St. Thomas Law Review

Volume 18
Issue 2 *Winter 2005*

Article 4

2005

The Evolution of the Legal Concepts of Family and Marriage in the EU Legal System and Its Impact on Society

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THE EVOLUTION OF THE LEGAL CONCEPTS OF "FAMILY" AND "MARRIAGE" IN THE EU LEGAL SYSTEM AND ITS IMPACT ON SOCIETY

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1. INTRODUCTION TO THE LEGAL CONCEPT OF THE FAMILY

The traditional legal concept of family is under challenge in Europe and is currently undergoing a persistent evolution in European Law. The main judicial fora where this legal evolution is occurring are the European Court of Human Rights ("ECHR") and the European Court of Justice ("ECJ"). Europe indeed stands as one of the most progressive regions in the world to promote new forms of family.

This paper explores the interconnections between national and European law, and how the latter is trying to contain the major modifications of the traditional concept of family in some of the European countries that have already provided a clear legal framework to fully recognise same-sex couples, and even their right to adopt children.

This matter is becoming increasingly complex as new forms of partnerships are requested and the legal arena responds. The concept of family is thus diluted into a pluralism of unions. The fundamental social element has been undergoing deconstruction from the North of Europe towards the South.

We shall begin in Section 2 by identifying the legislation of the European Union. In Section 3, we will identify the judicial role of the ECJ in interpreting the specific enactments of the EU. It is also necessary to consider the ECHR, as discussed in Section 4, and discover what protection the Convention for the Protection of Human Rights and Fundamental Freedoms purports to offer these new developing family forms.

As noted in Section 5, the major changes, however, are provided for by the national legislation of certain European States that have been gradually accepting the right of adoption by homosexual couples. These

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States thus define a new form of reproductive family that totally equalizes the rights of a homosexual couple with those of a heterosexual couple. The expansion of this new concept is linked to other rights that are recognized in the European legal order such as free circulation of persons and the right to be free from any form of discrimination. Sub-rights are then created in the interstices of positive law evolving at a very rapid pace.

Our intention is to draw an objective legal picture in this area. We shall also expand our interpretation of the relevant applicable European law. The last section contains a number of sociological arguments opposing the extension of the legal concepts of "marriage" and "family" to protect same-sex unions. We do not intend to develop a thorough scientific analysis of the arguments in favour and opposing. This type of legal and philosophical analysis was already undertaken by John Murphy,[1] whose study on the definitional, abstract and human rights approaches complements the present survey. In his invaluable article, he demonstrates how the judge in the United Kingdom ("UK") reasons before a case of legal recognition of same-sex couples in the UK and in Europe, in accordance with the various arguments in place.[2]

Our approach to this matter is considered *conservative* since we are sceptical of the substantive changes of the law in this field, as discussed in Section 6.[3] We believe that the concepts of "family" and "marriage" should remain not only unchanged, but also protected by law and national, regional and international institutions. The traditional family is a fundamental concept, both socially and legally, which positively affects the functionality of individuals within society. Therefore, the willingness by interest groups to dilute these concepts under the excuse of *discrimination* is a true attack on the special union between a man and a woman that creates the fundamental element of society, particularly because they have the potential of reproduction. Notwithstanding the modern alternative techniques for reproduction, the union between a man and a woman should be considered unique, and concepts such as "family" and "marriage" with all the other relevant rights should be used exclusively for this relation.

One particular aspect that we will examine is the emergence of new family forms in same-sex marriages. If the fundamental concepts of "marriage" are redefined, "other unions" or "family types" would be placed

1. John Murphy, Some Wrongs, and (Human) Rights in the English Same-sex Marriage 1-16 (unpublished manuscript), *available at* Debatewww.law2.byu.edu/marriage_family/John%20Murphy%202.pdf.

2. *Id.* at 13.

3. *See id.* at 1-2.

on par with heterosexual marriages, enjoying the same benefits the traditional family has provided over the course of humanity. This redefinition of marriage would undermine the concept of the traditional family and ignore its necessity for the benefit to mankind.

2. THE EVOLVING LEGAL CONCEPT OF THE FAMILY IN EUROPEAN LAW

The European Union ("EU") is a union of twenty-five Member States, which first started with the establishment of the European Community ("EC") in 1948. The EU has contributed to the gradual disappearance of interregional custom duties and a unification on several key issues of "high policy," such as a common sense of European identity and social, economic and financial policy. The membership of the European Union includes a myriad of cultures, ranging from the Protestant Nordic countries to the traditional Catholic countries of Italy and Spain and, most recently, towards the former Soviet Block countries, such as Latvia, Poland and Slovakia. Providing for a common social policy is therefore, in itself, problematic. The European Parliament ("EP") has, for example, recognised in the European Charter of Fundamental Rights that the right "to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."[4]

In light of recent social change, there has been much deliberation concerning the understanding of the "family" and "marriage"; these terms have come under heavy scrutiny. One threat to the "traditional" concept of the family exists in the recent upheaval of the term "marriage." The effect of parental stability in heterosexual marriage is not without significance. It is clear that the family stands as the most central unit of society and affords members of the family, children and parents alike, with the emotional and physical support they need.[5]

"Registered partnerships" have recently emerged as a new form of a legally-recognized family in the Nordic countries, when Denmark introduced legislation recognising "same-sex" unions in 1989.[6] This

4. *Charter of Fundamental Rights of the European Union*, 2000 OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES 10, *available at* http://www.europarl.eu.int/charter/pdf/text_en.pdf (last visited Mar. 7, 2006).

5. *See* Universal Declaration of Human Rights, G.A. Res. 217A (Dec. 10, 1948), *available at* www.un.org/Overview/rights.html. As Article 16(3) of the Universal Declaration of Human Rights declares, "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.*

6. Wikipedia, *Civil Unions in Denmark*, http://en.wikipedia.org/wiki/Civil_unions_in_Denmark (last visited Mar. 7, 2006).

concept is spreading across the low-countries and rapidly advancing south. The emergence of this new legal concept in Europe has led to the reconsideration of the "traditional family unit" on the European supra-national level. The potential impact of this change on the European Union should not be underestimated. It has the capacity to influence national legal frameworks and legislation through the creation of Directives immediately enforceable upon Member States.

2.1 THE EUROPEAN UNION AND THE RECOGNITION OF SAME-SEX MARRIAGES IN EU LAW

A standard sequence of legislative reforms towards legal recognition of homosexuality can be observed within national law of Member States. It unfolds in three steps: 1) decriminalisation, either followed by or accompanied by the setting of an equal age of consent; 2) adoption of anti-discrimination laws; and 3) passage of legislation recognising same-sex partnership and parenting.[7] This trend is quite strong, according to Kees Waaldijk, both within and outside the EU.[8] This slow evolution can be characterised as a "law of small change," as legislation advancing the recognition and acceptance of homosexuality is only politically feasible if it is considered a small change in the law. Furthermore, where a legal system has suppressed homosexuality, legislation is typically necessary to initially reduce the condemnation of homosexuality and advance its acceptance.[9] This has been dubbed the "law of symbolic preparation."[10]

Much of the "law of symbolic preparation" has recently been enacted within the EU. Article 13 of the newly-revised EC Treaty provides that sexual orientation is no ground for discrimination.[11] Similarly, the Council

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7. Kees Waaldijk, LEGAL RECOGNITION OF SAME-SEX PARTNERS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 635, 635-37 (Robert Wintemute & Mads Andenaes, eds., 2001).

8. *Id.* at 636-38. For instance, all countries, except Finland and Ireland, that have so far enacted anti-discrimination provisions, have decriminalised homosexual activity and established equal ages of consent at least three years before. *Id.*

9. *Id.* at 638.

10. *Id.*

11. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Nov. 10, 1997, O.J. (C 340), *available at* http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html (last visited Mar. 7, 2006).

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Id.

Directive[12] on employment discrimination contributes to the "law of symbolic preparation" and could pave the way for more incorporative legislation affecting more fields of anti-discrimination.

