

FAMILY LAW

The Legal Recognition of Same-Sex Relationships Within the European Union

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For more than a decade the legal recognition of same-sex relationships has garnered considerable attention around the globe. The substantive discussion about whether to permit same-sex couples to formalize their relationship is one of the most contested issues within Europe and the United States. The issue becomes even more disputed and complicated in the case of cross-border situations because the private international law approaches in respect of same-sex relationships differ to a large extent. This Article aims to explore how the member states of the European Union cope with the problems created by the free movement of same-sex couples across internal borders. An overview is provided of the actual situation concerning the possibilities of formalizing a same-sex relationship in the European Union. The development of the law shows that the competence of national courts of the EU member states is restricted. They have neither allowed the formalization of same-sex relationships nor have they recognized same-sex relationships concluded abroad if specific statutory rules are lacking. Instead, the courts encourage particular legislatures to enact rules. The Article then focuses on the recognition in one member state of same-sex relationships legally registered in another country. Thereby, a distinction is made between the individual national perspectives, on the one hand, and the European perspective on the other. The latter includes European human rights law and European law consisting of directives and (future) regulations. It is submitted that the European legislature should include same-sex relationship when legislating cross-border family relationships. Finally, the question is posed of what lessons—if any—the United States can draw from the European situation.

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I. THE CURRENT DEBATE AROUND THE GLOBE

For more than a decade, the legal recognition of same-sex relationships has garnered considerable attention around the globe.¹ The substantive discussion about whether to permit same-sex couples to formalize their relationship is one of the most contested issues within Europe and the United States.² The issue becomes even more disputed and complicated in cross-border situations because private international law approaches to same-sex relationships differ greatly.³ How do the member states of the European Union cope with the problems created by the free movement of same-sex couples across internal borders? Which rules are applicable? It is helpful for the current, turbulent American debate surrounding same-sex relationships to look at the current state of affairs in Europe.⁴

1. For an updated timeline of significant events regarding same-sex marriage and the legal recognition of same-sex couples worldwide, see CBC News, Same-Sex rights: World Timeline, http://www.cbc.ca/news/background/samesexrights/timeline_world.html (last visited June 6, 2008).

2. See, e.g., Mark Bell, *Holding Back the Tide?: Cross-Border Recognition of Same-Sex Partnerships Within the European Union*, 12 EUR. REV. PRIVATE L. 613, 614 (2004) (discussing the same-sex marriage debates within the European Union as well as Canada and the United States).

3. *Id.* at 627.

4. This contribution is primarily based on two studies. First, it is based on the comparative doctorate research of IAN CURRY-SUMNER, ALL'S WELL THAT ENDS REGISTERED?: THE SUBSTANTIVE AND PRIVATE INTERNATIONAL LAW ASPECTS OF NON-MARITAL REGISTERED RELATIONSHIPS IN EUROPE 597 (2005), which this Author had the pleasure to supervise. Second, it is based on the evaluation report of the Dutch Same-Sex Marriage Act and the Dutch Registered Partnership Act that was submitted to the Dutch Parliament in 2006. This extensive report, which particularly addresses the question of whether the new Dutch

This Article contains the following parts. First, the main subject-matter is illustrated by several case studies. Second, an overview will be provided of the possibilities for formalizing a same-sex relationship in the European Union, which since January 1, 2007, consists of twenty-seven member states.⁵ The Article then focuses specifically on the recognition in one member state of a same-sex relationship legally registered in another member state.⁶ Thus, a distinction exists between the individual national perspectives, on the one hand, and the European perspective on the other. The latter includes European human rights and European law consisting of directives and (future) regulations. The findings will be summarized, and finally, there is the crucial question of what lessons—if any—the United States can draw from the European situation. Before proceeding, it is worth emphasizing that, currently, no other field of law so clearly demonstrates that there is a very close interrelationship between substantive law and private international law. In particular, the recognition rules are strongly influenced by the substantive law rules of the jurisdictions that either permit same-sex couples to formalize their relationship or prohibit them from obtaining any legal recognition.

II. THE SUBJECT MATTER

The legal recognition of same-sex relationships entails two questions: First, is it possible for same-sex couples to obtain a legal status that provides them with rights and obligations? Some countries have answered this question positively by introducing new family law institutions, such as civil or registered partnerships that, to a certain extent, are similar to the existing institution of marriage.⁷ Others allow homosexual couples to enter into a marriage.⁸ A clear distinction is to

institutions (registered partnership and same-sex marriage) will be recognized abroad, was drafted by four researchers of Utrecht University. See Katharina Boele-Woelki et al., *Huwelijk of geregistreerd partnerschap?*, 134 ARS NOTARIATUS 346 (2007) (Neth.), available at http://www.justitie.nl/images/20061212_5456588b%20huwelijk%20of%20geregistreerd%20partnerschap.doc_tcm34-30196.pdf [hereinafter Boele-Woelki et al., *Huwelijk*]. The general conclusion is that the opening of civil marriage to same-sex couples is to be regarded as a success. *Id.* For an English summary, see Katharina Boele-Woelki et al., *The Evaluation of Same-Sex Marriages and Registered Partnerships in the Netherlands*, 2006 Y.B. PRIVATE INT'L L. 27, 27-35 [hereinafter Boele-Woelki et al., *Netherlands*].

5. European Comm'n, *The EU at a Glance: European Countries*, http://europa.eu/abc/European_countries/index_en.htm (last visited May 31, 2008).

6. Bell, *supra* note 2, at 613-32.

7. *Id.* at 615-17 (noting the similarities and distinctions between marriage, registered partnerships, legally recognized partnerships, and cohabitation).

8. See *id.* at 615-16 (explaining that the Netherlands and Belgium have opened marriage to same-sex couples).

be made between these different approaches in the substantive law debate. Second, cross-border aspects raise additional questions. Should a jurisdiction that has opened marriage to or introduced a registration scheme for same-sex couples allow nationals of other countries to formalize their relationship? Are there residency requirements, if any, to be fulfilled? Moreover, will a formalized same-sex relationship be recognized in other jurisdictions, and if so, how and under what conditions? These questions are to be answered by private international law rules, which traditionally address jurisdiction, applicable law, and recognition.⁹ In the field of international family law, to which cross-border same-sex relationships belong, the rules are predominantly based on national law.¹⁰ However, this may change. New rules on specific aspects such as property relations between partners are currently being prepared by the European legislature.¹¹ If these laws take effect, they will be binding on all member states of the European Union.

In order to highlight the questions which are to be solved by private international law, the following case studies might be illustrative:

1. Pieter and Paul enter into marriage in the Netherlands. They move to Spain where they request registration as a married couple. Will the Dutch same-sex marriage be recognized in Spain? And if so, will it be recognized as a marriage?
2. Petra and Pauline formed an *eingetragene Lebenspartnerschaft*¹² in Germany. They move to Austria where they request the dissolution of their relationship. Will the Austrian judicial authorities grant their request?
3. Piotr and Pawel, who are both Polish nationals, are on vacation in England, where they enter into a civil partnership. In Poland, they apply for recognition of their partnership. Will the legal status acquired under English law be recognized in Poland?
4. Paulette and Pascale, who are living in France in a *pacte civil de solidarité*,¹³ are on holiday in Lithuania when Paulette is killed as a result of a violent crime. Pascale starts proceedings in Lithuania, asking for compensation for damages. Will her claim be heard by

9. See Ana Quiñones Escámez, *Propositions pour la formation, la reconnaissance et l'efficacité internationale des unions conjugales ou de couple*, 96 REVUE CRITIQUE DE DROIT INT'L PRIVÉ [REV. CRIT. DR. INT. PR.] 357, 357-82 (2007) (Fr.).

10. Bell, *supra* note 2, at 614, 626-31.

11. *Id.* at 631.

12. An *eingetragene Lebenspartnerschaft* translates into English as a "registered life partnership."

13. A *pacte civil de solidarité* translates into English as a "civil solidarity pact."

the Lithuanian courts, because under the applicable Lithuanian tort law, only spouses and dependent children are entitled to damages?¹⁴

The first two cases, where parties are validly married or in a partnership in one country, and later move to another country, have been labeled by Linda Silberman as “mobile” cases.¹⁵ The “evasion” scenario (third case), where a same-sex couple travels to a country solely to formalize their same-sex relationship in that country,¹⁶ gives rise to fewer problems in the European context than within the United States, because residency requirements are generally satisfied in the country where the marriage is celebrated or the partnership is registered.¹⁷ In a considerable number of jurisdictions, however, same-sex partners are subject to (almost) identical residency requirements as heterosexual spouses.¹⁸ This “open” approach, which permits foreigners to easily obtain a legal status not allowed in the country of their nationality or residence, has increasingly been adopted in more recent statutes on the legal recognition of same-sex couples.¹⁹ It has been rightly observed that when same-sex registration schemes were first introduced, national legislatures, not wishing to create “limping” relationships, yet at the same time desiring to improve the domestic situation for same-sex couples, were left with few options other than to introduce strict requirements with regard to the parties’ residence as well as their nationality.²⁰ As a result, the ability of nonresidents and

14. This procedure entails three private international law inquiries: (1) determining if the Lithuanian court has jurisdiction, (2) which law is applicable, and (3) deciding if the French same-sex relationship can be recognized.

15. Linda Silberman, *Same-Sex Marriages: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2204-08 (2005). The status acquired under the law of the state of celebration is sometimes also referred to as “migratory” status. J. Thomas Oldham, *Developments in the US—The Struggle over the Creation of a Status for Same-Sex Partners*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 481, 492 (Andrew Bainham ed., 2006).

16. Silberman, *supra* note 15, at 2198-2204.

17. See, e.g., Fr. in the U.S., Getting Married in France, <http://ambafrance-us.org/spip.php?article387> (last visited June 6, 2008); U.S. Dep’t of State, Marriage of United States Citizens Abroad, http://travel.state.gov/law/info/marriage/marriage_640.html (last visited June 6, 2008). Consequently, questions asked in an American conflict-of-laws analysis—such as whether the jurisdiction with the same-sex relationship scheme has an interest in extending its laws to foreign nationals—are generally not posed in Europe.

18. CURRY-SUMNER, *supra* note 4, at 44, 123-24, 214-15. This is the case in Belgium, Germany, Scotland, Northern Ireland, and the Netherlands. *Id.* England and Wales only require a seven-day residency.

