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General Report on Same-Sex Marriage around the World

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Karen B. Brown • David V. Snyder
Editors

General Reports of the XVIIIth Congress of the International Academy of Comparative Law/ Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé

Macarena Sáez

Same sex cohabitation is banned or unrecognized in most of the world.[2] Forty years ago, same sex couples were not legally accepted in any country. In the last 30 years, however, around 20% of countries have granted some rights to same sex couples, making them visible to society. While there are still countries that criminalize sexual relations among two consenting adults of the same sex,[3] other countries are allowing same sex couples to marry and form a family. Between those two poles, many countries have moved or are moving from total rejection of same sex relationships to acceptance of some sort. Countries that have decriminalized sexual relations between individuals of the same sex have shortly thereafter seen a rise in the public debate about formal recognition of same sex couples. At the center of this debate is the role of marriage. While some scholars claim that marriage is essentially heterosexual and the basis for societal structure, others consider the exclusion of same sex couples from marriage unfair discrimination. Both positions are represented in the reports received for this Congress.

6.1 There Are Marriages and There Are *Same Sex* Marriages

All legally sophisticated societies have regulated cohabitation. It has not been individuals themselves who have restricted their sexual encounters, but each community has restricted the types of relationships publicly accepted. Although modern legal systems have functioned on the basis of a separation between a public and a private realm, the way that the private realm has been shaped has been an entirely public affair. Countries not only have traditionally determined a set of legally valuable relationships, but they have also defined duties and rights for each party within a relationship. In this context, the paradigm of the legally valued relationship has been marriage.

Marriage may not mean the same thing in every country but there is a general understanding that certain features are present when we meet a married couple. Generally, it means that the couple went through some formal recognition of their relationship in a particular country and that their union produces legal effects in that country. There is, foremost, an assumption that spouses are legally recognized as family. Most likely, the couple's offspring is legally accepted as

[1] This article was originally published in the American University Journal of Gender, Social Policy & the Law. Macarena Saez, *General Report: Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" is so Different*, 19 Am. U. J. Gender Soc. Pol'y & L. 1 (2011).

[2] This report is based on national reports submitted for the following countries: Australia, Austria, Belgium, Canada, Colombia, Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, New Zealand, Norway, Portugal, Romania, South Africa, Spain, Switzerland, Turkey, United Kingdom, United States, and Uruguay.

[3] The world was reminded again of this disparity after a gay couple in Malawi was sentenced to 14 years of prison for sodomy and indecency. Malawi's President Bingu wa Mutharika issued a pardon to the couple after a visit of UN President Ban Kimoon but made clear that he condemned the couple's behavior. *See* Barry Bearak, *Malawi President Pardons Gay Couple* (NewYork: Times, May 29, 2010), at http://www.nytimes.com/2010/05/30/world/africa/30malawi.html (last visited June 25, 2010).

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their own in the country where their union was registered and the couple has rights and obligations towards those children. When one meets a married couple it is safe to assume that some inheritance rights are also recognized. Until recently it was also assumed that marriage required one man and one or more women.[4] In the last 30 years, however, diversity of sex in marriage has become a contested issue.

The Netherlands was the first country to redefine marriage as a union of two individuals regardless of their sex. Instead of enacting a specific statute for same sex marriage, in 2001 the Netherlands amended the rules of marriage in their Civil Code stating that marriage could be contracted by two persons of different sex or of the same sex.[5] With this change, and other later changes, most rules on marriage apply equally to both opposite and same sex marriages.

Originally, however, there were differences between same and opposite sex marriage. Mainly, same sex couples did not have access to international adoptions. The Netherlands, however, amended its statutes in 2005 allowing same sex couples to adopt both locally and internationally.[6] Despite this equality of treatment, it would not be accurate to say that same sex couples can exercise their right to international adoptions just as heterosexual Dutch married couples do. There are still many countries that restrict adoption of their national children to heterosexual couples or single individuals, reducing the pool of countries from which same sex couples can look for adoption.[7]

A second difference referred to the marital presumption of paternity within marriage. In the case of same sex couples, no presumption can be made since it is biologically impossible for the partner of the same sex to be the biological parent of her spouse's child. Dutch legislation expressly established that the presumption of paternity did not operate in the case of same sex couples.[8] Although biologically correct, this exclusion meant that the only possibility of bi-parentage in the case of same sex marriages was through stepchild adoption. The Netherlands eventually changed its regulation in 2001.[9] The female spouse of a woman who gives birth to a child is recognized as the parent of that child, as long as there is no recognizable father, as it would be in the case of a sperm donor. This option, however, is not open to male partners who can only become parents of the same child through step child or joint adoption.[10]