The EU is following at the supra-national level of this aforementioned legal evolution pattern, i.e., the "law of small change" of its Member States:

> Where the EU has no history of decriminalisation (as criminal matters have been essentially left to the jurisdiction of Member States), we must look to the individual Member States. All have passed legislation decriminalising homosexual behaviour.[13]

There have been many (however, thus far non-binding) proposals aimed at introducing anti-discriminatory legislation on a national level. The European Parliament asked the Commission to draft a recommendation seeking to end "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, [and guaranteeing] the full rights of marriage or benefits of marriage, allowing the registration of partnerships" and to end "any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children."[14] The EP has also called for "rapid progress . . . with mutual recognition of the different legally recognised non-marital modes of cohabitation and legal marriages between persons of the same-sex in the [European Union]."[15] The inclusion of Article 21 against discrimination based on "sexual orientation" in the non-binding Charter of Fundamental Rights of the European Union (1999) is a recent example of measures of anti-discrimination against homosexuality.[16]

Despite the fact that the European Union is increasingly becoming a supra-national State, it is currently a limited legal system. As Waaldijk points out, the European Union itself cannot directly redefine marriage or introduce a concept of registered partnership because it has no competence

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12. Council Directive 2000/78, Article 11, 2000 O.J. (L303) 16, 16-17 (EC), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_303/l_30320001202en00160022.pdf (last visited Mar. 7, 2006).

> Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

Id.

13. Waaldijk, *supra* note 7, at 635.
14. Resolution on Equal Rights for Homosexuals and Lesbians in the EC, C61/40 (1994).
15. *Id.*
16. *Charter of Fundamental Rights of the European Union*, *supra* note 4, at 13.

regarding civil status or family law.[17] The EU cannot provide its citizens with civil status - this has been left solely to Member States' discretion.[18] Therefore, the EU can only introduce anti-discriminatory laws. This has been achieved partially due to its limited scope by the Framework Directive (2000) which protects against discrimination on sexual grounds exclusively in the field of employment. There are certain principles that can be drawn out of the Framework Directive which could be further developed by the EU, in order to 1) eliminate the discrimination between unmarried different-sex partners and unmarried same-sex partners; 2) eliminate discrimination between married different-sex spouses and registered same-sex partners, and 3) to eventually eliminate all forms of discrimination between married different-sex spouses and unmarried same-sex partners.[19]

In conclusion, the anti-discriminatory EU laws based on sexual orientation have only been enacted in the field of employment. The fact that four Member States have not yet fully completed decriminalisation of homosexual activity should slow down progress at the EU level. The EU has the potential competence to adopt Directives granting all spousal benefits to all partners even without previous national laws providing registration of same-sex partners. These anti-discriminatory measures amount to a universal acceptance of homoparental families creating a new and *de facto* form of family. This, however, could not be achieved unless supported unanimously by the European Commission. Ultimately, this cannot be realised until there is general acquiescence throughout the EU Member States of the legal acceptance of homosexuality.

2.2 THE POSSIBLE IMPACT OF THE EU CONSTITUTION ON THE EVOLUTION OF THE CONCEPT OF FAMILY

In accordance with the Universal Declaration of Human Rights, there is a legal framework in place to protect the family.[20] A recent form of a legal protection emerged in the Constitution of the European Union. The newly-drafted version of the Constitution contains several provisions regarding the family:

> Article II-67: Respect for private and family life – "Everyone has the right to respect for his or her private and family life, home and communications",[21]

17. Waaldijk, *supra* note 7, at 642, 644.
18. *Id.* at 644.
19. *Id.* at 645.
20. Universal Declaration of Human Rights, *supra* note 5, at 3-4.
21. Treaty Establishing a Constitution for Europe, Oct. 29, 2004.

> Article II-93: Family and professional life – "1. The family shall enjoy legal, economic and social protection. 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child";[22] and
>
> Article III-267(2) – To this end, "European laws or framework laws shall establish measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion."[23]

These provisions echo the articles set out in the Charter of Fundamental Rights of the European Union. The task to interpret it lies with the European Court of Justice. Current case law would suggest that "marriage," subject to national law, is limited to a union between a man and a woman.[24]

3. THE EUROPEAN COURT OF JUSTICE

3.1 THE EUROPEAN COURT OF JUSTICE CASE LAW

The European Court of Justice[25] has dealt with the concepts of "marriage" and "family" in cases regarding free movement of persons and sex equality law.

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22. *Id.*

23. *Id.*

24. *See* Cases C-122/99 & C-125/99 D & Kingdom of Swed. v. Council of the European Union, 2001 E.C.R. I-04319.

25. The role of the European Court of Justice ("ECJ") is to ensure that EU legislation (technically known as "Community law") is interpreted and applied in the same way in each Member State. In other words, it is always identical for all parties and in all circumstances. The Court has the power to settle legal disputes between Member States, EU institutions, businesses and individuals. The main functions of the ECJ are: (1) making preliminary rulings. (The courts in each EU country are responsible for ensuring that EU law is properly applied in that country. But there is a risk that courts in different countries might interpret EU law differently. This means that if a national court has any doubt about the interpretation or validity of an EU law, it may, and sometimes must, ask the Court of Justice for advice. This advice is given in the form of a "preliminary ruling"); (2) conducting proceedings for failure to fulfill an obligation. (The Commission can initiate these proceedings if it has reason to believe that a Member State is failing to fulfill its obligations under EU law. These proceedings may also be initiated by another Member State. In either case, the Court investigates the allegations and makes its judgment. The accused Member State, if it is indeed found to be at fault, must set things right at once.); (3) conducting proceedings for annulment. (If any of the Member States, the Council, Commission or (under certain conditions) Parliament believes that a particular EU law is illegal they may ask the Court to annul it. These "proceedings for annulment" can also be used by private individuals who want the Court to cancel a particular law because it directly and adversely affects them as

3.1.1 Free Movement of Persons and the Concept of the Family

All EU citizens under Regulation 1612/68 have the right to move freely and reside throughout all Member States.[26] It is understood that a "spouse" of an EU citizen who is a citizen of a Third Country has the right to apply for residency in the Member State.[27] If an EU citizen has a partner of the same-sex with whom he or she cannot marry, does he or she have the right to apply for residency? All current and existing EU legislation allows residency solely to a "spouse." ECJ case law excludes both cohabiting partners[28] and Registered Partners[29] from this right.

The only constraint on Member States is that they have to grant partners residency rights without discrimination.[30] The only possibility of this being extended to recognise same-sex partners is under Article 10(2) of Regulation 1612/68[31] where a same-sex partner may be considered as a "member of the family."[32] In the *McCollum* case, [33] the English High Court rejected this claim in the interpretation of Article 10(1) of the same Directive.[34]

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individuals. If the Court finds that the law in question was not correctly adopted or is not correctly based on the Treaties, it may declare the law null and void.); and (4) conducting proceedings for failure to act. (The Treaty requires the European Parliament, the Council and the Commission to make certain decisions under certain circumstances. If they fail to do so, the Member States, the other Community institutions and (under certain conditions) individuals or companies can lodge a complaint with the Court so as to have this violation officially recorded.) *See* http://europa.eu.int/institutions/court/index_en.htm, (last visited Mar. 7, 2006).

26. Commission Regulation 1612/68, 1968 O.J. (257) 2.

27. *Id.*

28. Case 59/85 Netherlands v. Reed 1986 E.C.R. 1283. Notably, this case was decided prior to the removal of restrictions which regulated movement of citizens of EU Member States based on Economic viability. Now one has the right to the freedom of movement regardless of economic standing.

29. Cases C-122/99 & C-125/99 D & Kingdom of Swed. v. Council of the European Union, 2001 E.C.R. I-04319.

30. Case 59/85 Netherlands v. Reed 1986 E.C.R. 1283.

31. Commission Regulation 1612/68, 1968 O.J. (257) 2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

32. *Id.*

33. McCollum v. Sec'y of State for the Home Dep't, (2001) 2001 WL 98401 (Q.B.). A dual Irish-British citizen had a Brazilian partner who resided in the UK longer than his permit allowed him to, where he should have returned and applied to return as Mr. McCollum's partner. *Id.*

34. *Id.*

> The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:
>
> (a) his spouse and their descendants who are under the age of 21 years or are dependants

There have been several proposals under the Commission to unify all rights of residency under one Directive.[35] There have also been proposals for a Directive, e.g., on Family Reunification, which would ultimately give citizens of third countries rights under EC law. The discussion surrounding the issue of whether a spouse includes a same-sex partner offers differing viewpoints.[36] The current draft of the proposals seems very conservative on the issue and it even expresses a restriction on the rights of same-sex spouses.[37] We see, therefore, that the interpretation of a "spouse" clearly applies solely to different-sex marriages. In conclusion, a "European family," as defined within the field of immigration, entails heterosexual partnerships which are accorded the status of "family."