19. See *id.*

20. This is the case in Denmark, Finland, and Sweden, which require either residence and nationality of one partner or residence of both partners for at least two years. Matti Savolainen, *The Finnish and the Swedish Partnership Acts—Similarities and Divergencies*, in LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE, 24, 24-31 (Katharina Boele-Woelki

nonnationals to enter into a legal relationship was severely restricted.²¹ Although the fears of “registration tourism” were one of the major concerns for European legislatures, these suspicions have not yet been realized.²² As more jurisdictions enact legislation for same-sex couples, the need to introduce residency requirements different from those imposed on aspirant spouses lessens.²³

The fourth example illustrates the travel or visitors’ case. The couple establishes a status in their country of residence; they do not move, but need their status to be recognized elsewhere. Consequently, this situation only poses transient effects on the jurisdiction where the couple never lived but where certain benefits or rights are requested. It is submitted that the private international law systems in Europe approach this scenario like mobile cases. The preliminary question of whether a person is entitled to claim certain rights or benefits is answered according to the recognition rules of the forum.²⁴ Thus, the idea that the recognition state has only a limited link to the parties and therefore has only little interest in what the formal relationship of the couple may be is considered to be irrelevant.²⁵

III. WHERE IS IT POSSIBLE TO FORMALIZE A SAME-SEX RELATIONSHIP?

It is common to divide Europe into four geographical parts: Northern, Central, Southern, and Eastern Europe.²⁶ This distinction

& Angelika Fuchs eds., 2003) [hereinafter LEGAL RECOGNITION]; see also LEGAL RECOGNITION, *supra*, app. at 215-17, 220-23, 227-30 (providing an English translation of the relevant Acts). Luxembourg requires the residence of both partners. *Id.* at 297-300. Slovenia requires that partners register thirty days in advance. *Slovenia Passes Same-Sex Marriage Law*, UPI.COM, July 24, 2006, http://www.upi.com/Top_News/2006/07/24/Slovenia_passes_same-sex_marriage_law/UPI-81921153747555.

21. See LEGAL RECOGNITION, *supra* note 20, app. at 215, 220-21, 229-30.

22. Ian Curry-Sumner, *Uniform Patterns Regarding Same-Sex Relationships*, 7 INT’L L. F. DU DROIT INT’L 186, 188-89 (2005).

23. See *id.*

24. See Boele-Woelki et al., *Netherlands*, *supra* note 4, at 30; Silberman, *supra* note 15, at 2208-09.

25. This is the American conflict-of-laws approach. See Silberman, *supra* note 15, at 2208-09.

26. See MORE OR LESS TOGETHER: LEVELS OF LEGAL CONSEQUENCES OF MARRIAGE, COHABITATION AND REGISTERED PARTNERSHIP FOR DIFFERENT-SEX AND SAME-SEX PARTNERS, A COMPARATIVE STUDY OF NINE EUROPEAN COUNTRIES 1, 37 (Kees Waaldijk ed., 2005), available at http://www.ined.fr/fichier/t_publication/1034/public_pdf1_document_de_travail_125.pdf [hereinafter MORE OR LESS TOGETHER]; Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 5 JUD. STUD. INST. J. 104, 106 (2005), available at http://www.jsijournal.ie/html/Volume%205%20No.%201/5%5B1%5D_Waaldijk_Others%20May%20Follow.pdf.

will also be utilized in this Part with respect to the twenty-seven member states of the European Union.²⁷ Outside the European Union, Andorra,²⁸ Iceland,²⁹ Norway,³⁰ and Switzerland³¹ have also introduced same-sex registration schemes.³²

A. Northern Europe

All three of the member states in Northern Europe have introduced registered partnerships.³³ As has been well-publicized, in 1989 Denmark became the first country in the world to introduce registered partnerships.³⁴ Sweden followed suit in 1994³⁵ as did Finland in 2001.³⁶ With regard to Sweden, it should be mentioned that the possibility of opening up marriage to same-sex couples was

27. See IAN CURRY-SUMNER, RECOGNITION OF SAME-SEX RELATIONSHIPS IN THE EU (forthcoming 2008).

28. Unió estable de parella 2005 [Act on Registered Cohabitation] Aug. 17, 2005, No. 25 (Andorra).

29. Act on Registered Partnership, No. 87 (June 12, 1996) (Ice.). This act became effective June 27, 1996, and dealt with “confirmed partnership” (*Lög um staðfesta samvist*). The act was amended by Act No. 52/2000. It introduced second-parent adoption and the possibilities for registering a partnership with a foreign national. Act. No. 52/2000 (Ice.). For an English translation of the acts, see LEGAL RECOGNITION, *supra* note 20, app. at 224-26.

30. Act on Registered Partnerships, No. 40 (Apr. 30, 1993) (Nor.). This partnership (*partnerskapsloven*) act entered into force on August 1, 1993. *Id.* It was subsequently amended by the Act of December 21, 2000, No. 104 (citizenship and residence requirement) and by the Act of June 15, 2001, No. 36 (adoption). See LEGAL RECOGNITION, *supra* note 20, app. at 218-19.

31. Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlichen Paare [Federal Law on Same-Sex Partnerships] June 18, 2004, SR. 211.231 (Switz.). The law became effective on January 1, 2007. Michelle Cottier, *Registered Partnerships for Same-Sex Couples in Switzerland: Constructing a New Model of Family Relationships*, in FAMILY LAW & FAMILY VALUES 181, 181-200 (Mavis Maclean ed., 2005); Myriam Grütter & Daniel Summermatter, *Das Partnerschaftsgesetz*, 5 DIE PRAXIS DES FAMILIENRECHTS [FAMPRAC.CH] 449 (2004) (Switz.); Willi Heussler, *Die eingetragene Partnerschaft gleichgeschlechtlicher Paare nach schweizerischem Recht—Begründung, Wirkungen, Auflösung*, 60 STANDESAMT [STAZ] 261 (2007) (Switz.).

32. Curry-Sumner, *supra* note 22, at 186-94.

33. See Maarit Jänterä-Jareborg & Caroline Sörgjerd, *The Experiences with Registered Partnership in Scandinavia*, 5 DIE PRAXIS DES FAMILIENRECHTS [FAMPRAC.CH] 577 (2004).

34. Lov om registreret partnerskab [Act on Registered Partnership] June 7, 1989, No. 372 (Den.). For an English translation, see LEGAL RECOGNITION, *supra* note 20, app. at 215-17.

35. See Lag om registrerat partnerskap [Law on Registered Partnership] (Svensk författningssamling [SFS] 1994:1117) (Swed.); Maarit Jänterä-Jareborg, *Registered Partnerships in Private International Law: The Scandinavian Approach*, in LEGAL RECOGNITION, *supra* note 20, at 137, 142.

36. Laki rekisteröidystä parisuhteesta [Act on Registered Partnerships], Sept. 28, 2001, No. 950/2001 [Fin.]; see Savolainen, *supra* note 20, at 27. For an English translation, see LEGAL RECOGNITION, *supra* note 20, at app. 227-30.

investigated.³⁷ In March 2007, a governmental report was published that contains proposals for a draft bill amending the Swedish Marriage Code, making it gender neutral.³⁸ In addition, the repeal of the Swedish Registered Partnership Act has been proposed.³⁹ Registered partnerships that have not been dissolved at the time the amended Marriage Code goes into force—probably in 2009—would take effect as marriages.⁴⁰ In the two other Nordic countries that belong to the European Union, no further steps towards opening marriage to same-sex partners have been taken, whereas in Denmark, the opposition proposed a bill to that end in January 2007, which was not adopted by the government.⁴¹ There is simply no discussion at all on this matter in Finland.

B. *Central Europe*

The vast majority of the eight member states belonging to Central Europe (Austria, Belgium, France, Germany, Ireland, Luxembourg, the Netherlands, and the United Kingdom) have enacted same-sex registration schemes. In two countries, two institutions are available: registered partnership⁴² and marriage⁴³ in the Netherlands, and statutory

37. See MORE OR LESS TOGETHER, *supra* note 26, at 170.

38. See Statens Offentliga Utredningar [SOV] 2007:17 Äktenskap för par med samma kön Vigsselfrågor [government report series] (Swed.).

39. See *id.* at 32, 36-37.

40. *Id.* The report on “Marriage for same-sex couples-wedding issues” was presented to the Swedish Minister for Justice. After the consultation procedure was finalized, the Swedish Prime Minister and the Minister of Justice referred the matter for consideration until January 2008, after which time a bill may be presented to Parliament. The Swedish Prime Minister and Minister of Justice, at the risk of breaking the Coalition Government, declared in early 2008 that they wanted to put forth a governmental bill. The Christian Democrats in the government are against same-sex marriage, but are not expected to break up the government on this issue.

41. See LEGAL RECOGNITION, *supra* note 20, app. at 215-17, 227-30.

42. Staatsblad van het Koninkrijk der Nederlanden [Stb.] [Official Gazette of the Kingdom of the Netherlands] July 5, 1997, No. 324. The institution of registered partnership was primarily created to ensure equal treatment for same-sex couples wishing to formalize their relationship. CURRY-SUMNER, *supra* note 4, at 121. It was argued that same-sex couples should also be provided with an opportunity to have their relationship publicly recognized. In doing so, this Act aimed to provide those couples opting to register their relationship with the same rights and duties attached to marriage. See *id.* The second objective was to provide an alternative for different-sex couples who would rather register a partnership than get married. Although registered partnership is similar to marriage, it is clearly distinguishable from it. See Katharina Boele-Woelki, *Registered Partnership and Same-Sex Marriage in the Netherlands*, in LEGAL RECOGNITION, *supra* note 20, at 41, 42-48.

43. Stb. Dec. 21, 2000, No. 9. The Act opening marriage to same-sex couples, passed on December 21, 2000, entered into force on April 1, 2001. *Id.* Equal treatment of same-sex couples also formed the foundation of this Act. The creation of registered partnership was, in the eyes of the legislature, not sufficient to satisfy the requirements imposed by the principle

cohabitation⁴⁴ and marriage⁴⁵ in Belgium.⁴⁶ In 1999, France introduced the civil solidarity pact, *pacte civil de solidarité* (*Pacs*), which was revised in 2007.⁴⁷ The fundamental amendments raised the question of whether, seven years after its introduction, the “weak” *Pacs* was moving towards marriage.⁴⁸ In March 2007, the French *Cour de cassation* held that a same-sex marriage, which had been concluded in France in 2004, was not valid under French law and that a marriage can only be between a man and a woman.⁴⁹ According to the Court, this principle does not violate any provision of the European Convention on Human Rights.⁵⁰ The *Cour de cassation* confirmed the decisions of both the local court and the intermediate appellate court.⁵¹ State lawyers argued that it was not an issue for the courts to decide, but rather one to be answered by parliament.⁵² In 2001, Germany introduced the *eingetragene Lebenspartnerschaft* (life partnership).⁵³ Both Luxembourg⁵⁴ and the United Kingdom⁵⁵ enacted their statutes on

of equality, as laid down in the Dutch Constitution. This principle required that exactly the same institution be open to same-sex and different couples.