This is the only differential treatment in the Netherlands between same and opposite sex married couples. All couples can also opt for a registered partnership and a married couple can decide to switch their relation to a registered partnership and vice versa.[11]

Belgium[12] became the second country to open marriage to same sex couples in June 2002. Professors Swennen and Leleu explain that the expansion of marriage to same sex couples was controversial and that there was great debate on the issue. The main argument against the expansion of marriage to same sex couples during the discussion of the bill was based on the interest of the State in protecting procreation, a feature exclusive to heterosexual marriages.[13] The central idea was that heterosexual marriage was worthy of special protection because of a natural link to procreation that same sex unions lacked. The compromise at

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[4] Polygamy is rejected in many Western world countries and it triggers harsh criticism. Its opponents, however, do not take the position that polygamy is not marriage. The rejection comes out of equality concerns or incompatibility with a liberal state, among others. Adrienne D. Davis, Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality, 110 Colulm. L. Rev. 1955 (2010).

[5] Nancy G. Maxwell, "Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison," 18 Az. J. Int'l & Comp. L. 141 (2001).

[6] Ian Curry-Sumner, All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe, European Family Law Series vol. 11 (Antwerp: Intersentia, 2003), 145–147.

[7] Denis Clifford, Frederick Hertz, and Emily Doskow, *A Legal Guide for Lesbian & Gay Couples*, 15th ed. (Reading: Addison-Wesley, 2010), 113.

[8] Katharina Boele-Woelki, "Registered Partnership and Same-Sex Marriage in The Netherlands," in *Legal Recognition of Same Sex Couples in Europe*, ed. Katharina Boele-Woelki and Angelika Fuchs, 44 (2003).

[9] Kees Waaldijk, Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries, 38 New Eng. L. Rev 549, 576 (2004).

[10] *Id.*

[11] Wendy W. Schrama, Registered Partnership in the Netherlands, 13 Int'l J. L. Pol'y & Fam. 322 (1999); *see also* Holland South Local Reference Information, "Same-sex Marriage and Registered Partnerships in the Netherlands," *available at* http://hollandsouth.angloinfo.com/countries/holland/gaymarriage.asp (last visited November. 17, 2010).

[12] Frederik Swennen & Yves-Henri Leleu, *National Report: Belgium*, 19 Am. U. J. Gender Soc. Pol'y & L. 57 (2011) [hereinafter Belgium Report].

[13] *Id.* at 66.

the end was to open marriage to same sex couples but deprive it of affiliation effects, including adoption.[14] Advocates of same sex marriage may have been happy to see that marriage was open to same sex couples, but the new regulation was far from reaching equality between opposite and same sex couples. Some scholars described it as an "amputated marriage."[15]

In 2005 Belgium amended its laws to allow adoption by same sex married couples.[16] However, the presumption of paternity that the legal system grants to husbands is still not available to same sex married couples. Since surrogacy is not allowed in Belgium, same sex couples can only become parents through adoption.[17] Thus, the lack of automatic parental recognition for same sex couples remains the only difference between opposite and same sex marriage.

In 2005 Spain[18] became the third country to amend its legislation and open marriage to same sex couples.[19] Law 13/2005 amended the Spanish Civil Code to include in the definition of marriage that this was a union between two people of undefined sex.[20] The justification of the Act was grounded in the right to free development of personality and equality based on article 32 of the Spanish Constitution that states that men and women have the right to enter into marriage with full legal equality.[21]

Professors Martinez de Aguirre and De Pablo Contreras disagree with the direction taken by the Spanish legislature and argue that same sex marriage may be unconstitutional. They consider that a correct interpretation of Article 32 of the Spanish Constitution should not lead to the recognition of same sex marriage.[22] Among other arguments, they claim that a grammatical interpretation of this article depends on the Dictionary of the Spanish Royal Academy's definition of marriage as a long term union between a man and a woman.[23] The word "marriage", therefore, requires the presence of both sexes. Thus a same sex marriage would be a contradiction in terms. Professors Martinez de Aguirre and De Pablo Contreras argue that because the social importance of marriage derives from its heterosexual nature and its link to the procreation of new citizens, same sex unions could not have the same social meaning because they would be structurally incapable of reproduction.[24] In their opinion, the Spanish legislature has changed the constitutional meaning of marriage by changing the core of the concept of marriage. This argument was also used in 2005 to challenge the Act before the Constitutional Tribunal.[25] The decision of this action is still pending. Part III will discuss these arguments in more detail.

Spanish law grants full equality to same sex couples, including adoption without restrictions. In this sense, it goes further than the Dutch and Belgian laws. However, it also maintained the rules on paternity presumptions of the Civil Code. Thus, bi-parentage within same sex marriage can only be achieved through adoption.