3.1.2 Sex Equality Laws and the Concept of the Family

The ECJ has confirmed, on a number of occasions, the contents of the concept of family in accordance with European Law. In this section, we briefly explore what the results are of the relevant case law.

In the case *Grant v. S.W. Trains,*[38] the applicant argued that her denial of benefits, which were granted to an employee's husband or wife, constituted discrimination on grounds of sexual orientation.[39] The Court refused to extend the equal pay principle, stating that there was a lack of consensus among the Member States about whether "stable relationships between two persons of the same-sex are not regarded as equivalent to marriages or stable relationships outside of marriage between persons of opposite sex . . . ,"[40] and the Member States held this position "for the

(b) dependent relatives in the ascending line of the worker and his spouse.

Id.

35. See, for instance, http://webjcli.ncl.ac.uk/2001/issue5/toner5.html.

36. For instance, Commissioners Kinnock and Vittorino have suggested different answers to this question. *See* Answer given by Mr. Kinnock on behalf of the Commission in response to Written Question E-3211/01 (Feb. 7, 2002), *available at* http://europa.eu.int/eurlex/pri/en/oj/dat/2002/ce160/ce16020020704en00730074.pdf (last visited Mar. 7, 2006); *cf* Answer given by Mr. Vitorino on behalf of the Commission in response to Written Question E-3261/01 (Mar. 12, 2002), *available at* http://europa.eu.int/eurlex/pri/en/oj/dat/2003/ce028/ce02820030206en00020003.pdf (last visited Mar. 7, 2006). The European Parliament suggested that only the "heterosexual spouse" must be admitted and the "homosexual spouse" must rely on the state's discretion. *See* H. Toner, *Immigration Rights of Same-sex couples in EC Law, in* LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 181 (K. Boele-Woelki & Angelika Fuchs eds., 2003).

37. Draft report on the Proposal produced by Giacomo Santini, 25th September 2002, *Reports of the European Parliament* (PE 319.238).

38. Case C-249/96, Grant v. S.W. Trains, 1998 E.C.R. I-621.

39. *Id.*

40. *Id.*

purpose of protecting the family."[41] Therefore, same-sex partnerships do not constitute a "family," nor are they protected by EU law.

There is only one decision regarding registered partnerships. In *D & Kingdom of Sweden v. Council of the European Union*[42] an EC official of Swedish nationality working at the council registered his union with another Swedish national, according to the 1994 Swedish Act.[43] In Sweden, this has the same legal recognition as marriage.[44] D filed for a household allowance which is granted to a "married official" according to the European Union Staff Regulations, but was denied.[45] The appellant argued that because civil status is a matter within the exclusive competence of the Member States, terms such as "married official" should be interpreted with reference to the law of the Member States and not given an independent definition.[46] The ECJ began its opinion by stating that, according to the majority of the Member States, the term "marriage" meant a union between two persons of the opposite sex.[47] The court took into account the recent developments within the previous decade of the Nordic countries' legal recognition of same-sex unions, but submitted that these developments were considered separate and distinct from marriage.[48] It ruled that it could not interpret the Staff Regulations in such a way that legal situations distinct from marriage be treated in the same way as marriage. The court affirmed that D could not be considered a married official.[49]

Is it possible that the ECJ's standpoint could change in light of recent developments in the legal recognition of same-sex couples in an increasing number of Member States? In the case *State of the Netherlands v. Reed*,[50] a British national was refused a residency permit in the Netherlands. Her application was rejected because she was an "unmarried companion." In this case, the Netherlands were in favour of a strict interpretation of the concept of marriage, arguing that a "dynamic" interpretation, based on new

41. *Id.*

42. Cases C-122/99 & C-125/99 D & Kingdom of Swed. v Council of the European Union, 2001 E.C.R. I-04319.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* At the time of the judgment, the legislation of the Netherlands was not yet in full force. *See* M. Bogdan, *Registered Partnerships and EC Law*, *in* LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 173 (2003) (Boele-Woelki & Fuchs eds., 2003).

49. Cases C-122/99 & C-125/99 D & Kingdom of Swed. v Council of the European Union, 2001 E.C.R. I-04319.

50. Case C-59/85, State of Netherlands v. Reed, 1986 E.C.R. 1283.

social and legal developments, must be visible in the *whole* Community and not on just one or two Member States.[51] *Prima facie*, the court will be reluctant to view "marriage" in a different light until the changes are seen in a majority of Member States.

In some *obiter dicta*, the ECJ has also gone so far as to define the specific roles of men and women within the family in accordance with the "traditional" understanding of the family.[52] The doctrine developed in the 1980s, that childcare is the primary responsibility of the woman, and if employment is taken up, this is second-place to the responsibilities within the home.[53] This viewpoint has also been strengthened in recent years.[54] Clare McGlynn claims that, in essence, the court has upheld disparate treatment based on motherhood, arguing that the privilege of motherhood over fatherhood does not constitute unlawful sex discrimination. Where childcare is primarily the responsibility of the mother, the father is limited to a "breadwinning" role.[55]

3.2 THE EUROPEAN COURT OF JUSTICE AND RECENT DEVELOPMENTS

The ECJ has extended the idea of the "family" in the *Eyüp* case to include a cohabiting partner.[56] Whether the "traditional" concept of the family evolves further remains to be seen. This is due, however, to the limited scope for wider application based on the facts of the case. A period of unmarried cohabitation was sandwiched between the marriage, divorce, and subsequent remarriage of Mr. and Mrs. Eyüp.[57] The Court stated that for the period of cohabitation it "cannot be regarded as an interruption of their joint family life . . ." and, accordingly, could be deemed as a "member of the family."[58] This is, however, a small step forward from *Reed v. Netherlands*,[61] and the idea that the notion of the family could be extended

51. *Id.*

52. Clare McGlynn, *Challenging the European Harmonisation of Family Law: Perspectives on the Family in Europe*, *in* PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 221-22 (Boele-Woelki ed., 2003).

53. *Id.* at 222. *See also* Case C-163/82, Commission v. Italian Republic, 1983 E.C.R. 3273; Case C-184/83, Hofmann v. Barmer Ersatzkasse, 1984 E.C.R. 3047.

54. McGlynn, *supra* note 52, at 222. *See, e.g.*, Case C-243/95, Hill & Stapleton v. The Revenue Comm'rs & the Dep't of Fin., 1998 E.C.R. I-3739; Case C-128/98, Abdoulaye v. Renault, 1999 E.C.R. I-5723; Case C-476/99, Lommers v. Minister van Landbouw, Natuurbeheer en Visserii, 2002 E.C.R. I-2891.

55. McGlynn, *supra* note 52, at 222.

56. Case C-65/98, Eyüp v. Landesgeschaftsstelle des Arbeitsmarktservice Vorarlberg, 2000 E.C.R. I-4747.

57. *Id.*

58. *Id.*

to heterosexual cohabitees. This is primarily due to the egalitarian approach of the ECJ, which is developing in accordance with the changing concept of the family within Europe. This case has limited scope for further application to the legal recognition of newer family forms because this case clearly deals with heterosexual families.[59]

Overall, we can observe a conservative stance; the ECJ is reluctant to redefine the concept of "marriage" unless there is a substantive change in the overall picture of all the legal systems across Europe. This not only conforms to sound legal principles, but it ultimately reaffirms the courts' emphasis of the necessity of the traditional concept of the family.

4. THE EUROPEAN COURT OF HUMAN RIGHTS ("ECHR")

4.1 THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW AND THE CONCEPT OF THE FAMILY

The ECHR operates as a separate entity from that of the European Union. It applies the Convention for the Protection of Human Rights and Fundamental Freedoms that was drawn up within the Council of Europe.[60] All EU Members, however, have ratified the ECHR. It was opened for signature in Rome on November 4, 1950, and entered into force in September of 1953.[61] Taking as their starting point the 1948 Universal Declaration of Human Rights, the framers of the Convention sought to pursue the aims of the Council of Europe through the maintenance and further realisation of human rights and fundamental freedoms.[62] The Convention was to represent the first steps for the collective enforcement of certain rights set out in the Universal Declaration.

