritance issues continually arising alongside the more fundamental and prior issue of immigration rights for TCN partners and children. There are many who might support this deference to national sensitivities in the speed at which this transition proceeds in various Member States. Nonetheless, there are plenty of arguments of principle that can be brought forward either in the context of litigation in individual cases, or in the context of lobbying for legislative change, to press for further movement along this trajectory. And despite cautionary voices, there are many who see such arguments of principle as being far more fundamental and compelling.

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