Spanish law does not establish rules on marriage of a Spanish citizen with a foreign citizen. The interpretation has been, however, that a Spaniard can marry a foreigner of the same sex even if the partner's country does not recognize same sex marriage.[26]

Almost at the same time as Spain, Canada[27] opened marriage to same sex couples. The Civil Marriage Act, enacted by Federal Parliament, modified the common law definition of marriage by stating that "marriage, for civil purposes, is the lawful union of two persons to

[14] *Id.* at 67.

[15] *Id.* at 65, 70.

[16] *Id.* at 78.

[17] Professor Swennen explained to me that surrogacy was performed in Belgian hospitals, though there was no current regulation on this matter. Furthermore, some judges may not allow adoption of children born from a surrogate mother and international surrogacy is illegal.

[18] Carlos Martínez de Aguirre Aldaz & Pedro de Pablo Contreras, *National Report: Spain*, 19 Am. U. J. Gender Soc. Pol'y & L. 289 (2011) [hereinafter Spain Report].

[19] Law 13/2005, (Spain) (B.O.E., 2005, 157), *available at* http://www.boe.es/boe/dias/2005/07/02/pdfs/A23632-23634.pdf. (last visited June 25, 2010).

[20] Spain Report, *supra* note 18, at 291.

[21] *Id.*

[22] *Id.* at 292.

[23] *Id.* at 294.

[24] *Id.* at 295.

[25] For an account by the Spanish press, see Reuters, *El PP presenta recurso de inconstitucionalidad contra bodas gays*, Sep. 30, 2005, at http://www.20minutos.es/noticia/52467/0/ESPANA/GAYS/RECURSO/. The constitutionality claim can be found at http://www.felgtb.org/files/docs/7cef87591594.pdf (last visited June 27, 2010) (Spain).

[26] *See* Maria Ángeles Rodriguez Vásquez, "Los matrimonios entre personas del mismo sexo en el derecho internacional privado español," *Boletin Mexicano de Derecho Comparado [B.M.D.C]* 41 (2008): 194 (Mex.).

[27] Marie-France Bureau, *National Report: Canada*, 19 Am. U. J. Gender Soc. Pol'y & L. 85 (2011) [hereinafter Canada Report].

the exclusion of all others."[28] Professor Bureau states in her report that the pathway to same sex marriage began in the nineties, with several provinces granting rights to same sex couples that only married couples enjoyed before.[29] The Federal Parliament also took measures aimed at insuring equality for same-sex couples. As an example, Professor Bureau cites the *Loi visant à moderniser le régime d'avantages et d'obligations dans les Lois du Canada*, enacted in 2000.[30] This law amended 68 provisions to insure a uniform application of federal laws to unmarried same sex and opposite sex couples.[31]

Canada seems to have achieved complete equality between same sex and opposite sex marriages. Same sex couples can adopt just as opposite sex couples can. Regarding the paternity presumption within same sex marriage, the rules vary from province to province.[32] In Quebec, however, marriage entails a presumption of paternity that applies both to fathers and to the partner of the woman who gives birth.[33]

There is one restriction applicable to same-sex marriage that relates to freedom of religion. According to article 3 of the Civil Marriage Act, officials of religious groups can refuse to perform marriages that are not in accordance with their religious beliefs. In some provinces this prerogative has been utilized, albeit unsuccessfully, to give civil servants the right to refuse celebrating a civil marriage when it goes against their religious beliefs.[34]

South Africa[35] is an interesting case of legal reform triggered by courts. The Marriage Act of 1961 defined marriage as a union between a man and a woman, but in 2005 the Constitutional Court gave the legislature a year to amend the Marriage Act to include same sex marriage.[36] The reasoning was based on the values of human dignity, equality and freedom.[37] Parliament consequently enacted the Civil Union Act 17 of 2006.[38] Article 1 of the Act states that "unless the context otherwise indicates, 'civil union' means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others." [39]

Instead of amending the Marriage Act, South Africa opted for the creation of a new set of rules through the Civil Union Act. There are four statutes in South Africa that regulate unions: The Marriage Act, the Customary Marriages Act 120 of 1998, the Civil Union Act, and the Recognition of Customary Marriages Act.[40] Accordingly, couples have several options for civil recognition of cohabitation:

1. Marriage according to the Marriage Act for heterosexual couples.
2. Marriage for same and opposite sex couples according to the Civil Union Act.
3. Civil Partnership for same and opposite sex couples according to the Civil Union Act.
4. Marriage in accordance with the customs and usages traditionally observed among the indigenous African peoples of South Africa, as regulated by the Recognition of Customary Marriages Act.