59. Case C-65/98, Eyüp v. Landesgeschaftsstelle des Arbeitsmarktservice Vorarlberg, 2000 E.C.R. I-4747.

60. Convention for the Protection of Human Rights & Fundamental Freedoms Sep. 3, 1953, Europ. T.S. No. 5.

61. European Court of Human Rights, http://www.echr.coe.int (follow "The Court" hyperlink) (last visited Feb. 22, 2006).

62. "Any Contracting State (State application) or individual claiming to be a victim of a violation of the Convention (individual application) may lodge directly with the Court in Strasbourg an application alleging a breach by a Contracting State of one of the Convention rights." European Court of Human Rights, http://www.echr.coe.int. (follow "The Court" hyperlink; then follow "Basic Information on Procedures" hyperlink) (last visited Feb. 22, 2006). The applicant must be a "potential victim" of human rights abuses. Convention for the Protection of Human Rights & Fundamental Freedoms Article34, Nov. 4, 1950, Europ. T.S. No. 5. The mere existence of certain laws or practices has been considered enough as an interference with their fundamental rights even without the intervention of the state against the individual.

It is important to recognise that the State need not have, in essence, done anything against the individual, but the mere existence of certain laws or practices is considered interference with fundamental rights.

The rights protected under the ECHR with regard to family life include:

> Article 8
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> Article 12
>
> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.
>
> Article 14
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[63]

The notion of "family" is an autonomous one and the ECHR has been forced to review the concept of the "family." The latest developments, however, suggest that a family is considered a heterosexual relationship based on marriage and, eventually, parenthood.[64] The courts have extended the idea of the "family" and have not constricted it to relations by blood. They have incorporated factors of cohabitation,[65] mutual care, and regular visitation by the biological parent. The birth of a child creates a family with the mother and father, even if their relationship has ended.[66] The "family" has also been extended to include the father of an illegitimate child who no longer lives with the mother.[67]

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63. Convention for the Protection of Human Rights & Fundamental Freedoms Articles 8, 12, & 14, Nov. 4, 1950, Europ. T.S. No. 5.

64. *Id.*

65. Johnston v. Ireland, 9 Eur. Ct. H.R. Rep. 203, 1986 E.C.R. 1651.

66. *See generally* Berrehab v. Netherlands, 11 Eur. Ct. H.R. Rep. 322 (1989); Keegan v. Ireland, 18 Eur. Ct. H.R. Rep. 342 (1994).

67. *See generally* Keegan v. Ireland, 18 Eur. Ct. H.R. Rep. 342 (1994).

Other relationships, such as same-sex partnerships or those with a transsexual partner, are said to be protected by the term "private life." In a line of cases before the ECHR, the Commission found that same-sex partners did not have any family life.[68] As discussed below, where there is no "family life," there can be no interference, and there can be no protection.

4.2 THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW ON THE LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE

When the equality claims of same-sex partners in the forty-three Member States of the Council of Europe are rejected by the national legislators or courts or (in the twenty-five of those Member States) by the European Community legislature or the ECJ, they often turn, as a last resort, to the ECHR. Can the ECHR come to the rescue and protect the legal recognition of same-sex couples?

4.2.1 Should the Homosexual Relationship Fall into the Concept of "Family Life" or "Private Life"?

The former European Commission of Human Rights screened all cases brought before the court until it was merged on November 1, 1998.[69] The commission adopted a line of reasoning about applications from same-sex partners or parents in the decision *X & Y v. United Kingdom*,[70] which it did not alter for thirteen years. In this case, the commission held that the UK's refusal to permit a Malaysian-national man to remain in the UK with his UK-national male partner did not violate their rights under Articles 8 and 14.[71] "Despite the modern evolution of attitudes towards homosexuality, the Commission [found] that the applicants' relationship [did] not fall within the scope of the right to respect of family life."[72] Instead, their relationship was a "matter of private life." Their deportation from the UK did not amount to an interference with their private lives because they failed to prove that there was no country in the world in which they could not live, and therefore required no justification.[73] "In an

68. Robert Wintemute, *Strasbourg to the Rescue? Same-Sex Partners & Parents Under the European Convention*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 714 (Wintemute & Andenas eds., 2001).

69. *Id.*

70. *Id.* at 714-15.

71. *Id.* at 715.

72. *Id.*

73. *Id.*

immigration case, a finding that the applicants had a 'family life' would not have made much difference, because Article 8 does not guarantee even married different-sex partners a right to live together in a particular country."[74]

In *Simpson v. United Kingdom*, the Commission justified different treatment of same-sex couples on the basis that it was not discrimination since "the family . . . merits special protection in society."[75] The Commission was happy to accept that governments may give special treatment to families, but may thereby exclude same-sex couples from this special treatment.[76] The position of the ECHR had not substantially changed ten years later (although legislative change in Denmark and Sweden on the legal recognition of same-sex couples had been introduced) in *Röösli v. Germany*,[77] which is almost identical to the decision in *Simpson*.[78]

4.2.2 Right to Marry and Evolutive Interpretation

The Court has clearly stated that the "right to marry guaranteed by Article 12 referred to the traditional marriage between persons of opposite biological sex."[79]

However, the European Convention on Human Rights, as all human rights legal instruments, is submitted to the evolutive or dynamic interpretation since the Convention is a "living instrument which . . . must be interpreted in the light of present-day conditions."[80] The interpretation of the provisions on the right to marry develops with the values of a democratic society that accepts in national legislation the same-sex marriage. Hence, Article 12 may undergo a different interpretation. Moreover, this judicial organ has even a progressive role. As the court stated in *Kjeldsen v. Denmark*, the convention is "an instrument designed to

74. *Id.*
75. *Id.* at 716.
76. *Id.*
77. *Id.*
78. *Id.*
79. Cossey v. United Kingdom, 13 Eur. Ct. H.R. 622 (1990). *See* Rees v. United Kingdom, 9 Eur. Ct. H.R. 56 (1987).
80. Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1, 10 (1978). In Marckx v. Belgium, the court stated the following: "It is true that, at the time when the Convention . . . was drafted, it was regarded as permissible and normal in many European countries to draw a distinction . . . between the 'illegitimate' and the 'legitimate' family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions." 2 Eur. Ct. H.R. 330, 346 (1979).

maintain and promote the ideas and values of a democratic society"[81] in a spirit of "pluralism, tolerance and broadmindedness . . . ."[82]

Meanwhile, no application presented to the Commission appears to have involved a claim by a same-sex couple that they have a Convention right to contract a civil marriage, either under Article 12 alone, or together with Article 14. In *C. & L. M. v. United Kingdom*, "the first applicant argued that deportation would interfere with her Article 12 'right to found a family' with her female partner, which was not dependent on the Article 12 'right to marry.' The Commission replied, citing case-law on attempts by transsexual persons to marry, that 'the first applicant's relationship with her lesbian cohabitee does not give rise to a right to marry, and found a family within the meaning of Article 12.'"[83]

These "negative" judgments, however, as Wintemute points out, are "frozen."[84] Since the Commission no longer exists, and its decisions are in no way binding on the Court, the Court is free to depart from them without citation of explanation. The Court itself held that "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."[85] Due to the fact that the current state of the legal recognition of same-sex couples has changed dramatically over the past decade, the Court can easily reach different conclusions than those of the Commission. Wintemute thus describes the Court's case law as a "blank slate."[86]

An *obiter dictum* of the Court in *Goodwin v. United Kingdom* is worth mentioning, however; it has been stated that the omission of any reference to gender in the right to marry enshrined in the Charter of Fundamental Rights of the European Union was deliberate.[87]

4.2.3 Discrimination in the Right to Marry

It has been submitted that the right to marry provided for by Article 12, interpreted in conjunction with Article 14 – stating "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured

81. Kjeldsen v. Denmark, 1 Eur. Ct. H.R. 711, 731 (1976).
82. Handyside v. United Kingdom, 1 Eur. Ct. H.R. 737, 754 (1976).
83. Wintemute, *supra* note 68, at 717.
84. *Id.*
85. *Id.*; Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1, 10 (1978).
86. *Id.*
87. Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18, 480 (2002). Article 9 provides simply that "the right to marry and the right to found a family shall be guaranteed." *Id.* at 468.

without discrimination on any ground such as sex, race, colour, language . . ." – should be extended to same-sex couples.[88]

We argue that the prohibition of same-sex marriage is not discriminatory, and is compliant with the aforementioned articles on the basis of the following arguments thoroughly developed by Murphy:[89]