44. Loi instaurant la cohabitation légale, Wet to invoering van de wettelijke samenwoning [Law founding legal cohabitation] (1998), *reprinted in* 169 *Moniteur Belge*, *Belgisch Staatsblad* [Stb.] 786, *available at* http://www.juridat.be/cgi_loi/legislation.pl.

45. Loi ouvrant le mariage aux personnes de même sexe et modifiant certaines dispositions du Code civil, Wet tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek [Law opening marriage to persons of the same sex and amending certain provisions of the Civil code] (2003), *reprinted in* 173 *Moniteur Belge*, *Belgisch Staatsblad* [Stb.] 9825, *available at* http://www.juridat.be/cgi_loi/legislation.pl.

46. Sabrina Otten, *La cohabitation légale en droit belge et en droit allemand: deux itinéraires dissemblables*, 52 *REVUE DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ DE LIÈGE* 101, 103-04 (2007) (Fr.).

47. Law No. 2006-728 of June 23, 2006, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 24, 2006, p. 1. *See generally* Joëlle Godard, *Pacs Seven Years On: Is It Moving Towards Marriage?*, 21 *INT'L J.L. POL. & FAM.* 310 (2007) (discussing the history and potential implications of the *Pacs* legislation).

48. Philippe Simler & Patrice Hilt, *Le nouveau visage du Pacs: un quasi mariage*, 80 *LA SEMAINE JURIDIQUE* 1495 (2006) (Fr.).

49. *Cour de cassation* [cass. ass. plén.] [highest court of original jurisdiction] Mar. 13, 2007, *Bull. civ. I.*, No. 76 (Fr.).

50. *Id.*

51. *Id.*

52. *See* Hugues Fulchiron, *Un homme, une femme: La Cour de cassation rejette le mariage homosexuel*, 20 *RECUEIL DALLOZ* 1375, 1375-76 (2007) (Fr.).

53. Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Act on Ending Discrimination of Same-Sex Unions: Life Partnerships], Feb. 22, 2001, *BGBl. I* at 266 (F.R.G.). For an English translation of the act, see *LEGAL RECOGNITION*, *supra* note 20, app. at 256-64.

54. Loi relative aux effets légaux de certains partenariats [Law relating to the effects of certain legal partnerships] Nov. 1, 2004, No. 4946 (Lux.).

registered and respectively civil partnerships in 2005.⁵⁶ The only two countries of this part of Europe that have no statutory registration scheme for same-sex couples in effect are Austria and Ireland. However, bills are now pending or have been announced.⁵⁷ In Austria, the Green Party submitted a bill in 2006 introducing a so-called *Zivilpakt*.⁵⁸ It is highly controversial. The Irish Prime Minister announced in July 2007 that his government was planning to introduce legislation to give same-sex couples the same rights as married couples.⁵⁹ The legislation would be similar to Britain's civil partnership law.⁶⁰ Earlier, a private member's bill that would have allowed civil unions was defeated in Parliament.⁶¹

C. Southern Europe

In the jurisdictions in Southern Europe, Spain is taking the lead. Nearly all of the autonomous regions in this country now have some form of registered partnership,⁶² and since 2005, Spain is the third

55. United Kingdom Civil Partnership Act, 2004, c.33. The Civil Partnership Act 2004 entered into force on December 5, 2005. See CURRY-SUMNER, *supra* note 4, at 204.

56. See Nicholas Bamforth, "The Benefits of Marriage in All But Name"? Same-Sex Couples and the Civil Partnership Act 2004, 19 CHILD & FAM. L.Q. 133, 133-60 (2007). In that article, the author addresses two questions: (1) whether civil partnerships should be seen as a parallel institution to marriage for all major civil purposes and (2) whether it is acceptable under the European human rights conventions to maintain marriage and civil partnership as mutually exclusive institution for opposite-sex and same-sex couples, respectively. See *id.*

57. See *infra* notes 58-61 and accompanying text.

58. Gesetzesantrag zur Schaffung eines Bundesgesetzes über den Zivilpakt, [ZIP-G] [Law on the creation of a civil pact] vom 29 September 2005, Bundesgesetzblatt Teil III [BGB1 III] 712/A (XXII. GP) (Austria); Gesetzesantrag zur Öffnung der Ehe für Lesben und Schwule [Law opening marriage to lesbians and gays] BGB1 III No. 715/A (XXII. GP) (Austria).

59. See Bertie Ahern, T.D., Taoiseach Speech at the Official Opening of the Premises of Outhouse (July 16, 2007) (transcript), available at <http://www.taoiseach.ie/index.asp?locID=558&docID=3489>; Carl O'Brien, *State Likely To Introduce Civil Partnership Law*, ILGA-EUROPE, June 12, 2005, http://www.ilga-europe.org/europe/guide/country_by_country/ireland/state_likely_to_introduce_civil_partnership_law.

60. See General Register Office (Northern Ireland), Guidance on Civil Partnerships in Northern Ireland, <http://www.groni.gov.uk> (follow "How To Form a Civil Partnership" hyperlink) (last visited June 15, 2008); Gen. Register Office, Civil Partnerships, <http://www.gro.gov.uk/gro/content/civilpartnerships> (last visited June 15, 2008).

61. An Bille Um Chumainn Shibhialta (Civil Unions Bill), 2006 (Act No. 68/2006) (Ir.), available at <http://oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2006/6806/b6806d.pdf> (last visited June 15, 2008).

62. See CRISTINA GONZÁLEZ BEILFUSS, PAREJAS DE HECHO Y MATRIMONIOS DEL MISMO SEXO EN LA UNIÓN EUROPEA 1 (2004) [hereinafter GONZÁLEZ BEILFUSS, PAREJAS DE HECHO]; Cristina González Beilfuss, *Non-marital Cohabitation, Registered Partnership and Same-Sex Marriage in Private International Law: The Spanish Perspective*, 2004 Y.B. PRIVATE INT'L

country in Europe to allow same-sex couples to celebrate marriage.⁶³ The conformity of the Spanish Act opening marriage to same-sex couples with the constitution is currently being challenged.⁶⁴ It is not yet known when the Spanish Constitutional Court will make its decision. Since 2001, Portugal has only recognizes a de facto union between persons of the same and of different sex, which does not require any registration.⁶⁵ In May 2007, a lesbian couple in Portugal appealed to the Portuguese constitutional court because their application for a marriage license had been refused by the courts.⁶⁶ In February 2007, the government in Italy approved a draft bill to recognize domestic partnership under the name *Diritti e doveri delle persone stabilmente Conviventi* (DICO), which translates as “rights and duties of stable cohabitants.”⁶⁷ The bill proposed to give unmarried couples—including same-sex couples—health and social welfare benefits and provided an entitlement to inherit after a couple has lived together for at least nine years.⁶⁸ The bill faced considerable opposition from, among others, the Catholic Church and the majority of the right-wing opposition.⁶⁹ In the Justice Committee of the Senate, it was discussed together with a proposal to introduce a Contract of Social Union (CUS), which incorporates parts from previous parliamentary bills and from the DICO bill.⁷⁰ The fate of these proposals is uncertain because the center-left government in Italy fell in January 2008.⁷¹ In

LAW 185, 185-89 [hereinafter Beilfuss, *Nonmarital Cohabitation*]; *infra* notes 63-71 and accompanying text.

63. See Proyecto de Ley por la que se modifica el Código Civil en material de derecho a contraer matrimonio (B.O.E. 2005, 121/000018).

64. See Beilfuss, *Nonmarital Cohabitation*, *supra* note 62, at 194.

65. See Marta Costa, *La cohabitation légale belge et l'union de fait portugaise*, 1 REVUE DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ DE LIÈGE 131, 132 (2007) (Fr.); R. Martins, *Same-Sex partnerships in Portugal: From De Facto to De Jure?*, 4 UTRECHT L. REV. 194, 194-211 (2008).

66. The Constitutional Court has not yet decided the case. The decision of the Lisbon Court of Appeals was handed down on February 15, 2007. Lisbon Court of Appeals, App. No. 6284/2006-8 (Feb. 15, 2007) (Port.).

67. *Diritti e doveri delle persone stabilmente conviventi* [Rights and Duties of Stable Cohabitants] (2007) (Italy), available at http://www.pariopportunita.gov.it/Pari_Opportunita/UserFiles/comunicati-stampa/dico.pdf.

68. *Id.*

69. The Free Library, Italy and Same-Sex ‘Marriage,’ <http://www.thefreelibrary.com/Italy+and+same-sex+‘marriage.’-a0167107169> (last visited June 6, 2008).

70. Matteo Bonini Baraldi, *Family vs. Solidarity: Recent Epiphanies of the Italian Reductionist Anomaly in the Debate on De Facto Couples*, 4 UTRECHT L. REV. 175, 175-93 (discussing the history of parliamentary action presented thus far, the societal drives behind them, the political debates, and finally analyzing the pitfalls of the last proposal in Italy).

71. *Id.*

Greece, Malta, and Cyprus, no legislative activities are currently being undertaken.⁷²

D. *Eastern Europe*

In comparison with the other parts of Europe, Eastern Europe is lagging behind. Although Slovenia,⁷³ the Czech Republic,⁷⁴ and very recently, Hungary⁷⁵ all passed legislation recognizing registered partnerships, a proposal to introduce them in Poland was rejected in 2005.⁷⁶ Currently, it is not expected that new initiatives will be taken there. There is also no legal recognition of same-sex couples in Slovakia. Some Slovakian political parties, however, support the idea of same-sex partnerships. In 1997 and 2000, two bills on same-sex partnerships were submitted, but both proposals were quickly rejected. Generally, the development of the registered partnership institution demonstrates that several proposals are always needed before a majority is reached in parliament. In particular, the Baltic States (Estonia, Lithuania, and Latvia) strongly object to the legal recognition of same-sex relationships.⁷⁷ Moreover, in Latvia, a constitutional ban must be overcome.⁷⁸

E. *From Minority to Majority*

The comparison of the four overviews reveals that, currently, thirteen of the twenty-seven member states have provided for a

72. See ILGA Europe, Marriage and Partnership Rights for Same-Sex Partners: Country by Country, http://www.ilga-europe.org/europe/issues/marriage_and_partnership/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited June 6, 2008).