It is interesting that the political compromise between opposing views on the topic of same sex marriage has led South Africa to an array of alternatives, all of which seem to have the same effects. The same rights and duties, including the right to stepchild adoption and adoption in general, apply to married couples under the Marriage Act, married couples under the

[28] Lois Sur le Mariage Civil [Law on Civil Marriage], R.S.C., ch. 33, Article 2 (2005) (Can.) ("Le mariage est, sur le plan civil, l'union légitime de deux personnes, à l'exclusion de toute autre personne."), *available at* http://www.canlii.org/fr/ca/legis/lois/lc-2005-c-33/derniere/lc-2005-c-33.html (last visited October 22, 2010).

[29] Canada Report, *supra* note 27, at 88.

[30] *Id.* at 89.

[31] *Id.*

[32] The Greenwood Encyclopedia of LGBT Issues Worldwide 60 (Chuck Stewart ed., Greenwood Press 2010).

[33] *Id.*; *see also* Robert Leckey, 'Where the Parents are of the Same Sex': Quebec's Reforms to Filiation, 23 Int'l J. L. Pol'y & Fam. 62, 66 (2009).

[34] Canada Report, *supra* note 27, at 91.

[35] François du Toit, *National Report: South Africa*, 19 Am. U. J. Gender Soc. Pol'y & L. 277 (2011) [hereinafter South Africa Report].

[36] Fourie and Bonthuys v. Minister of Home Affairs, 2006 (3) BCLR 355 (CC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2005/19.pdf (last visited October 22, 2010).

[37] *Id.* at 47.

[38] Civil Union Act of 2006, BSRSA (S. Afr.), *available at* http://www.info.gov.za/view/DownloadFileAction?id=67843 (last visited June 28, 2010).

[39] *Id.* at art. 1.

[40] South Africa Report, *supra* note 35, at 281.

Civil Union Act, and registered unions under the Civil Union Act.[41]

Similar to Canada, the Civil Union Act allowed religious denominations to request their designated marriage officers to be exempt for conscientious reasons from registering civil unions of same sex couples.[42]

With regards to parenting, the rules on parental responsibilities are established in the Children's Act 38, 2005. According to this regulation it is possible for the spouse of the biological parent to enter into an agreement by which he or she assumes parental responsibilities of the child.[43] The rules apply equally to same sex and opposite sex couples.

Similar to South Africa, when Norway[44] amended its Marriage Act in 2008 to state that "two persons of opposite sex or of the same sex may contract marriage,"[45] it authorized "marriage solemnizers" to refuse to celebrate a marriage. Clerical solemnizers can refuse to solemnize a marriage if one of the parties is divorced and the previous spouse is still living or if the parties to the marriage are of the same sex.[46] As explained above, this was also the model for Canada and South Africa. This is the only difference between same and opposite sex marriage in Norway. Thus, the spouse of a woman giving birth obtains parental rights over the spouse's biological child at the moment of birth.

In 2009, Sweden amended its regulation and opened marriage to same sex couples.[47] Adoption was already permitted to same sex couples under a civil registered partnership.[48] A distinctive feature of the Swedish experience is that the Swedish church was in favor of the expansion of marriage. In most countries religious denominations have been a strong opposition to same sex marriage.[49]

Portugal,[50] Iceland,[51] and Argentina[52] are the last three countries allowing same sex marriage by passing laws in 2010.

Paragraph 1 of Article 36 of the Portuguese Constitution states that all persons have the right to form a family and marry in conditions of full equality.[53] The second paragraph states that the law will determine the requirements and effects of marriage.[54] These paragraphs were the grounds for a constitutional challenge of the definition of marriage set out by the Portuguese Civil Code. In a case in 2007 presented by two women whose marriage license was denied, the Constitutional Court affirmed that prohibition of same sex marriage was not unconstitutional but that neither was same sex marriage.[55] The court left the legislature to regulate this matter.[56] Three years after this decision, the Portuguese Congress passed Law 9 of 2010, redefining marriage as a contract between two people that intend to form a family through a community of

[41] *Id.* at 285.

[42] Civil Union Act of 2006 at art. 6.

[43] South Africa Report, *supra* note 35, at 285.

[44] Torstein Frantzen, *National Report: Norway*, 19 Am. U. J. Gender Soc. Pol'y & L. 273 (2011) [hereinafter Norway Report].

[45] Marriage Act, § 1 (Nor.) *translated in* http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401 (last visited October 22, 2010).

[46] Norway Report, *supra* note 44, at 274 (citing Marriage Act § 13).

[47] Ministry of Justice (Swed.), Fact Sheet, *Gender Neutral Marriage and Marriage Ceremonies*, May 2009, *available at* http://www.sweden.gov.se/content/1/c6/12/55/84/ff702a1a.pdf (last visited November 10, 2010).