> *Difference between sexual discrimination and sexual orientation discrimination.* Limiting the right to marry to a person of a certain gender amounts to the "sexual orientation discrimination," which is not contemplated by the "sex discrimination" intended in Article 14.[90] The fact that sexual orientation is not mentioned in Article 14 renders the claim of discrimination clearly void.[91] The right to marry – that is exclusively intended for opposite sex couples – negatively affects only a certain category of people who have chosen a precise sex orientation. Only a clear positive sex orientation discrimination clause could have supported this claim.
>
> *Differential treatment.* The prohibition of same sex marriage can be considered as differential treatment towards those who wish to marry with people of the same gender. Differential treatment can be lawfully maintained if there are cogent reasons to do so. Since the legal concept of "family" has been based on a heterosexual union, this type of differential treatment does not amount to sexual discrimination. This argument was especially warranted by the European Commission of Human Rights itself when it remarked upon the intrinsic value to society of families founded on heterosexual marriages and cohabitation, such that they warrant "special protection."[92]
>
> *Case law.* As we have previously seen, domestic and European case law does not view a same-sex couple as a family.[93] The consistency as between the case law deriving from the Convention and that already in force under domestic and EC law is ensured. However, it goes without saying that the European Court of Human Rights could grant family status to same-sex *married couple* and registered same-sex partnership to a couple from a nation in which this type of union is legally recognized, e.g. Belgium or the Netherlands.[94]

In the case explained above in point 1, *X & Y v. United Kingdom*, it is alleged that the prohibition of same-sex marriage amounts to a *sex-based discrimination* against a homosexual because, for instance, a woman is

88. Convention for the Protection of Human Rights & Fundamental Freedoms Articles 12 & 14, Nov. 4, 1950, Europ. T.S. No. 5.
89. *See generally* Murphy, *supra* note 1.
90. *Id.* at 22.
91. *Id.* at 22-23.
92. *Id.* at 25.
93. *Id.* at 30.
94. *Id.*

denied the same right a man has to marry a woman. We agree with Murphy when he explains how the discrimination depends on the "comparator" of the person who claims to be discriminated against respecting a certain right.[95] If, for instance, a man wants to exercise the right to marry a woman (in a legal framework where only heterosexual marriage is allowed), his comparator is another man or a woman who has to marry a person of the opposite sex. Every man shall have the right to marry any woman and *vice versa.* There is no discrimination based upon sex because both a man and a woman can only marry a person of the opposite sex. In this case, it can only be alleged sex-based orientation discrimination.[96]

Contrary to this approach, it may be submitted that, if a comparison is established between a heterosexual female and a homosexual male, the judge can come to the conclusion that a sex-based discrimination is in place (and not only a sex orientation based discrimination). Wintemute argues that the sexual orientation is *per force* a type of sex discrimination "where a person is sexually attracted to a partner of a given sex (e.g., male), whether or not that person's attraction is classified as same-sex or opposite sex depends entirely on that person's own sex."[97] Thus, preventing a man from doing something that any woman can do, in this perspective, amounts to sex-based discrimination.

In our view, the prohibition of same-sex marriage is a discrimination based upon sex orientation, and not a discrimination based upon sex, because the right to marry is to be exercised to form a "family" (Article 12).[98] The study of ECJ and ECHR, pursued in sections 3 and 4, has clearly shown that a family is formed by the marriage of two individuals of opposite sex.[99] This is the reason why it is the legal concept of family that qualifies the sex of the person with whom another person can marry and not *vice versa.* If the right to marry should be truly exercised with anybody, could a man invoke the discrimination based upon sex (Article 14)[100] in order to be entitled to marry (Article 12)[101] his mother, thus

95. *Id.* at 28.

96. *Id.* at 33. This interpretation is also shared in the authoritative comment to Article 12 by E. MAS when he states that "il est toutefois, difficile – dans l'état actuel de la jurisprudence et vu les termes exprès de l'article 12 – de déduire de celui-ci un droit pour les homosexuals de se marier entre eux." E. MAS, "Article 12," L.E. Petitti, LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME, Economica/CEDIN, Paris, at 443.

97. R. WINTEMUTE, *op. cit.,* at 346.

98. European Convention on Human Rights, Article 12, Nov. 4, 1950, 213 U.N.T.S. 221.

99. *See* European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

100. *Id.* Article 14.

101. *Id.* Article 12.

forming a family? The answer is nay because incest is generally statutorily prohibited. Accordingly, the legal concept of "family" maintains the difference between the discrimination based upon sex and a discrimination based on sex orientation. A same-sex union is not encompassed by the legal concept of family; therefore, the discrimination of the negative clause of Article 14 cannot be invoked to allow this type of marriage.[102]

4.2.4 Recent Developments – Transsexuals and the Right to Marry

Whilst Article 12 of the ECHR protects heterosexual marriages, it does not yet extend to same-sex marriages, as discussed above – it now recognizes the right for a biologically male/female transsexual living as a woman/man to marry another woman/man, despite their opposite biological sex if the transsexual is recognized as a "female/male" under national law.[103]

Overall, the ECHR distinguishes between "family life" and "private life." Heterosexual relationships are protected under "family life" and homosexual and transsexual relationships are protected under "private life."[104] In the ECHR, marriage is clearly restricted to a legal union between a man and a woman.[105] Recent case law in *Goodwin v. UK* has not had an impact on the necessity of heterosexuality, but it has now influenced the courts to recognise the "social gender" of an individual.[106] This case law does not support the arguments of proponents of homosexual marriages; in fact, it is more of a set back as the courts have insisted on heterosexuality. However, it is clear that in some form these are homosexual marriages as they still retain their biological identity.

4.2.5 The Exercise of Other Rights

4.2.5.1 Discrimination in General

In recent cases, the ECHR has taken a cautious approach and held that differences in treatment concerning sexual orientation always require a strong justification.[107] In *Smith v. United Kingdom*[108] and *Lustig-Prean v.*

102. European Convention on Human Rights, Article 12, Nov. 4. 1950, 213 U.N.T.S. 221.
103. Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18, 480 (2002).
104. European Convention Human Rights, Article 12, Nov. 4. 1950, 213 U.N.T.S. 221.
105. *Id.*
106. Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18, 480 (2002).
107. *See infra* notes 113 & 114.
108. Smith v. United Kingdom, 33 Eur. Ct. H.R. Rep. 30 (2001).

United Kingdom,[109] both cases which involved discrimination based on grounds of sexual orientation within the armed forces, a violation of Article 8 was found because "particularly serious reasons" are required to justify sexual orientation discrimination.[110] On this development, Robert Wintemute comments:

> The Court's case-law appears to be evolving towards a general principle that all differences in treatment based on sexual orientation without a strong justification violates the [European] Convention, either as an unjustifiable interference with "private life" (and possibly at some stage "family life") under Article 8, or as discrimination in relation to these areas under Articles 8 and 14.[111]

4.2.5.2 Right of Adoption and Custody

In a recent adoption case in *Salgueiro da Silva Mouta v. Portugal*,[112] where a homosexual father had been refused custody of his daughter in favour of the heterosexual mother purely on the grounds of his sexual orientation, the argument succeeded that there was a violation of Article 8, in conjunction with Article 14.[113] It was found that the Portuguese Court discriminated against him on the basis of his sexual orientation by denying him his conventional right of "family life."[114] This judgment, however, has not been extended to same-sex couples with regard to rights of homosexuals in any other capacity.

This decision confirms a position that excludes the adoption candidates that reveal their homosexuality and denies them the right to legally adopt each other's children. In February 2002, in the case *Fretté v. France*,[115] the court was seized with the question to know whether a candidate that has revealed his homosexuality has the right to legally adopt a child. This right was denied by France, and the ECHR refused to condemn France for violation of Articles 8 (right of respect of private and family life)[116] and 14 (prohibition against discrimination)[117] of ECHR.[118]

109. Lustig-Prean v. United Kingdom, 29 Eur. Ct. H.R. Rep. 548 (2000).

110. European Convention Human Rights, Article 15, Nov. 4, 1950, 213U.N.T.S. 221.

111. Wintemute, *supra* note 68.

112. Salgueiro Da Silva Mouta v. Portugal, 31 Eur. Ct. H.R. Rep. 47 (2001). *See also* Fretté v. France, 38 Eur. Ct. H.R. Rep. 21 (2004).