73. See Act of 22 June 2005 (Številka 001-22-52/05) (Slovn.) (effective July 23, 2006); Boele-Woelki et al., *Huwelijk*, *supra* note 4.

74. Registered Partnership Act (July 1, 2006) (Czech Rep.).

75. See Orsolya Szeibert, *Same-Sex Partners in Hungary Cohabitation and Registered Partnership*, 4 UTRECHT L. REV. 212-21 (2008). The Act was accepted by Parliament on December 17, 2007, was published in the Hungarian Official Gazette on December 29, 2007, and will enter into force on January 1, 2009. *Id.* Both heterosexual and homosexual couples may register their partnerships under this Act. *Id.*

76. See Polska, Gays and Lesbians, http://www.poland.travel/en-us/Artykuly/informacje_praktyczne-en-us/obyczaje/geje_i_lesbijki/pot_category_view (last visited June 6, 2008).

77. See, e.g., Martin Helme, *Estonia Rejects Gay Marriage*, BRUSSELS J., Jan. 11, 2006, <http://www.brusselsjournal.com/node/659>; ILGA, Same-Sex Marriage in the Baltics—To Allow or To Ban?, http://africa.ilga.org/europe/news/same_sex_marriage_in_the_baltics_to_allow_or_to_ban (last visited June 6, 2008) [hereinafter Same-Sex Marriage in the Baltics].

78. Same-Sex Marriage in the Baltics, *supra* note 77.

statutory registration scheme. This is a slight minority. However, if we add to this group the countries that have legislation pending, the number increases to seventeen out of twenty-seven member states that will have taken steps to legally recognize same-sex relationships by either opening up civil marriage (four jurisdictions) or by introducing a form of registered partnership (sixteen jurisdictions).⁷⁹

Moreover, it is expected that eventually all but a few member states will legislate on the formalization of same-sex relationships. The short history of the legal recognition of same-sex marriages and registered partnerships clearly illustrates that, in this field, political developments play a considerably more dominant role than religion and culture. Spain is the most expressive example in this respect. The point of view of the European Commissioner for Justice, Franco Frattini, displays the political pressure in this field.⁸⁰ The Commissioner's statements came when the governments of the Baltic States and Poland ruled against legalizing homosexual marriages.⁸¹ He moved to combat all forms of discrimination, including discrimination on the basis of sexual orientation.⁸² Frattini announced that any member states that do not eliminate all forms of discrimination, including the refusal to approve homosexual "marriage," will be subject to sanctions and eventual expulsion from the European Union.⁸³ Indisputably, the latter action will not be taken.

A closer look at those jurisdictions, which to date provide same-sex couples with the possibility to formalize their relationships, requires us to make a distinction between marriage and registered partnership. Belgium, the Netherlands, and Spain have opened up marriage to same-sex couples.⁸⁴ The institution of marriage already existed. However, before opening up marriage, these three countries had introduced a new statutory registration scheme for same-sex

79. Sweden has proposed replacing registered partnership with marriage, whereas the other three countries allowing same-sex marriages concurrently allow a partnership to be registered. See MORE OR LESS TOGETHER, *supra* note 26, at 170; *supra* notes 4, 18-19, 37-45, 62-64 and accompanying text.

80. Mary Jo Anderson, *Christians Slam 'Homophobia' Resolution: European Parliament's Action Equates Condition to Racism, Anti-Semitism*, WORLDNETDAILY.COM, Feb. 1, 2006, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=48601.

81. *Id.*

82. *Id.*

83. *Id.*

84. See Boele Woelki et al., *Netherlands*, *supra* note 4, at 30; *supra* notes 4, 18-19, 37-45, 62-64 and accompanying text.

couples.⁸⁵ The couples may choose one or the other,⁸⁶ whereas in the other ten European countries same-sex couples can *only* be registered.⁸⁷ In addition to the distinction between these two institutions, we must keep in mind that there are no two identical schemes of registered partnerships. In some systems, the registered partnership is very similar to marriage,⁸⁸ whereas in others the rights and obligations of the partners are considerably less far-reaching than those of spouses.⁸⁹ In other words, the European map portraying registered partnerships is not uniform. On the contrary, the systems are united in their diversity.

IV. RECOGNITION OF SAME-SEX RELATIONSHIPS IN CROSS-BORDER CASES

A. *The National Perspectives*

The diversity of the substantive rules becomes even more apparent in cross-border cases. Take a Dutch same-sex relationship, which has been formalized in the form of either a marriage or a registered partnership.⁹⁰ How will such a relationship be recognized in those countries that have a registration scheme? The table below indicates the different answers to these questions for those twelve member states that provide statutory same-sex registration schemes.⁹¹

Table 1

in	Dutch same-sex marriage recognized as	Dutch same-sex registered partnership recognized as
Belgium	<i>mariage</i>	<i>cohabitation légale</i>
Czech Republic	<i>registrované partnerství</i>	<i>registrované partnerství</i>
Denmark	<i>registreret partnerskab</i>	<i>registreret partnerskab</i>
France	<i>mariage</i>	?

85. The registered partnership schemes in Spain were introduced by the legislatures of the autonomous regions and not by the federal legislature. See Beilfuss, *Nonmarital Cohabitation*, *supra* note 62, at 188-89.

86. See *supra* notes 4, 18-19, 37-45, 62-64 and accompanying text; Waaldijk, *supra* note 26, at 121-23.

87. See *supra* notes 23-25, 28-40, 47-54 and accompanying text.

88. See *supra* note 18.

89. See *supra* note 20.

90. See Michael Bogdan, *Some Reflections on the Treatment of Dutch Same-Sex Marriages in European and Private International Law*, in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH 25, 25-30 (Talia Einhorn & Kurt Siehr eds., 2004).

91. As indicated below, there is no clear answer for France and Spain.

in	Dutch same-sex marriage recognized as	Dutch same-sex registered partnership recognized as
Germany	<i>eingetragene Lebenspartnerschaft</i>	<i>eingetragene Lebenspartnerschaft</i>
Hungary	<i>bejegyzett élettársi kapcsolat</i>	<i>bejegyzett élettársi kapcsolat</i>
Luxembourg	<i>partenariat</i>	<i>partenariat</i>
Finland	<i>rekisteröidystä parisuhteesta</i>	<i>rekisteröidystä parisuhteesta</i>
United Kingdom	civil partnership	civil partnership
Slovenia	<i>partnerski skupnosti</i>	<i>partnerski skupnosti</i>
Spain	<i>matrimonio</i>	?
Sweden	<i>registrerat partnerskap</i>	<i>registrerat partnerskap</i>

There is no problem in Belgium and Spain with respect to marriage.⁹² It is striking that officials in France have stated that a Dutch same-sex marriage will be recognized as a marriage even though France only has a *pacte civil de solidarité*, which provides for less far-reaching legal consequences than the Dutch registered partnership.⁹³ In May 2007, the recognition of formal relationships entered into abroad was changed in Belgium.⁹⁴ Based upon a circular letter, the Minister of Justice recommended that all registered partnerships, such as the Scandinavian and German schemes that resemble marriage, should be recognized as marriage in Belgium.⁹⁵ This does not, however, apply to the Dutch registered partnership, because in the Netherlands different

92. See Boele-Woelki et al., *Netherlands*, *supra* note 4, at 31, 34; Beilfuss, *Nonmarital Cohabitation*, *supra* note 62, at 185-202.

93. *Effet en France du mariage homosexuel valablement célébré dans un pays de l'Union européenne*, Rep. Min. No. 41533 of July 26, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 26, 2005, p. 7437; JCP II [2005] éd. not. [2005], [no. 35].

The French recognition rules regarding marriage also contain a choice of law test, which ensures that a Dutch same-sex marriage will only be recognized in France, should it satisfy the French choice of law rules. As a result, both parties to a same-sex marriage celebrated in The Netherlands will need to possess the nationality of a State which permits the celebration of marriages between persons of the same-sex if this marriage is to be recognized in France.

Boele-Woelki et al., *Netherlands*, *supra* note 4, at 31 n.5.

94. Circulaire du 29 mai 2007 modifiant la circulaire du 23 Septembre 2004 relative aux aspects de la loi du juillet 2004 portant le Code de droit international privé concernant le statut personnel, Circulaire van 29 mei 2007 tot wijziging van de circulaire van 23 Septembre 2004 betreffende de aspecten van de wet van juli 2004 houdende het Wetboek van international privaatrecht die betrekking hebben op het personeel statuut [Circular of May 29, 2007, modifying the circular of September 23, 2004, regarding aspects of the law of July 2004 of the Code of international law concerning personal status], *reprinted in* 177 *Moniteur Belge*, *Belgisch Staatsblad* [Stb.] 29, 469, *available at* http://www.juridat.be/cgi_loi/legislation.pl.

95. *Id.*

relationship forms for same-sex and different-sex couples are available.⁹⁶ According to the Belgian authorities, these distinctions should be taken into account.⁹⁷ Most likely, a Dutch registered partnership will then only be recognized as a statutory cohabitation. All other jurisdictions recognize both Dutch institutions as their “local” institution, which is available for same-sex couples.⁹⁸ Consequently, a Dutch marriage between partners of the same sex will be recognized in Germany as an *eingetragene Lebenspartnerschaft*, or in the United Kingdom as a civil partnership. It will not be recognized as a marriage.