[48] Yvonne C. L. Lee, "Don't Ever Take a Fence Down Until You Know the Reason It Was Put up" – Singapore Communitarianism and the Case for Conserving 377A," *Singapore Journal of Legal Studies* 347 n. 161 (2008) (Sing.).

[49] For media coverage of the Swedish church support of religious same sex marriage, see *Same sex marriage suggested by board of Church of Sweden*, Stockholm News (Swed.), June 13, 2009, *available at* http://www.stockholmnews.com/more.aspx?NID=3407 (last visited October 22, 2010).

[50] The Report on Portugal was prepared by Professor Jorge Duarte Pinheiro [hereinafter Portugal Report].

[51] In June 10, 2010, the Icelandic Parliament unanimously approved a law that allows marriage between same sex partners. *See* Michelle Garcia, *Iceland Legalizes Gay Marriage*, *available at* http://www.advocate.com/News/Daily_News/2010/06/11/Iceland_Legalizes_Gay_Marriage/ (last visited October 22, 2010).

[52] On July 10, 2010, the Senate approved the bill with amendments to the Argentina Civil Code to redefine marriage as a union between two individuals, regardless of their sex. *See* Juan Forero, *Gay rights activists celebrate Argentine vote for same-sex marriage*, Washington Post, July 16, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071501119.html (last visited October 22, 2010).

[53] Portugal Report, *supra* note 50, at 2; *see also* VII Revisão Constitucional [Seventh Revised Constitution] art. 36 (2005), *available at* http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx (last visited October 22, 2010).

[54] *Id.*

[55] Acórdão No. 359/2009, Tribunal Constitucional [Constitutional Court], *available at* http://www.tribunalconstitucional.pt/tc/acordaos/20090359.html (last visited October 22, 2010).

[56] *Id.*

life.[57]Under the new statute all references to husband or wife became applicable to spouses in a gender neutral voice.[58] The Portuguese legislature followed the original model of the Netherlands and Belgium allowing adoption to married couples of different sex only.[59]

Recently, Argentina became the first Latin American country to allow same sex marriage. Article 42 of the new Statute states:

> All references to the institution of marriage established in our legal system will be understood to apply to marriages between two people of the same sex as well as two people of different sex. Members of families from a marriage of two people of the same sex, as well as those of a marriage by two people of different sex will have the same rights and obligations. No regulation of the Argentine legal system shall be interpreted or applied in a way that may limit, restrict, exclude or suppress the exercise or enjoyment of the same rights and obligations to marriages formed by two people of the same sex as well as the one formed by two people of different sex.[60]

In addition to the countries already mentioned, there are countries with federal systems where the regulation of families is a state or provincial matter. Mexico and the United States[61] are notably in this position because parts of their territory have redefined marriage to include same sex couples. The debate over same sex marriage in the United States has been intense both at the legislative and adjudicative level. In his report, Professor Meyer gives an account of how Hawaii started a trend of political and legal fights that is far from being over.[62] This discussion repeated in many states and it reached the federal government with the passing of the Defense Marriage Act (DOMA).[63] Currently, Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and the District of Columbia issue marriage licenses to same sex couples. [64] Also, New York, Rhode Island, California and Maryland recognize as valid same sex marriages performed in other jurisdictions.[65] In all of them, marriage is treated as a neutral institution where no differences are made between same sex and opposite sex marriages. The only difference of treatment has been reported in Iowa, where hospital staff refused to include in the birth certificate of a child the female spouse of the biological mother. As of November 2011, a law suit is pending on this issue.[66]

Although states may have autonomy to define marriage, the federal benefits granted to married couples are too numerous for marriage to be considered an exclusively state matter.[67] The lack of federal recognition of same sex marriage, therefore, has an impact on the daily lives of same sex couples. There have been several challenges to DOMA. The latest decisions are

[57] Portugal Report, *supra* note 50, at 3; *see also* Diário da República, 1ª Série A – N 105–31 de Maio de 2010, Página 1853. Lei n. 9/2010, art. 2 ("…Casamento é o contrato celebrado entre duas pessoas que pretendem constituir família mediante uma plena comunhão de vida, nos termos das disposições deste Código."), *available at* http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=1249&tabela=leis (last visited November 8, 2010).

[58] Diário da República, 1ª Série A – N 105–31 de Maio de 2010, Página 1853. Lei n. 9/2010, art. 2.

[59] Lei N 9/2010 art. 3 (Port.), *available at* http://dre.pt/pdfgratis/2010/05/10500.pdf (last visited October 22, 2010).