113. European Convention on Human Rights, Article 8 & 14, Nov. 4, 1950, 213 U.N.T.S. 221.

114. Salgueiro Da Silva Mouta v. Portugal, 31 Eur. Ct. H.R. Rep. 47 (2001).

115. Fretté v. France, 38 Eur. Ct. H.R. Rep. 21 (2004).

116. European Convention on Human Rights, Article 8, Nov. 4, 1950, 213 U.N.T.S. 221.

117. European Convention on Human Rights, Article 14, Nov. 4, 1950, 213 U.N.T.S. 221.

118. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

4.2.6 Further Developments

Wintemute submits that one of the most important factors, considered in sections 4.2.1 and 4.2.3, in the Court's decisions as to whether an interference with "private life" or "family life" can be justified as "necessary in a democratic society" under Article 8(2), or whether a difference in treatment is "discrimination" under Article 14 combined with Article 8, is the degree of "consensus" within the forty-three Member States of the Council of Europe regarding the need for the challenged practice. The greater level of acceptance or "consensus" that the practice is unnecessary, the more likely the court will find a violation and *vice-versa*.[119] Not only did the court observe that the Convention is a "living instrument,"[120] the Court recently observed that "the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to changing conditions in contracting States and respond . . . to any emerging consensus as to the standards to be achieved."[121] The case law surrounding the extension of rights to same-sex couples is based on the European consensus of 1983 prior to legislation from multiple Member States. Therefore, the pathway is opened for the eventual extension of marriage rights of different-sex couples to same-sex couples.

The English and French texts of the European Convention of Human Rights and Fundamental Freedoms declare in Article 12 the right of "men and women."[122] In light of the legislative development described below in section 5, it is likely, as Wintemute submits, that at some point the Court will be willing to accept the argument that "neither text says that a man can only marry a woman, and that a woman can only marry a man."[123]

It might be later assumed, for example, that the denial of the right of same-sex partners to marry would clearly be an apparent violation of Articles 8 and 14 together, which must, according to precedent, be strongly justified.[124] The argument could potentially be developed that the refusal to a "right to marry on sexual grounds" is a violation of Articles 12 & 14, where the denial of this right must require "serious justification."[125]

119. Wintemute, *supra* note 68, at 723.
120. Chapman v. United Kingdom, 33 Eur. Ct. H.R. 18 (2001).
121. *Id.*
122. European Convention on Human Rights, Article 12, Nov. 4, 1950, 213 U.N.T.S. 221.
123. Wintemute, *supra* note 68, at 728.
124. European Convention on Human Rights, Article 8 & 14, Nov. 4, 1950, 213 U.N.T.S. 221.
125. European Convention on Human Rights, Article 12 & 14, Nov. 4, 1950, 213 U.N.T.S. 221.

Furthermore, developments in national law have both influenced and been influenced by an emerging consensus in the Parliamentary Assembly of the Council of Europe ("PACE"). In 2000, PACE expressed an opinion that "the ground 'sexual orientation' should be added [to Article 14]."[126] They also recommended that Member States "review their policies in the field of social rights and protections . . . in order to ensure that homosexual partnership[s] and families are treated on the same basis as heterosexual partnerships and families" and "take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the same residence rights as bi-national heterosexual couples."[127]

Overall, the source of the increased equality for same-sex couples will be the national legislatures and courts. Until there is a new "European consensus" *de lege lata* on the legal recognition of same-sex partnerships or families, the ECHR should not aid them seeking this recognition.

5. CONCEPT OF "FAMILY" UNDER EUROPEAN UNION MEMBER STATES' NATIONAL LAW – THE LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE

Contrary to ECJ case law, a major rethinking of attitudes towards homosexual relationships has taken place during the last two decades in national law. The rapid movement toward acceptance and integration of homosexual unions would have been received with incredulity as recently as the early 1980s. The political and cultural climate in Europe at that time did not support such a radical upheaval of the structure of society. Legislatures generally respond with one of four reactions to the rapid change of political opinion on homosexual unions: 1) no reaction at all; 2) enactment of rules for homosexual relationships; 3) enactment of laws for homosexual cohabitation; and 4) the opening of marriage to homosexual couples.[128]

The legal recognition of same-sex couples has been furthered by multiple organs of State government. The legislative body in the Netherlands (State Parliament) first began initial discussions on proposals for a bill allowing civil same-sex marriages.

126. European Convention on Human Rights, Article 12, Nov. 4, 1950, 213 U.N.T.S. 221.

127. Recommendation 1470 (2000), Situation of Gays and Lesbians and Their Partners in Respect of Asylum and Immigration in the Member States of the Council of Europe, June 30, 2000, http://assembly.coe.int/Documents/AdoptedText/TA00/erec1470.htm.

128. Anders Agell, *Legal Status of Same-sex Couples in Europe – A Critical Analysis* in THE LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE (Boele-Woelki & A. Fuchs eds., 2003).

Civil homosexual and lesbian marriages have risen to a level of legal recognition in the Netherlands[129] and Belgium[130] through the passing of legislation. Since 1989, Denmark,[131] Norway,[132] Sweden,[133] Iceland,[134] and Finland[135] have all enacted legislation authorising the formal registration of same-sex "domestic partnerships" and extending to such relationships essentially all of the economic and many of the non-economic legal benefits of marriage. Further, gay rights are widely recognized in Hungary[136] and Portugal.[137]

As outlined by Yuval Merin, states have adopted four differing types of models in order to provide same-sex couples with some or most of the

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129. *See infra* section 5.1.

130. Projet de loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil (2 December 2002).

131. Danish Registered Partnership Act, No 372 (June 23, 1989).

132. The Norwegian Act on Registered Partnership for Homosexual Couples, Act No. 40 (Apr. 30, 1993).

133. Law Regarding Registered Partnership (June 23, 1994).

134. Law on Approved Cohabitation, Articles 1-9 (June 12, 1996).

135. Act on Registered Partnerships, 950/2001.

136. Civil unions in Hungary are regulated as follows:

> The law applies to couples living together in an economic and sexual relationship (common-law marriage) including same-sex couples. No official registration required. The law gives some specified rights and benefits to two persons living together. These rights and benefits are not automatically given – they must be applied for to the social department of the local government in each case. Amendment to the Civil Code: "Partners – if not stipulated otherwise by law – are two people living in an emotional and economic community in the same household without being married." The Hungarian government considers extending the rights of people living in unregsitered [sic] cohabitation and making facultative registration of cohabitation possible starting from 2007 with the introduction of the new Civil Code. That bill is currently in drafting phase, no official draft has been released yet. A bill has been introduced to Parliamant [sic] by the junior coalition partner to make the registration of cohabitation possible even before the adoption of the new Civil Code. The proposal would give extended rights connected to inheritence [sic] and housing to couples who register.

http://en.wikipedia.org/wiki/Civil_unions_in_Hungary (last visited Apr. 13, 2006).

137. Civil unions in Portugal are regulated as follows:

> Civil unions in Portugal were granted by the act of 15 March 2001. The legislation extends to same-sex couples the same rights as heterosexual couples living in a de facto union for more than two years. The law covers housing arrangements, civil servants and work benefits, the option to choose a fiscal regime as married partners, and welfare benefits. There are very limited rights, and do not cover most of the rights and benefits associated with marriage. This is, by definition, a de facto union; the only possible "registration" is an application for joint tax assessment. At the same time, a multi-person law ("common economy") was also approved that protects two or more persons that live in common economy with most of the rights of the de facto union, except welfare benefits.

http://en.wikipedia.org/wiki/Civil_unions_in_Portugal (last visited Apr. 13, 2006).

rights associated with marriage: 1) Civil marriage for same-sex couples, 2) Registered partnership, 3) Domestic Partnership, and 4) Cohabitation.[138]

5.1 CIVIL MARRIAGE FOR SAME-SEX COUPLES

The Netherlands and Belgium are thus far the only countries to have recognised "same-sex marriage."[139] It was the Dutch parliament, not the courts or the executive, that legally enabled same-sex marriages.[140] The courts had previously never granted homosexuals or lesbians the right to marry.[141] Effective April 1, 2001, a bill was passed in the legislature of the Netherlands giving essentially all "same-sex marriages" the same rights, protections and benefits as their heterosexual counterparts.[142] Included within the bill, same-sex couples were allowed to adopt children as long as, similarly to heterosexuals, they have been cohabiting for more than three years.[143]

Many parliament members expressed their view that the prevailing law simply recognising "registered partners" did not amount to full equality.[144] The Dutch government was at first reluctant to go ahead with the proposals, as it would mean that the Netherlands would be the first country in the world to have done so. Secondly, there was concern for the legal recognition of married couples outside of the Netherlands. The passing of the bill was made possible because of the make-up of the political parties within the Dutch parliament. For the first time in over eighty years, the coalition forming parliament did not include the Christian Democrats, who strongly opposed the bill.[145] Furthermore, only five percent of the Dutch parliament represented conservative Christian political parties.[146]

138. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 55 (2003).