The possibility of a Dutch same-sex relationship not being recognized in the remaining member states of the European Union is high. The following public policy arguments are used. First, and most importantly, reference is made to the traditional concept of marriage.⁹⁹ Moreover, it is often argued that this concept is protected by the national constitution.¹⁰⁰ Finally, it is submitted that nonrecognition does not violate the human rights protected by the European Convention on Human Rights.¹⁰¹ In other words, it is for each national state to decide how to regulate formalized relationships according to its own constitution, culture, religion, and family system. Illustrative of this is the reasoning of the court of appeal in Rome, which confirmed in its decision of July 13, 2006, that the public authority of the municipality of Latina rightly refused to enter a Dutch same-sex marriage into the register of births, deaths, and marriages.¹⁰² The court of appeal approved the statement of the court of first instance that the transcription of the same-sex marriage cannot automatically be made,

96. See CURRY-SUMNER, *supra* note 4, at 40-41; MORE OR LESS TOGETHER, *supra* note 26, at 61.

97. See MORE OR LESS TOGETHER, *supra* note 26, at 50, 61.

98. See *supra* Tbl. 1.

99. See, e.g., MARGARET A. SOMERVILLE, THE CASE AGAINST “SAME-SEX MARRIAGE” 3-5 (2003), available at <http://www.marriageinstitute.ca/images/somerville.pdf>.

100. See, e.g., Gudrun Schultz, *Ireland High Court Rules Against Gay 'Marriage' Citing Harm to Children*, LIFESITENEWS.COM, Dec. 15, 2006, <http://www.lifesitenews.com/ldn/2006/dec/06121502.html>; Michele Sesta, *Corte d'Appello di Roma 13 luglio 2006 (decr.): Il Matrimonio Estero Tra Due Cittadini Italiani Dello Stesso Sesso è Trascrivibile in Italia*, in *FAMIGLIA E DIRITTO* 166 (2007).

101. Peter Tatchell, *Equality Is Still a Dream*, UKWATCH.NET, Aug. 2, 2006, http://www.ukwatch.net/article/equality_is_still_a_dream (quoting the President of the United Kingdom family division as having stated that “to accord a same-sex relationship the title and status of marriage would be to fly in the face of the [European] convention [on Human Rights]” (alterations in the original)).

102. Sesta, *supra* note 100, at 166.

but is subject to a revision based on Italian legislation.¹⁰³ On the other hand, the court agreed with the petitioners that the notion of marriage is neither defined in the constitution nor in the Italian legal system, and is therefore accessible to interpretation.¹⁰⁴ In a further concession, the court stated that supranational contents can influence the Italian legal system, but because of the lack of any supranational provisions on same-sex marriages, no basis for interpretation could be derived.¹⁰⁵ In addition, same-sex marriage provisions of other member states of the European Union do not have any impact on the Italian legal system.¹⁰⁶ Within the Italian legal system the different sex of the spouses is a constitutive condition.¹⁰⁷ A same-sex marriage does not fall within the scope of article 29 of the Italian Constitution (protection of marriage).¹⁰⁸ Although this does not prevent the legislature from creating new forms of family relationships, under the current law a same-sex marriage cannot be equated with a conventional marriage, and therefore cannot be recognized.¹⁰⁹ Because of this, the refusal of transcription was legitimate.

Another illuminating decision where similar arguments were put forward was handed down in December 2006 in Ireland.¹¹⁰ A marriage entered into in Canada between two Irish women was not recognized.¹¹¹ The court held that it was beyond its power to do so.¹¹² Instead, the court encouraged the legislature to introduce a statutory registration scheme for same-sex couples.¹¹³ However, comparable public policy arguments are also used when a same-sex marriage is not

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Zappone v. Revenue Comm'rs*, [2006] I.E.H.C. 404 (14th December, 2006) (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2006/H404.html> (last visited June 6, 2006).

111. *Id.* For information on Canadian and English law, see Peter Bowal & Carlee Campbell, *The Legalization of Same-Sex Marriage in Canada*, 21 AM. J. FAM. L. 37, 37-41 (2007) (discussing “the interplay between the judiciary, legislatures and the public” regarding the Civil Marriage Act in Canada); Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 INT’L J.L. POL’Y & FAM. 249, 249-85 (2006) (examining the Civil Marriages Act in Canada that extends marriage to same-sex couples and noting that the disallowance of same-sex marriages in England may violate that equality provision of the European Convention on Human Rights).

112. *Zappone*, [2006] I.E.H.C. 404.

113. *Id.*

recognized—as was the case in *Wilkinson v. Kitzinger*.¹¹⁴ Petitioner Wilkinson sought a declaration as to her marital status under the English Family Law Act of 1986.¹¹⁵ She and her partner, the first respondent, were lawfully married under Canadian law.¹¹⁶ The High Court in London, however, did not recognize their marital status, which they had obtained abroad.¹¹⁷ Moreover, the petitioner's submission that the provisions of the Matrimonial Causes Act of 1973 and the Civil Partnership Act of 2004, which explicitly preclude recognition of a marriage between persons of the same sex, amount to a violation of the petitioner's rights under articles 12, 8, and 14 of the European Convention on Human Rights was dismissed.¹¹⁸ According to the relevant sections of the Civil Partnership Act of 2004 dealing with the international recognition of same-sex relationships, the Canadian same-sex marriage can only be recognized as a civil partnership.¹¹⁹ In the Irish decision of December 14, 2006, Justice Dunne rightly observed that there is no discernable pattern apparent from the approaches taken in the different jurisdictions.¹²⁰ This will not change in the future. Further litigation will take place and the outcome of this litigation is clear: the picture will remain colorful and diverse.¹²¹

Taking the Dutch situation as an example, the question of whether and how same-sex marriages and registered partnerships lawfully entered into outside the Netherlands will be recognized can be answered in more detail. Generally, if they conform to the *lex loci celebrationis* they will be recognized.¹²² Article 5 of the Dutch Private International Law Marriage Act provides that a lawful marriage contracted outside the Netherlands, or a marriage that has become lawful thereafter according to the law of the state where the marriage took place, shall be recognized as such.¹²³ With respect to registered partnerships, however, three additional requirements must be fulfilled.

114. *Wilkinson v. Kitzinger*, [2006] EWHC (Fam) 2022 (Eng.).

115. *Id.* at [1].

116. *Id.* at [2].

117. *Id.* at [122].

118. *Id.* at [122], [131].

119. *Id.*; see Jens M. Scherpe, *Legal Recognition of Foreign Formalised Same-Sex Relationships in the UK*, 2007 INT'L FAM. L. 198, 198-200.

120. *Zappone*, [2006] I.E.H.C. 404.

121. Gerard-René de Groot, *Private International Law Aspects Relating to Homosexual Couples*, in GENERAL REPORTS OF THE XVIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 325, 325-27 (Katharina Boele-Woelki & Sjeff van Erp eds., 2007).

122. See CURRY-SUMNER, *supra* note 4, at 394-400.

123. See *id.* at 415.

Article 2(5) of the Dutch Private International Law Registered Partnerships Act provides that the foreign institution will only be recognized *as such* if it forms a legally regulated form of cohabitation between two persons who maintain a close personal relationship.¹²⁴ Moreover, the cohabitation must have been registered by an authority competent to do so in the place where it was entered into, must exclude the existence of a marriage or other form of cohabitation with a third person regulated by law, and must create obligations between the partners which, in essence, correspond with those in connection with marriage.¹²⁵ If these conditions are fulfilled, the registered partnership concluded abroad will be recognized as such, which means that it will be recognized in its original form.¹²⁶ In this respect, the Dutch solution deviates from the general approach.

Taking the various situations into account, an attempt should be made to qualify the different approaches. In terms of private international law, nonrecognition leads to limping relationships. In all respects this result is particularly unsatisfactory for the couples in question. At the other end of the spectrum, we do not encounter difficulties if the same institutions, such as marriage, exist in both countries (where the relationship is formalized and where recognition is sought) and are very similar. It can be argued that the Dutch registered partnership, the Swedish registered partnership, and the English civil partnership are completely equivalent. Particularly interesting is the so-called adapted or accommodated recognition.¹²⁷ This encompasses the concept of adopting another country's law as one's own legal system in order to achieve a comparable result. However, this is only true provided that the recognizing state does not oppose the legal recognition of same-sex relationships according to the formalizing state's substantive law. This means that the foreign institution is recognized as the national institution of the jurisdiction where recognition is sought. This can either lead to an *upgrade* or a *downgrade* depending on (1) which institution is to be recognized and (2) where the institution is to be recognized. This leads to entirely different results. In those countries where a domestic form of registered partnership has been created, same-sex marriages celebrated abroad are often afforded recognition as the domestic form of

124. Stb. July 5, 1997, No. 304, art. 2(5).

125. *Id.*

126. See CURRY-SUMNER, *supra* note 4, at 510.

127. Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. (SUPP.) 257, 267-68 (2006).

registered partnership. As a result, a same-sex marriage concluded in the Netherlands, Belgium, or Spain will be downgraded in England and Wales to a civil partnership, whereas a German *eingetragene Lebenspartnerschaft* will be upgraded in Belgium to a marriage.

B. *The European Perspective*

1. European (Human) Rights

In the overall discussion of same-sex relationships and their recognition, specific European rights are also to be taken into account. The right to respect for family life, the right to marry, and the right not to be discriminated against on grounds such as sex are protected under the European Convention of Human Rights.¹²⁸ In each national procedure, parties may rely upon these rights.¹²⁹ The European Court of Human Rights in Strasbourg, however, has not yet had the opportunity to decide the question of whether homosexual couples should have either the right to marry or the right to obtain a legal position that is similar to a marriage. An additional route may be followed within the European Union.¹³⁰ Only among the member states can the right to move freely within the territory play a role. This principle of the free movement of persons¹³¹ is granted by article 18 of the Treaty Establishing the European Community (EC Treaty).¹³² It has

128. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 12, 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

129. However, the French *Cour de cassation* denied that a violation of these rights had occurred. See *Cour de cassation* [Cass. ass. plén.] [highest court of original jurisdiction] Mar. 13, 2007, Bull. civ. I., No. 76.

130. See Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MKT. L. REV. 629, 629-65 (2006). The author, who pictures the European human rights landscape as an area that provides a strong example of legal pluralism, illustrates a variety of interactions, and relationships. *Id.* “Both the EU and ECHR have, as legal systems, a certain amount of autonomy or self reference. Yet they also interlock and overlap with each other Their relationship is symbiotic, incremental and even messy and unpredictable.” *Id.* at 665 (footnote omitted).

131. For a comparison of the European Union’s right of free movement with the United States’ right to travel doctrine, see Adam Weiss, Note, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81, 81-124 (2007).