[60] Unofficial translation by the author. The original text in Spanish states: "Art. 42. Aplicación. Todas las referencias a la institución del matrimonio que contiene nuestro ordenamiento jurídico se entenderán aplicables tanto al matrimonio constituido por dos personas del mismo sexo como al constituido por dos personas de distinto sexo. Los integrantes de las familias cuyo origen sea un matrimonio constituido por dos personas del mismo sexo, así como un matrimonio constituido por dos personas de distinto sexo, tendrán los mismos derechos y obligaciones. Ninguna norma del ordenamiento jurídico argentino podrá ser interpretada ni aplicada en el sentido de limitar, restringir, excluir o suprimir el ejercicio o goce de los mismos derechos y obligaciones, tanto al matrimonio constituido por personas del mismo sexo como al formado por dos personas de distinto sexo" *available at* http://www.infobae.com/download/55/0345567.pdf.

[61] Report on the United States prepared by Professor David M. Meyer.

[62] *Id.* at 6.

[63] Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996).

[64] For a detailed account of the current legislation in each state of the United States, see Sonia Bychkov Green, Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States, Appendix I (The John Marshall Law School, Working Paper Series, March 1, 2010), *available at* http://ssrn.com/abstract=1562234.

[65] *Id.*

[66] Lynda Waddington, *Same-sex couple sues state for right to appear on daughter's birth certificate*, May 13, 2010, http://iowaindependent.com/33946/same-sex-couple-sues-state-for-right-to-appear-on-daughters-birth-certificate (last visited October 22, 2010).

[67] In the U.S. there are more than one thousand benefits granted by the federal government to married couples. Additional State benefits vary and extend the difference of treatment. *See* Barbara J. Cox, *"The Little Project" From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 Wis. Women's L. J. 90 (2000) (citing Office of the General Counsel, General Accounting Office, Report to

from July 8, 2010 by a U.S. District Judge in Massachusetts. In *Massachusetts v. U.S. Department of Health Human Services* and *Gill v. Office of Personnel Management*, Judge Touro ruled that important parts of the DOMA were unconstitutional for violating equal protection principles:

> In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, 'there is no reason to believe that the disadvantaged class is different, in *relevant* respects' [citing *Romer*, 571 U.S. at 635] from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification. As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Sect. 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.[68]

Also, in September of 2009 members of the House of Representatives introduced the Respect for Marriage Act to repeal the Defense of Marriage Act.[69] As of November 2011, the bill is still under consideration.

The Federal District of Mexico passed a law in December of 2009 amending its State Civil Code. Marriage is now a union between two individuals and all rights and obligations recognized to married couples apply to same sex married couples.[70] The amendment also changed the rule on concubinarian unions to reflect that these unions can now include two female or two male concubines.[71] The Attorney General of Mexico challenged the constitutionality of the statute on the basis that the constitutional mandate is to protect the family defined as a heterosexual and bi-parental institution. He also challenged the rules on adoption because with the expansion of marriage to same sex couples, the statute opened adoption to same sex couples.[72] The Supreme Court upheld the statute, allowing same sex marriage in the Federal District and stating that the Federal Constitution of Mexico provides a vague concept of family. This interpretation leaves the door open to other states to amend their marriage regulations too.[73] The first step towards same sex marriage in the Federal District was the Law of Cohabitation Society (*Ley de Sociedad de Convivencia*) passed in 2006. This statute defined cohabitation society as a legal act formed when two adult individuals of different or same sex, and legally fitted, establish a common household, with the intent to stay together and assist each other.[74]

6.1.1 "Same" Is Different

Most countries reach recognition of same sex marriage after a gradual recognition of same sex couples that starts with the granting of partial material rights. Recognition of marriage as the symbol of full equality is the culmination of these processes. Married same sex couples, however, have not automatically been granted all rights attached to heterosexual marriage. The first and most common difference between opposite and same sex marriage relates to marriage as

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the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary, House of Representatives, GAO/OCG 97-16 (1997), *available at* www.gao.gov/archive/1997/og97016.pdf (last visited November 8, 2010)).

[68] Gill v. Off. of Personnel Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

[69] H.R. Res. 3567, 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3567ih.txt.pdf (last visited October 22, 2010).

[70] Gaceta Oficial del Distrito Federal, Dec. 29, 2009, *available at* http://www.metrobus.df.gob.mx/transparencia/documentos/marco%20normativo/decreto%20codigo%20procedimientos%20civil.pdf (Article 146 of the Civil Code for the Federal District states: "Matrimonio es la unión libre de dos personas para realizar la comunidad de vida, en donde ambos se procuran respeto, igualdad y ayuda mutua. Debe celebrarse ante el Juez del Registro Civil y con las formalidades que estipule el presente código.").

[71] *Id.* at art. 291 (stating that "female concubines and male concubines ("concubinas y concubinos") have reciprocal rights and obligations). The former article 291 stated that the female concubine and her male concubine ("la concubina y el concubinario") had reciprocal rights and obligations. http://201.159.134.50/Estatal/DISTRITO%20FEDERAL/Codigos/DFCOD01.pdf (last visited October 18, 2011)

[72] *Id.* at art. 395.