139. *Id.* at 56.

140. *Id.* at 123-24.

141. When a lesbian couple was refused the right to marry in Rotterdam in 1990, they took recourse to the high court. The court ruled that the exclusion of same-sex marriage was not unjustified and therefore not discriminatory. The basis for the decision lay in one the legal consequences of marriage; that a woman's husband was considered the legal father of any children; thus marriage was not applicable to same-sex couples. *See* Peter Tatchel, *Europe in Pink: Lesbian and Gay Equality in the New Europe* 9 A QUICK SCAN 122 (1992).

142. MERIN, *supra* note 138, at 127.

143. *Id.* at 120.

144. *Id.* at 124.

145. *Id.* at 125.

146. *Id.*

According to the new law, passed in April 2001, marriage was based on the neutrality of the sexes.[147] Thus, marriage was simply declared "a symbol that carries special meaning."[148] They see it as a way of confirming their commitment to each other. There is no reason why same-sex couples should be denied the opportunity to do so. On April 1, 2001, the first gay civil marriages were performed. Many were registered partners who had previously had their unions legally recognised under existing legislation. Within the first six months of passing the new legislation, almost two thousand same-sex couples had married, which is a total of three percent of all marriages in the Netherlands.[149]

5.2 THE REGISTERED PARTNERSHIP MODEL

Next to the legal recognition of civil same-sex marriage, the registered partnership model is the most extended model of the legal recognition of same-sex unions. This model of partnership has been adopted by five Scandinavian countries: Denmark in 1989, Norway in 1993, Sweden in 1995, Iceland in 1996 and Finland 2002 – and formerly by the Netherlands in 1998 (as discussed above).[150]

The registered partnership model offers same-sex couples the rights, benefits, and responsibilities associated with marriage, with few exceptions. The main differences are that it does not bestow the same parental rights that a marriage would and it also prohibits the sanctification of their union in State churches.[151]

We shall briefly consider the example of Denmark, the first country in the world to provide comprehensive legislation to allow the recognition of same-sex partnerships.[152] It was a gradual process that originated in the 1960s as the pressure of reform grew to meet the new developing family forms and types of cohabitation. The first attempt to pass legislation of this kind was submitted by the Danish Socialist People's Party ("SF") in 1968.[153] This bill, however, was not adopted. It has always been Danish policy to include interest organisations in the legislative process and "Denmark's National Organization for Gay Men and Lesbian Women (LBL) pushed for recognizing same-sex couples and played a major part in

147. *Id.* at 127.
148. *Id.*
149. *Id.* at 129.
150. *Id.* at 125, 94, 103-04, 108, 111.
151. *Id.* at 56-57.
152. *Id.* at 61.
153. *Id.* at 62.

the developments that led to the adoption of the Registered Partnership Act."[154]

The preamble to the Registered Partnership Act outlines the reasons for its introduction.[155] It stated the fundamental rights enjoyed by married couples of housing, pensions, immigration, and entitlement to work should be given to homosexual and lesbian couples.[156] It stated that this would improve chances for young people to make choices with their lives according to their own wishes.[157] Also, it would improve the chances of long-lasting and steady relationships, where a hostile approach would hinder this.[158] This legal institution may also reduce the risk of the spreading of AIDS.[159] During the first seven years of registered partnerships for Danish citizens, 2,083 unions took place.[160] Of those unions, a total of seventeen percent have been resulted in divorce.[161]

5.3 THE DOMESTIC PARTNERSHIP MODEL

The Domestic Partnership Model is a less comprehensive form of the two models described above.[162] Merin distinguishes this model on its scope and geographical limits.[163] It has been for the most part instrumented by local or State authorities, and not on a national level.[164] This model contains very few rights – mostly work-related benefits – and provides limited legal consequences in different areas.[165] Furthermore, the partners have no obligations toward one another.[166] These have been introduced in Catalonia and Aragon in Spain.

5.4 THE COHABITATION MODEL

This model attempts to equate the status of same-sex couples with that of opposite-sex cohabiting couples that form a *de facto* family.

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154. *Id.*
155. *Id.* at 69.
156. *Id.*
157. *Id.*
158. *Id.*
159. Linda Nielsen, *Family Rights and the "Registered Partnership,"* 4 DENMARK INTL. J.L. & FAM. 297, 298 (1990).
160. MERIN, *supra* note 138, at 68.
161. *Id.* at 68.
162. *Id.* at 57.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 58-59.

Many European countries, including France, Belgium, Hungary, Portugal and Germany, all have a mixture of the latter two models described above. France[167] and Germany[168] have a "light" version of the registered partnership model, whereas the law in Hungary and Portugal more resembles the cohabitation model.

Whereas in the Nordic countries the reform process was a statutory one, the law in Hungary was changed judicially and only later amended by national legislation. The court maintained that the constitution protected the union between a man and a woman and they saw no reason to change the law on civil marriage.[169] The court held, however, that the traditional definition of common law marriage was unconstitutional and discriminatory.[170] It therefore ordered Parliament to make the legislative changes necessary to implement the new ruling within one year.[171]

The existence of common law marriage is a factual matter, which can only be decided upon according to the facts of the case. According to case law, the conditions are that a couple must have lived together and been involved in an economic and emotional union for a certain period of time. It does not confer parental rights to same-sex couples, but does extend the same economic rights as married heterosexual couples. Since it requires no registration it is difficult to quantify the total number of those who have taken advantage of the new legislation.

It has been submitted that the Hungarian decisions were somewhat of an anomaly in the evolution of gay rights in the Western world. Merin highlights questionable motives behind the ruling. The decision came as a complete surprise as there was no pressure from gay or lesbian activist

167. Civil unions in France are regulated as follows:

> In France[,] a *pacte civil de solidarité* (civil pact of solidarity) instituted a form of civil union between same-sex or opposite-sex with mutual rights and responsibilities less thatn [sic] those of marriage. "Initially, PACS offered the right to file joint income taxes only after 3 years. As of 2005, all PACS couples file joint taxes, in the same manner as married couples. Due to the way that the progressive tax is applied in France, a couple filing joint income taxes, in almost all cases, pays less tax than they would filing separately if one of the partners earns substantially more than the other.

http://en.wikipedia.org/wiki/Pacte_civil_de_solidarit%C3%A9 (last visited Apr. 13, 2006).

168. Civil unions in Germany are regulated as follows:

> Since 1 August 2001, Germany has allowed civil unions for same-sex couples, although outright same-sex marriage is not allowed. The Life Partnership Act (*Eingetragene Lebenspartnerschaft*, literally "registered life partnership") grants same-sex couples who specifically apply for it a subset of the rights and obligations connected with marriage.

http://en.wikipedia.org/wiki/Civil_unions_in_Germany (last visited Apr. 13, 2006).

169. Közzétéve a Magyar Közlöny 2005. évi 149. számában AB közlöny: XIV. évf. 11. szám, 908/B/1992

170. *Id.*

171. *Id.*

groups in Hungary at the time, as those groups lacked political influence. The liberal ruling of the court is mainly a product of Hungary's wish to be a part of "New Europe," though it was not the same step for gay rights as it had been in the Nordic countries. Other factors have been suggested, including the young judiciary, which took over after the older judiciary members left following the collapse of the former Soviet Block, and which was influenced by Western ideas, including the American model of "judicial activism."[172] Authors have claimed that the subsequent legislation, enacted by the Hungarian government, only "looked good on paper" and characterised it as "an aborted liberalisation of gay rights in Hungary."[173]

In France, the provocative act of the Mayor Mamère of the city of Bègles to marry a homosexual couple was immediately contested by the government.[174] Moreover, an administrative and judicial procedure has been instituted against the Mayor, claiming that he could make proposals for a new law, but not change or act upon a law that does not exist.[175] However, this provocative act has been supported, not only by homosexual lobbyist groups, but also by lawyers. Aware that this act was contrary to the domestic case law interpreting Article 12 of the French Civil Code, the couple's lawyers purportedly resorted to European law by submitting that the European Parliament reports speak in favour of the change in the law in order to stop this discrimination. However, these types of reports do not have any legal value in national law because they merely expressed what the tendencies *de lege ferenda* should be.[176]

Moreover, these groups interpret the ECHR and its case law as a tool against such perceived discrimination. The interpretation of the lawyers is openly deceiving since, as widely demonstrated in sections 4.2.3, Articles 8 and 12 do not provide for the protection of homosexual marriages, but only the right regarding family life and the right for a woman and a man to marry and to found a family.[177] No interpretative method can lend

172. Leslie Goransson, *International Trends in Same-Sex Marriage*, *in* ON THE ROAD TO SAME-SEX MARRIAGE 176, 177 (Robert P. Cabaj & David W. Purcell eds., 1998).