132. The EC Treaty will be amended by the Treaty of Lisbon, which was to be effective in 2009. Treaty Establishing the European Community, art. 18, Dec. 29, 2006, 2006 O.J. (C 321E) 37, 49-50 [hereinafter EC Treaty]. Article 2(2) of the Treaty of Lisbon amending the EC Treaty provides that the Union must offer its citizens an area of freedom, security, and justice without internal frontiers and will ensure the free movement of people with respect to external border controls, asylum, immigration, and the prevention and combating of crime. Treaty of Lisbon Amending the Treaty on European Union and the

become one of the leading principles¹³³ in the discussion on the unification and harmonization of family law in Europe.¹³⁴ If a case concerning the nonrecognition of a status obtained in one of the member states is brought to the European Court of Justice in Luxembourg, the chances are high that the free movement of person's principle will play a dominant role.¹³⁵ In addition, at the level of private international law, it is under discussion whether the primary rule of the free movement of persons may serve as a "theoretical gateway" for establishing a private international law principle of mutual recognition that facilitates the recognition of EU citizens' personal status and family relationships within the Union.¹³⁶

Opposition to discrimination against homosexuals and the notion of the free movement of persons are strongly supported by the European Parliament.¹³⁷ This has resulted in the adoption of several resolutions that are aimed at combating discrimination against and attaining equal rights for homosexuals in the European Union.¹³⁸ The

Treaty Establishing the European Community, art. 2, § 2, Dec. 13, 2007, 2007 O.J. (C 306) 1, 11. As this Article was going to press, Ireland rejected the Treaty of Lisbon. Sarah Lyall, *Ireland Derails a Bid To Recast Europe's Rules*, N.Y. TIMES, June 14, 2008, at A1.

133. Katharina Boele-Woelki, *The European Agenda: An Overview of the Current Situation in the Field of Private International Law and Substantive Law*, in 2006 INT'L FAM. L. 149, 149-54.

134. For the results of the Commission on European Family Law, which are aimed at providing a contribution to this process, see Katharina Boele-Woelki et al., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, in 7 EUROPEAN FAMILY LAW SERIES 176 (2004); Katharina Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities*, in 16 EUROPEAN FAMILY LAW SERIES 1-276 (2007).

135. See Peter McElevy, *Free Movement of Persons and Cross-Border Relationships*, in 7 INT'L L. F. DU DROIT INT'L 153, 153-58 (2005); Clare McGlynn, *Family Reunion and the Free Movement of Persons in European Union Law*, in 7 INT'L L. F. DU DROIT INT'L 159, 159-66 (2005); Johan Meeusen et al., *General Report*, in INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION 1, 7-11 (Johan Meeusen et al. eds., 2007).

136. For discussion on this matter, see Roberto Baratta, *Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC*, 27 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 4, 6-11 (2007) (F.R.G.). The author considers articles 10, 12, and 18 of the EC Treaty as a theoretical foundation of a private international law principle and derives three consequences from this principle: (1) domestic conflict of laws rules and substantive rules should not be applied if they lead to a nonrecognition result, (2) personal and family status legally acquired should be maintained throughout the territory of the EC, and (3) the recognizing member state should grant a status as similar in effect as possible to the status gained in the state of origin. *Id.* at 7-9.

137. See European Parliament Resolution on Homophobia in Europe, EUR. PARL. DOC. P6_TA0018/2006 [hereinafter European Parliament Resolution on Homophobia].

138. See, e.g., Resolution on Equal Rights for Gays and Lesbians in the EC, 1998 O.J. (C 313) 186; Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, 1994 O.J. (C 61) 40.

most recent resolution was passed in January 2006.¹³⁹ In the resolution, homophobia is condemned and the European Parliament's request is reiterated by the European Commission's proposals that would guarantee freedom of movement for Union citizens and their family members and registered partners of either gender.¹⁴⁰

Finally, in the discussion surrounding same-sex relationships, it has been submitted that it is debatable whether it is prudent for the European Court of Justice to intervene in an ongoing, politically controversial, and sensitive debate.¹⁴¹ Fundamental rights might constitute powerful weapons for proponents of extending and strengthening partnership rights, but to ensure Union-wide legitimacy, it might be wiser to advance these notions in political debates rather than in court proceedings.¹⁴² In the Author's opinion, this advice should not be followed. The short history of the legal recognition of same-sex couples illustrates that in most jurisdictions, political action was only taken after court proceedings were initiated.¹⁴³ As illustrated above, courts of the member states have come to the conclusion that it is beyond their powers to introduce a new institution or to recognize foreign institutions based upon their own motion.¹⁴⁴ Moreover, they have encouraged national governments and parliaments to legislate on the recognition of same-sex couples.¹⁴⁵ In many countries, the legislature has followed this advice.¹⁴⁶ It is not only in this field that it is generally acknowledged that judicial decisions effectively lead to legislative measures.¹⁴⁷ This also applies to the European Court of Justice, whose decisions have a highly authoritative character.¹⁴⁸

139. European Parliament Resolution on Homophobia, *supra* note 137.

140. *Id.*

141. See Anne Pieter van der Mei, Book Review, 14 MAASTRICHT J. EUR. & COMP. L. 101, 103 (2007).

142. See *id.* at 101-03.

143. See, e.g., Zappone v. Revenue Comm'rs, [2006] I.E.H.C. 404 (14th December, 2006) (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2006/H404.html> (last visited June 6, 2008).

144. See, e.g., *id.*

145. See, e.g., *id.*

146. See Joined Cases C-122 & 125/99P, D. & Sweden v. Council, 2001 E.C.R. I-4319.

147. See *id.* at I-4354.

148. In this case, Community legislation that grants entitlement to household allowances under the Staff Regulations was challenged by a Swedish official who had entered into a registered partnership under Swedish law. *Id.* at I-4346. The European Court of Justice affirmed the Community administration's decision that allowances can be granted to spouses but not registered partners. *Id.* at I-4359. Only the legislature can adopt measures that alter that situation. *Id.* at I-4354.

2. (Future) European (Private International Law) Legislation

a. Directives

The two European directives on the rights of citizens of the European Union and their families to move and reside freely within the territory of the members states¹⁴⁹ and on family reunification consider both spouses and registered partners to be family members.¹⁵⁰ With respect to the latter, the following condition must be fulfilled: the legislation of the host member state should treat registered partnerships as equivalent to marriage. This means that if statutory schemes for same-sex couples are *not* available in the host member state, the registered partner will not be treated as a family member.¹⁵¹ Thus, according to this European legislation, the member states are not obliged to recognize a registered partnership. Again, this depends on their national legislation. Following this line of reasoning, one might argue that the recognition of spouses of a same-sex marriage—who have acquired an even “stronger” civil status—should be determined by national rules of the individual member states. On the other hand, this can be disputed by referring to the recitals of the directives, which prohibit discrimination on the basis of sexual orientation.¹⁵² Therefore, same-sex spouses might fall within the scope of the directives.¹⁵³

b. Brussels II *bis* and the Proposed Amendments

The European Council has had competence to legislate in the field of cross-border family relationships ever since an important amendment to the EC Treaty was passed in 1997.¹⁵⁴ The Regulation Concerning Jurisdiction, Recognition, and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibilities (Brussels II *bis*), which is to be applied in the member states, neither contains a definition of marriage nor specifically refers to registered

149. 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, 2004 O.J. (L 158) 77.

150. Council Directive 2003/86, On the Right to Family Reunification, 2003 O.J. (L 251) 12.

151. *Id.*

152. See European Convention on Human Rights, *supra* note 128, art. 14.

153. See HELEN TONER, PARTNERSHIP RIGHTS, FREE MOVEMENT, AND EU LAW (2004). The author makes a strong plea for extending migration rights to same-sex spouses and unmarried partners of EU citizens moving from one member state to another. *Id.* at 102-06.

154. EC Treaty arts. 61(c), 67(1).

partnerships.¹⁵⁵ Regarding the latter, it is acknowledged that the Regulation does not apply.¹⁵⁶ The courts of the three countries where same-sex marriages are allowed do not have a problem with granting a divorce to same-sex couples when applying the jurisdictional rules of the Regulation.¹⁵⁷ Consequently, a same-sex divorce that has been obtained in one of the two other jurisdictions is to be recognized under the Regulation.¹⁵⁸ So far, no court decision has been delivered regarding this question in either of these countries, nor has a procedure been commenced to dissolve a same-sex marriage or recognize a same-sex divorce in one of the other European Union member states where only a registered partnership between same-sex partners is possible or where no similar institution has as yet been introduced.¹⁵⁹ The application by the Belgian, Dutch, and Spanish courts of the Brussels II *bis* rules on jurisdiction to same-sex divorces, however, may cause problems. Under certain circumstances, the application of the communitarian jurisdictional rules can lead to same-sex spouses not being able to dissolve their marriage in any country.¹⁶⁰ This risk is very real when article 3 of the Brussels II *bis* Regulation confers jurisdiction not upon the courts where a same-sex marriage is permitted, but upon the courts of another member state.¹⁶¹ If a Belgian, Dutch, or Spanish court declares Brussels II *bis* to be directly applicable, while invoking article 3 to deny its own jurisdiction, yet a court of another member state does not find Brussels II *bis* to be applicable and refuses to hear the divorce petition because same-sex marriages are not recognized in its country, the spouses will be left without a remedy.¹⁶² An amendment to the Brussel II *bis* Regulation, which will most likely be

155. Council Regulation 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matter of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, 2003 O.J. (L 338) 1.

156. P.M.M. MOSTERMANS, *ECHTSCHIEDING* 10 (2006).

157. See MATTEO BONINI BARALDI, *DIFFERENT FAMILIES, SAME RIGHTS? FREEDOM AND JUSTICE IN THE EU: IMPLICATIONS OF THE HAGUE PROGRAMME FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES AND THEIR CHILDREN* 32 (2007), available at http://www.ilga-europe.org/Europe/publications/non_periodical/different_families_same_rights_freedom_and_justice_in_the_eu_implications_of_the_hague_programme_for_lesbian_gay_bisexual_and_transgender_families_and_their_children_december_2007.

158. *Id.*

159. See Katharina Boele-Woelki & Cristina González Beilfuss, *The Impact and Application of the Brussels IIbis Regulation*, in *BRUSSELS IIBIS REGULATION IN THE MEMBER STATES: COMPARATIVE SYNTHESIS* 23, 29 (Katharina Boele-Woelki & Cristina González Beilfuss eds., 2007) [hereinafter *BRUSSELS IIBIS*].