[73] The Supreme Court decision has not been published yet.

[74] Decreto de Ley de Sociedad de Convivencia para el Distrito Federal [Law of Cohabitation Society for the Federal District] art. 2, 136 Gaceta Oficial del Distrito Federal, 16 de Noviembre de 2006 (Mex.).

the gateway to forming a legally recognized family. Countries that were willing to allow marriage between two people of the same sex were not ready to recognize same sex couples as a legitimate parental unit.[75] Many countries have indeed opted for a regime of registered partnership with the specific purpose of distinguishing on one hand an institution that recognizes a union between two individuals, and on the other, an institution that transcends those two individuals and creates legally recognized family ties.

The second common difference between same sex and opposite sex marriages is the treatment of these two institutions by private international law. A country cannot guarantee that marriages performed under its laws will be recognized by other countries. It can, however, regulate what marriages performed abroad, under foreign law, will be recognized in its own territory. It can also restrict the conditions under which foreign nationals can marry within its borders. The Netherlands, for instance, imposed more restrictive rules for same sex than for opposite sex couples on eligibility to marry in Dutch territory.[76] Denmark had done the same with its Registered Partnership Act.[77] Same sex marriage creates a problem in international private law, just as polygamy, surrogacy, or other controversial practices that clash with national regulations do.[78]

The third common difference relates to marriage as a symbol. A point of debate has been whether same sex marriages should be recognized or solemnized by the same officers and through the same procedures than opposite sex marriages. In those countries where civil marriage is achieved through the recognition of a religious ceremony, the desire to protect freedom of religion and allow religious ministers to refuse the solemnization of same sex marriage is understandable. This protection, of course, should not be used as an excuse to create a policy of *de facto* discrimination by leaving same sex couples without any available officer to perform a marriage ceremony. In countries where civil marriage is a strictly secular process, the decision to separate officers and ceremonies does not have any grounds other than a political compromise. Inclusion of same sex couples into the mainstream institution of marriage has come, most of the time, with some type of relinquishing of the symbolism relating to marriage. In some cases, religious ministers are not available. In other cases the officer called to register same sex marriage is different than the one who celebrate heterosexual marriages.

6.2 From Marriage-Like Treatment to Full Invisibility

The redefinition of marriage as a union between two individuals regardless of their sex is a twenty first Century phenomenon. Regulation of same sex cohabitation, instead, is a trend that started earlier, towards the end of the twentieth century. Through legislative changes and judicial review, many countries have granted same sex couples benefits and rights traditionally linked to marriage. Although there are more countries that do not recognize any rights to same sex couples than countries that do, the number of countries affording some form of recognition increases every day.

Countries that recognize the existence of same sex couples and regulate some components of their unions can be divided into three groups:

(a) Full equality of rights between same sex and opposite sex couples but no access to the symbol of marriage.
(b) Recognition of same sex couples as partners with ample recognition of material rights and a narrow access to building family ties.
(c) Recognition of same sex couples as a lawful association between two individuals, narrow or no access to family ties, and limited material rights.

[75] *See* Belgium Report, *supra* note 12, at 70–71; *see also* Portugal Report, *supra* note 50, at 2.

[76] Waaldijk, *supra* note 9, at 579.

[77] Act on Registered Partnership N. 372 was enacted on June 7, 1989 with § 2.2 stating that "A partnership may only be registered provided that (1) one of the parties is habitually resident in Denmark and a Danish citizen, or (2) both parties have been habitually resident in Denmark the 2 years immediately preceding the registration." *See* Boele-Woelki, *supra* note 8, at 215.

[78] For an account on international private law and same sex couples, see Gerard-René de Groot, "Private International Law Aspects Relating to Homosexual Couples," *Electronic Journal of Comparative Law* 13 (2007). Regarding the recognition of Dutch same sex marriage in other countries, see Michael Bogdan, "Some Reflections on the Treatment of Dutch Same-Sex Marriages in Europe and in International Private Law," in *Intercontinental cooperation Through Private International Private Law: Essays in memory of Peter E. Nygh*, ed. Tania Einhorn and Kurt Siehr (The Hague: T.M.C. Asser Press, 2004), 25–35.