173. Lilla Farkas, *Nice on Paper: The Aborted Liberalization of Gay Rights in Hungary*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 563, 564 (Robert Wintemute & Mads Andenas eds., 2001).

174. Emmanuel Georges-Picot, *French Slam Mayor for Gay Weddings*, CBS NEWS, June 15, 2004, http://www.cbsnews.com/stories/2004/06/15/world/printable623302.shtml (last visited March 13, 2006).

175. *Id.*

176. LE FIGARO (June 8, 2004).

177. European Convention on Human Rights, Nov. 4, 1950, *available at* http://www.hri.org/docs/ECHR50.html.

credence to the interpretation that the lawyers of the homosexual couple try to extricate through this politically provocative action. The judiciary procedure that will be commenced against the Mayor will be determinative in the course of this debate in France.

We see an overall picture of very rapid change of the acceptance of homosexuality and the deconstruction of the traditional concept of the family throughout all of Europe, spreading from North to South. An urgent look at this swift change needs to be undertaken in order to assess its implications, before changes become too embedded in the legal framework of Europe and psyche of European citizens and families. This trend throughout Europe may ultimately lead to the general acceptance of homosexual marriage and parenting across the whole Europe, thus creating "new" and "acceptable" family forms.

7. CONCLUSIVE OBSERVATIONS OF THE POSSIBLE SOCIOLOGICAL IMPACT OF THIS EVOLUTION

Having already drawn the main conclusions at the end of every section, in this one we highlight some sociological arguments against the rapid developments in the legal concept of family in Europe. The changes in family law that we have outlined above will inevitably spur on two main sociological structural changes in the perception of family in European society. The first deals with the perception of the relationship between a man and a woman; the second is related to the rearing of children.

The unique relationship between a man and a woman that has been traditionally called marriage is under extreme danger by the new "pluralistic" legislation in the European legal order, as outlined in section 5. European legal pluralism is characterised by the presence of more than one legal order regulating this social field.[178] This creates a situation of legal uncertainty in the European context and in the judicial organs (see above sections 3.2 and 4.2.6).

The more these tendencies are legally accepted, the more this acceptance will also encourage it. This implies that a society that accepts a certain controversial behaviour of a minority makes of that minority a potential equal group and even a majority. In the meantime, the legalisation of same-sex unions will influence the perception of family in

178. *See* Lynne D. Wardle, *Same-Sex Marriage and the Limits of Legal Pluralism*, *in* THE CHANGING FAMILY: FAMILY FORMS AND FAMILY LAW 382 (John Eekelaar & Thandabantu Nhlapo eds., 1998); *see also* Anne Hellum, *Actor Perspectives on Gender & Legal Pluralism in Africa*, *in* LEGAL POLYCENTRICITY: CONSEQUENCES OF LEGAL PLURALSIM IN LAW 13, 15 (Hanner Petersen & Henrik Zahle, eds., 1995).

the whole European society. As a consequence, the pattern of natural reproduction could be subjected to a major change.

This circle can lead to a dysfunctional society. Often it is a dysfunctional heterosexual family that leads to homosexual behaviour. Indeed, scientific evidence demonstrates that a boy's perception that he has been abandoned by his father seems to be one of the factors associated with male attraction and homosexual behaviour.[179] A girl's broken relationship with her father has a direct link to maintaining an intimate and emotional relationship with men. The loss of a father (through divorce) will mean that there is a higher risk of homosexuality.[180] In turn, the legalisation of same-sex marriages means formally accepting most of the negative aspects causing this behaviour and promoting it as a new model.

The second major change in the perception of family relates to the rearing of children. One of the major questions raised by the evolution of family law is the possibility for the homosexual parents to adopt children. The very desire of a homoparental family to adopt children raises suspicion and does not seem to be morally justified otherwise than through a sort of fashion and self-satisfaction.

A fundamental question is to know whether this possibility is in conformity with the fundamental concept of "best interest" of the child enshrined in the Convention on the Rights of the Child ("CRC").[181] Although the recognition of same-sex adoption (as sketched in section 4.2.5.2) is currently limited to three European countries,[182] it is worthwhile to mention some arguments against this practice. Jean-Pierre Winter warns that a homoparental family can even lead the eventual adopted children to the end of transmission of life through mental illness, death and sterility.[183] Moreover, psychoanalysts fear that the legal recognition of same-sex marriage will become a model for future homoparental families. This model renders obsolete the universality of the theory of Oedipus, which is fundamental for the harmonious development of the child, i.e., the recognition in the child of the double difference of sexes and of

179. Wardle, *supra* note 178, at 395.

180. *Id.* at 395. (Parental separation is "associated with a measurably increased incidence of homosexuality [in the children]"); JEFFREY SATINOVER, HOMOSEXUALITY & THE POLITICS OF TRUTH 107 (1996).

181. Convention on the Rights of the Child, G.A. Res 44/25 (Nov. 20, 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm.

182. *See also* the negative report on this eventuality in France *Science de la vie: de l'éthique au droit,* Rapport du Conseil d'Etat, 1988.

183. Jean-Pierre Winter, *Gare aux enfants symboliquement modifiés*, LE MONDE DES DÉBATS, Mar. 2000.

generations.[184] Ross describes the case history of an adolescent girl whose behaviour has changed after learning that her mother is homosexual.[185] Studies show that having a homosexual parent may be particularly difficult for adolescents, and may interfere with their own sexual development.[186]

A final argument brought up by certain researchers is that a homoparental family model (as observed in section 5) runs counter to the interest of society since it annihilates the difference between sexes. This model is the first step towards a division of humanity into two worlds: one masculine and the other feminine, with no possibility that they can recombine. The loss of any contact between a man and a woman may follow. There will be no effort to bridge gender differences since one can please himself staying in his own sexual world.[187]

In conclusion, European law is moving away from the traditional legal concept of family and, consequently, from its social benefits that Wardle has outlined: traditional families provide the best setting for the safest and most beneficial expression of sexual intimacy, the most balanced social upbringing for children (as they learn to respond equally to both male and female), the best security for the status of women, the strongest and most compassionate unit of society, and the passing down of balanced social knowledge and skills, the best seed-ground for democracy, and the most important schoolroom for self-government.[188]

Proponents of same-sex marriage believe that if they can acquire this label of marriage, they will receive the same social and economic benefits. It is not the label or a marriage certificate that makes the heterosexual marriage relationship unique; it is the nature of heterosexual marriage that is a benefit to individuals and society. That is why they should solely enjoy the legal status of marriage.

A self-conflicting argument submitted by advocates of same-sex marriage is that antagonistic principles of legitimacy cannot coexist within the same political system.[189] Where a marriage embodies something

184. S. Korff Sausse, *PACS et Clones, La Logique du Même*, LIBÉRATION, July 7, 1999.

185. "Could not find source, impossible, but I can assure that it is correctly cited."

186. ILL – Joellyn L. Ross, *Challenging Boundaries: An Adolescent in a Homosexual Family*, 2 J. OF FAM. PSYCHOL. 227-240 (1988).

187. *See* Sausse, *supra* note 184 (drawing an analogy between reproductive cloning and homoparental families stating that both promote the engendering of the same by the same, thereby abandoning the association of two dissimilar individuals).

188. Wardle, *supra* note 178, at 383.

189. Chantal Mouffe, *Democracy and Pluralism: A Critique of the Rationalist Approach*, 16 CARDOZO L. REV. 1533, 1536 (1995).

fundamental and inherent in the nature of mankind, same-sex marriages cannot coexist.

We finally maintain that heterosexual marriage is unique, but it is not our intention to undermine any right that recognises the legality of other-than-heterosexual unions. The extension of the terms "family" and "marriage" is inappropriate for these types of unions in law. Circumscription of these terms is necessary to protect the institution of marriage and the traditional concept of the family.