160. *Id.*

161. *Id.*

162. See P.M.M. Mostermans, *The Impact and Application of the Brussels IIbis Regulation in the Netherlands*, in *BRUSSELS IIBIS*, *supra* note 159, at 217, 219-20.

adopted in 2008, could solve this problem. The proposal by the Commission¹⁶³ does not, however, contain any new provisions that include same-sex relationships,¹⁶⁴ whereas in the current discussion of this amendment, it is submitted that the place where a same-sex relationship has been formalized should be included in the number of jurisdictional grounds.¹⁶⁵ Along these lines the European Parliament, which has been consulted about the Commission's Proposal, has suggested including a *forum necessitatis*.¹⁶⁶ It has been recommended that where a competent jurisdiction is located in a member state under whose law there is no provision for divorce and the existence or validity of the marriage is not recognized, jurisdiction shall be granted to either the member state of which one of the spouses is a national or in which the marriage took place.¹⁶⁷ This proposal would enable same-sex marriages to be dissolved in the country where the marriage took place. Hopefully, the European legislature will adhere to the European Parliament's advice.

c. The Regulation on Maintenance

The December 2005 Proposal for an EU Regulation¹⁶⁸ on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions, and Cooperation in Matters Relating to Maintenance

163. *Commission Proposal for a Council Regulation Amending Regulation (EC) No. 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters*, COM (2006) 399 final (July 17, 2006) [hereinafter *Commission Proposal*]; see Th. M. de Boer, *The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law*, in EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW 321, 321-41 (Katharina Boele-Woelki & Tone Sverdrup eds., 2008).

164. Given the fact that this proposal addresses questions of both jurisdiction and applicable law, the European legislature will integrate the new rules into the current Regulation. See *Commission Proposal*, *supra* note 163, at 3-4; cf. Boele-Woelki & González Beilfuss, *supra* note 159, at 23-24 (stating that this proposal will modify the rules on jurisdiction and applicable law on matrimonial matters). The abbreviation of this instrument with "Brussels IIter" or "Rome III" is incorrect, because while "Brussels" refers only to international procedural law and "Rome" refers only to applicable law, the new instrument will also include choice-of-law rules. See Christian Kohler, *Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States*, 34 INT'L & COMP. L.Q. 563, 563 (1985) (stating that the Brussels Convention created a European law of procedure).

165. de Groot, *supra* note 121, at 341.

166. *European Parliament, Draft Report on the Proposal for a Council Regulation Amending Regulation (EC) No. 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters*, COM (2006) 399 (Jan. 9, 2008).

167. *Id.*

168. *Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations*, COM (2005) 649 final (Dec. 15, 2005).

Obligations favors a broad scope for the future community instrument.¹⁶⁹ According to article 1, all maintenance obligations arising from family relationships or from relations that have comparable effects should be covered by the Regulation in order to guarantee an equal treatment of maintenance creditors.¹⁷⁰ In the provision on the choice of law by the parties, reference is made to the case of a maintenance obligation between two persons who are or were married or are *in a relation that has similar effects* under the law applicable to it.¹⁷¹ The 2005 proposal will soon be replaced by a new version. Given that the European Union became a member of the Hague Conference on Private International Law in April 2007, the European Commission was awaiting the two instruments that were adopted on November 23, 2007, under the auspices of this organization: (1) The Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and (2) the Protocol on the Law Applicable to Maintenance Obligations. The Convention focuses on maintenance obligations arising from a parent-child relationship,¹⁷² whereas the scope of the Protocol—which is deemed to replace the Hague Maintenance Convention of 1973—is set wider: any maintenance obligation arising from a family relationship, parentage, marriage, or affinity falls within its scope.¹⁷³ Consequently, this provision comprises maintenance obligations which are based on formalized same-sex relationships creating a family relationship.¹⁷⁴ It is surprising that neither the preliminary Draft Report to the Convention¹⁷⁵ nor the Draft Report to the Protocol¹⁷⁶ explicitly

169. See Michael Hellner, *The Maintenance Regulation: A Critical Assessment of the Commission's Proposal*, in EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW, *supra* note 163, at 343, 343-78.

170. *Id.*

171. *Id.*; *Commission Proposal*, *supra* note 163, at 19.

172. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, available at http://hcch.net/index_en.php?act=conventions.pdf&cid=131.

173. Protocol on the Law Applicable to Maintenance Obligations, art. 1, Nov. 23, 2007, available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=133.

174. *Id.*

175. Hague Conference on Private Law [HCPIL], *Draft Explanatory Report on the Hague Preliminary Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, Prel. Doc. No. 32 (Aug. 2007), available at http://www.hcch.net/upload/wop/exp138draft_e.pdf [hereinafter HCPIL, *Draft Explanatory Report*].

176. HCPIL, *Preliminary Draft Protocol on the Law Applicable to Maintenance Obligations: Explanatory Report*, Prel. Doc. No. 33, (Aug. 2007), available at http://www.hcch.net/upload/wop/maint_pd33e.pdf.

mentions same-sex marriages.¹⁷⁷ Most likely the provisions of the Protocol will become an integral part of the future European Union Maintenance Regulation.

d. The Regulation on Matrimonial Property Relations

A further Regulation is being prepared that will regulate the private international law aspects of matrimonial property. The first step was taken in July 2006 in the form of a Green Paper.¹⁷⁸ It launches a wide-ranging consultation exercise on the legal questions arising in an international context with regard to matrimonial property regimes and—this is remarkable—the property consequences of other forms of union. The Green Paper specifically questions whether registered partnerships should be included in the scope of the instrument.¹⁷⁹ The recently published summary of replies provided by the European Commission indicates that, in accordance with the view expressed by a majority of the forty replies which were received, the traditional questions of private international law (jurisdiction, applicable law, and recognition and enforcement) with reference to both married couples and registered partnerships should be further examined.¹⁸⁰ It is generally agreed that nonmarital cohabitation, however, will be

177. HCPIL *Draft Explanatory Report*, *supra* note 175, at 86. This draft only refers to registered partners in relation to article 18 of the Convention, which addresses the partial recognition and enforcement of a maintenance decision.

For example, a decision grants maintenance to a mother who is a registered partner and her child. However, if maintenance obligations between registered partners are not within the scope of the Convention for the State addressed, the part of the decision awarding maintenance to the mother will not be entitled to recognition and enforcement. On the other hand, it will still [sic] possible to recognise and enforce the part of the decision concerning the child.

Id.

178. *Commission Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes Including the Question of Jurisdiction and Mutual Recognition*, at 1, COM (2006) 400 final (July 17, 2006).

179. *Id.* at 4-10.

180. *Summary of Replies to the Green Paper on the Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Questions of Jurisdiction and Mutual Recognition* (Feb. 5, 2008), available at http://ec.europa.eu/civiljustice/news/docs/summary_answers_com_2006_400_en.pdf (last visited June 6, 2008) [hereinafter *Summary of Replies*]. The contributions of governments, academia, and associations of legal practitioners on the Green Paper are available as well. See *Contributions on the Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*, http://ec.europa.eu/justice_home/news/consulting_public/matrimonial_property/news_contributions_matrimonial_property_en.htm (last visited June 6, 2008) [hereinafter *Contributions on the Green Paper*].

excluded from the scope of the future instrument.¹⁸¹ With regard to the objective connecting factors to be considered when spouses have not chosen the law applicable to the marriage, the question of applicability to registered partnerships has arisen, since very few replies were in favor of applying the same rules to both marriages and partnerships and most agree to adopt the place where the partnership was registered as the connecting factor.¹⁸²

e. The Convention on the Recognition of Registered Partnerships

The European landscape of current and future instruments that are and will be applied to cross-border same-sex relationships has recently been supplemented by the first multilateral convention in this field. Under the auspices of the International Commission on Civil Status (ICCS),¹⁸³ a Convention on the Recognition of Registered Partnerships was adopted on September 5, 2007.¹⁸⁴ It contains a definition of a registered partnership, and it will not come as a surprise that the application of the *lex loci celebrationis* is favored.¹⁸⁵ Thus, if the Convention becomes effective, each contracting state will recognize the effects of the civil status of partners who entered into a registered partnership in another contracting country.¹⁸⁶ In addition, a dissolution or annulment is to be recognized.¹⁸⁷ Finally, it should be mentioned that any state may reserve the right to exclude registered partnerships concluded between persons of different sex from the scope of the Convention.¹⁸⁸ Currently, thirteen out of the sixteen

181. *Summary of Replies*, *supra* note 180, at 3.

182. *Contributions on the Green Paper*, *supra* note 180.

183. The Commission's aim is to facilitate international cooperation in civil status matters. European Judicial Network in Civil & Commercial Matters, General Information—International Law, http://ec.europa.eu/civiljustice/homepage/homepage_int_en.htm (last visited June 6, 2008). Since 1956, thirty-two conventions have been adopted to that end. See Comm'n de l'État Civil, Liste des conventions CIEC, <http://www.ciec1.org/ListeConventions.htm> (last visited June 6, 2008) [hereinafter Liste des conventions].

184. Convention sur la reconnaissance des partenariats enregistrés, Sept. 5, 2007, ICCS Convention no. 32 [hereinafter Convention on the Recognition of Registered Partnerships]. Both the unofficial English translation and the authentic French version are available at Liste des conventions, *supra* note 183.

185. Convention on the Recognition of Registered Partnerships, *supra* note 184, art. 1. According to article 1, a registered partnership is “a commitment to live together, other than a marriage, entered into by two people of the same or of different sex and gives rise to registration by a public authority.” *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

member states of the ICCS that could ratify this Convention are European Union member states.¹⁸⁹

V. UNITED IN DIVERSITY

The four case studies provided at the beginning of this contribution are all resolved somewhat differently. The Dutch same-sex marriage will be recognized in Spain, whereas the dissolution of the *eingetragene Lebenspartnerschaft* cannot take place in Austria. Germany must provide the forum. Furthermore, neither the English civil partnership nor the French *pacte civil de solidarité* will be recognized in Poland and Lithuania. The Polish couple has no legal status as a couple in their country of nationality and residence and the French female partner of the deceased has no right to claim damages in the country where the crime has taken place. More complicated cases are likely to occur. Take, for instance, a same-sex couple that lives in the area of two or even three borders and where they both work in the other country or in the other two countries. It is likely that the status of their residence will not be recognized as the place where they receive their social or other benefits and where they probably pay taxes. This is the consequence of the lack of any cooperation so far in Europe.

In summarizing the European approach regarding the cross-border implications of same-sex relationships, it is evident that, to date, the issue does not belong to those fields where the Europeanization of private international law is currently taking place. It is all left to national legislatures and courts. We can probably speak about a revolution with respect to the substantive discourse over whether to permit the legal recognition of same-sex relationships in the form of either marriage, registered partnerships, or civil unions, but in the field of conflict of laws, no revolutionary solutions have been adopted so far. On the contrary, traditional concepts are applied: in those countries which allow couples to legally formalize their same-sex relationship, the rules require that the couple must either (1) have their residence in the state of celebration *or* (2) not face an impediment to such a relationship according to their national law *or* the law of their

189. Compare The International Commission on Civil Status (ICCS), <http://www.ciec1.org/CIECenBref-EN-1-1-2008.pdf> (last visited June 6, 2008) (listing the member states of the ICCS), with Member States of the EU, http://europa.eu/abc/european_countries/index_en.htm (last visited June 6, 2008) (listing the member states of the European Union).

habitual residence.¹⁹⁰ Thus, Spanish nationals can conclude their same-sex marriage in the Netherlands if one of them has his or her habitual residence in that country. In particular, the transformation of a foreign institution into the “local” institution (adapted recognition) expresses how traditionally but carefully the recognition issue is solved, not to mention those states that do not recognize a relationship formalized abroad because their national family laws prevent same-sex couples from obtaining any legal status. During the last twenty years in which formalized same-sex relationships have come into existence, it has become apparent that at both the substantive and private international law levels, the member states have missed the opportunity to coordinate their national legislation. However, in the near future, the Community must make a clear decision about formalized same-sex relationships when adopting the new private international law instruments in matrimonial matters, maintenance, and matrimonial property relationships. This Author recommends to not make any distinction between spouses of opposite and same sex and to include specific rules for registered partnerships. In doing so, the European legislature would exemplify how private international law instruments adhere to both human rights—such as nondiscrimination on the basis of sexual orientation—and to the free movement principle. Within the European Union, formalized same-sex relationships should be portable.

In general, the development of the legal recognition of same-sex relationships shows that the competence of national courts is restricted. They have neither allowed the formalization of same-sex relationships nor recognized same-sex relationships concluded abroad if specific statutory rules are lacking. Instead, the courts encourage individual legislatures to enact rules. In addition, we must await appeals to the European Court of Human Rights and the European Court of Justice. This can take some time and we must keep in mind that appeals are very costly. Finally, even if uniform private international law rules are enacted, differences will remain. As a result, only if all member states either open marriage to same-sex couples or introduce a formal relationship that is similar to marriage will the inherent problems be resolved. Today, this latter suggestion might be a utopian idea, but only eight years ago who was able to predict that same-sex partners would be allowed to marry?

190. See Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe*, 60 LA. L. REV. 1053, 1059 (2000).

VI. LESSONS FOR THE UNITED STATES?

In looking at the American debate surrounding the legal recognition of same-sex couples, it has been said that American law on the availability of formalized same-sex relationships and on the likelihood of their recognition elsewhere (and for what purpose) presents a confusing picture.¹⁹¹ We are confronted with a variety of different approaches and regulations, such as the federal Defense of Marriage Act (DOMA) of 1996,¹⁹² the mini-DOMAs of many states,¹⁹³ different same-sex relationship schemes in the form of marriage (only a few), or civil unions and domestic partnerships acts, which are available in eleven states.¹⁹⁴ They all differ considerably.¹⁹⁵ These legislative measures do not stand alone. They are assessed within the framework of the United States Constitution's Full Faith and Credit Clause,¹⁹⁶ the right to travel, and public policy considerations. Giving advice requires a thorough description and analysis of the American situation, including both substantive law and conflict of laws. This was done in 2006 for the Seventeenth International Congress of Comparative Law.¹⁹⁷ The entire issue is highly controversial, the number of articles in legal journals is enormous, and the topic remains

191. See Ian Curry-Sumner & Scott Carry-Sumner, *Is the Union Civil? Same-Sex Marriages, Civil Unions, Domestic Partnerships and Reciprocal Benefits in the USA*, 4 UNIFORM L. REV. 236, 236-78 (2008).

192. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The Act contains two provisions. The Act defines the terms *marriage* and *spouse* for the purposes of federal law, saying that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.* § 3. Furthermore, it authorizes states to refuse recognition of same-sex marriages performed elsewhere, stating that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." *Id.* § 2.

193. "An obvious concern for states that recognize same-sex civil unions, civil solidarity pacts, civil partnerships, registered partnerships, reciprocal beneficiary relationships, or domestic partnerships is that state and federal DOMAs leave same-sex couples in the uncertain state of 'un-wed' whenever they travel from one state or country to the next." Thomas Hoff Prol, *New Jersey's Civil Unions Law: A Constitutional "Equal" Creates Inequality*, 52 N.Y.L. SCH. L. REV. 169, 180 (2007).

194. Ten states and the District of Columbia have domestic partnership acts. See Oldham, *supra* note 15, at 485-91. The states are California, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Oregon, Vermont, and Washington. *Id.*

195. See Matthew T. Cook & Jason E. Shelly, *Recognition of Same-Sex Marriage*, 8 GEO. J. GENDER & L. 683, 683-745 (2007).

196. U.S. CONST. art. IV, § I.

197. See Hay, *supra* note 127, at 275; Oldham, *supra* note 15, at 481-96.

a deeply polarizing one for large numbers of Americans.¹⁹⁸ As in Europe, the political dimension should not be underestimated. Peter Hay,¹⁹⁹ for instance, concludes with respect to the American debate that the resolution of the recognition of same-sex relationships will ultimately need to be a political one—as was the shift from fault to no-fault divorce.²⁰⁰ Besides, it seems that the discussion in the United States will heat up as the presidential election approaches and then more than likely will slow down again. Apart from a comprehensive analysis, a comparison of both systems is missing. This exceeds the main objectives of this Article. Which lessons are to be learned from the European situation is finally to be decided by those who are experts in American conflict of laws, family law, immigration law, and/or constitutional law.²⁰¹

However, according to this Author's opinion, the following recommendations may be helpful. If states decide to address issues of same-sex relationships through legislation, they should keep in mind that people's mobility is increasing, not only within the United States, but also outside this country. Conflict of laws or private international law questions are to be included in the same-sex marriage, civil union, or domestic partnership acts. For instance, who is allowed to conclude a civil union? Will an out-of-state or elsewhere-established relationship be recognized?²⁰² Should the name of the relationship selected by other jurisdictions control its treatment or should the nature of the rights and obligations conferred by another jurisdiction be

198. For example, a Westlaw search on June 6, 2008, of legal journals in the United States and Canada based on the term *same-sex marriage* resulted in more than 4300 entries.

199. See Hay, *supra* note 127, at 279.

200. The interesting question of whether it would be desirable to completely abolish legal marriage and replace it with a new legal status, open to all individuals who want to register their commitments to an intimate partner, has been addressed by Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 537-66 (2007).

201. For methodological aspects, see Anjuli Willis McReynolds, Comment, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073, 1073-1104 (2006). See also Lisa Newstrom, Note, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L L.J. 781, 781-805 (2007) ("[I]f American courts wish to retain their reputation not only for fairness but for a reluctance to twist the rights of the minority to fit the political will of the majority, then they must stop hiding behind a legislative history that fails to acknowledge the existence of gays and lesbians.").

202. See *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (App. Div. 2008). This opinion gave effect to a same-sex marriage celebrated in Canada for the purposes of spousal health care benefits because there was no express legislation to the contrary. *Id.* at 741-42; see also *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 509 (Sup. Ct. 2008) (rejecting the defendant's motion to dismiss a divorce action based on an assertion that a same-sex marriage entered into in Canada is void in New York).

decisive? Is it necessary to compare the rights and obligations granted by other jurisdictions with the rights and obligations afforded in one's own jurisdiction? Should the idea that a formalized relationship is valid everywhere if valid where celebrated be adopted? If so, under what conditions may a state refuse recognition? What requirements should be fulfilled? These are essential questions which need to be answered.²⁰³ In the Netherlands, for instance, the legislature was ignorant of these considerations when it introduced the new institution of the registered partnership into Dutch family law in 1998.²⁰⁴ It took the Netherlands seven years to enact the Private International Law Registered Partnership Act.²⁰⁵ The number of articles, namely twenty-five, illustrates how many different issues have been addressed.

At the global level, it is recommended that all jurisdictions contribute to the enhancement of the legal status of same-sex couples.²⁰⁶ The Hague Conference for Private International Law—to which also the United States is a very active member state—should investigate the possibilities of either including these relationships into existing conventions via protocols or adopting an international convention on the recognition of same-sex relationships. Each is an option.²⁰⁷ However, preparation and final adoption of a Hague Convention and the amount of time it takes for a convention to enter into force—around twenty years total—shows us the reason to start contributing today.

203. The legislature in California provides a good example. Pursuant to section 299.2 of its Family Code, California will recognize a same-sex legal union other than marriage that is validly entered into in another jurisdiction if it is substantially the same as a Californian registered domestic partnership, regardless of whether or not it is called a domestic partnership. CAL. FAM. CODE § 299.2 (Deering 2006).

204. Ian Sumner, *Registered Partnerships and Private International Law: Great Britain and the Netherlands Compared*, in 49 PUBLICATIONS DE L'INSTITUT SUISSE DE DROIT COMPARÉ, ASPECTS DE DROIT INTERNATIONAL PRIVÉ DES PARTENARIATS ENREGISTRÉS EN EUROPE 29, 41-42 (2004).

205. See Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141, 149-54 (2001).

206. The formalization of same-sex relationships outside Europe and the United States is possible in Canada (as of July 20, 2005), New Zealand (December 9, 2004), South Africa (November 30, 2006), Uruguay (January 1, 2008), two Argentinean provinces (Buenos Aires Stad and Río Negro), an Australian state (Tasmania), and a region of Brazil (Rio Grande do Sol). Bart Rwezaura, *To Be or Not To Be: Recognition of Same-Sex Partnerships in Hong-Kong*, 34 HONG KONG L.J. 557, 557-80 (2004).

207. This has been proposed before. See Boele-Woelki, *supra* note 190, at 1053-59; Katharina Boele-Woelki, *The Family in International Law/La Famille et le Droit International*, 7 INT'L L. F. DU DROIT INT'L 146, 146-52 (2005).