6.2.1 Separate but Equal

The United Kingdom[79] is among the few countries in the first category, with three registered partnerships that cover the three legal systems that make up the United Kingdom. Professor Kenneth Norrie states that the Civil Partnership Act of 2004 created "a statutory institution for the legal recognition and regulation of same-sex relationships, which is distinct from but equivalent to the existing institution of marriage...."[80]

Requirements to enter into a marriage and into a civil partnership in the United Kingdom are very similar.[81] The grounds for dissolving a civil partnership are also the same for both institutions, with the exception of adultery.[82] This cause for divorce is the basis for an interesting perspective raised by Professor Norrie regarding the real nature of the difference of treatment between marriage and civil partnerships. In his opinion, whereas marriage is a sexed and religious institution, civil partnership is a de-sexed and secular institution.[83] He doesn't deny that sexual relations are assumed between the parties in a civil partnership but he claims that, legally speaking, the sexual character of the relationship is irrelevant. In fact, the only grounds for divorce that do not apply to partnership dissolution are adultery and sexual impotency.[84]

With regards to the secular nature of registered partnerships, Professor Norrie states that registration of a partnership is exclusively in the hands of civil servants. Marriage, instead, can be performed by civil servants or by religious officers vested with such powers by each recognized religion.[85]

The European Court of Human Rights (ECHR) has divided the distinctions between same and opposite sex couples between material, parental, and other consequences.[86] An analysis of the differences between same sex and opposite sex couples in the United Kingdom leads to the conclusion that it treats marriage and registered partnership equally with regards to material and parental consequences. The distinctions come within the umbrella of what the ECHR called "other consequences."[87] These other consequences are closely tied to the idea of symbolism, which is what Professor Norrie links to religion.[88] Without providing same sex marriage, the United Kingdom gives better treatment to same sex couples than what the Netherlands originally did and Portugal has recently granted. The United Kingdom also treats same sex couples married abroad as civil partners.[89]

In 1989 Denmark[90] was the first country to legally recognize same sex couples through a registered partnership regime open only to same sex couples.[91] Although the original text left most parental rights outside the scope of the act, today the differences between marriage and registered partnership are almost unnoticeable. Since 2009 same sex registered couples have the right to stepchild adoption with certain restrictions.[92] Also, all women have access to assisted reproductive technologies regardless of their sexual orientation and marital status.[93] This change, the Danish report points out, was framed as a health issue rather than a family law one.[94] It had, nevertheless, the

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[79] Kenneth Norrie, *National Report: United Kingdom*, 19 Am. U. J. Gender Soc. Pol'y & L. 329 (2011) [hereinafter UK Report].

[80] *Id.* at 333; *see also* Civil Partnership Act, 2004, c. 33, *available at* http://www.legislation.gov.uk/ukpga/2004/33.

[81] UK Report, *supra* note 79, at 333.

[82] *Id.*

[83] *Id.* at 334.

[84] *Id.*; *see also* Civil Partnership Act, 2004, c. 33, Part II, Ch. 2.

[85] UK Report, *supra* note 79, at 335.

[86] Schalk and Kopf v. Austria, Application no. 30141/04, Eur. Ct. H.R. (June 24, 2010), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Schalk%20|%20Kopf&sessionid=63568865&skin=hudoc-en.

[87] *Id.* at 31.

[88] UK Report, *supra* note 79, at 338.

[89] *Id.* at 339–40; *see also* Civil Partnership Act, 2004, c. 33, Part V, Ch. 2.

[90] Annette Kronborg & Christina Jeppesen, *National Report: Denmark*, 19 Am. U. J. Gender Soc. Pol'y & L. 113 (2011) [hereinafter Denmark Report].

[91] Professors Kronborg and Jeppesen point out that although Greenland and the Faroe islands are part of Denmark, they have their own legal systems. Greenland has a registered partnership since 1996 but the Faroe Islands does not have any regulations for same sex couples. *See* Cece Cox, "To Have and To Hold--or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States," 4 *Law and Sexuality* 1, 7 (2005).

[92] Denmark Report, *supra* note 90, at 118.

[93] *Id.* at 118–19.

[94] *Id.* at 119.

effect of diminishing the difference between marriage and registered partnership as the gateway to family formation. Finally, in July 2010, Denmark passed an act that allows same sex couples to adopt under the same conditions than married couples.[95]

Today, the main difference between married couples and registered partnerships lies in what Professor Norrie called the secular feature of same sex unions as opposed to the religious meaning of marriage. Couples concluding a marriage in Denmark can choose to do so in a religious or in a civil ceremony. Registration of a partnership, however, is a strictly secular act.[96]

6.2.2 The Meaning of the Word "Almost:" I Can Treat You as a Spouse but Not as a Parent

Several of the national reports referred to the situation of same sex couples as "almost equal" to married couples. This is the case of the reports from Australia, Austria, and New Zealand. In all these countries same sex couples enjoy property rights, social security, inheritance rights, among others. Their recognition, however, falls short in the area of Family Law, where access to adoption or assisted reproductive technologies is usually limited or not granted to same sex couples. Considering that adoption is the main option that same sex couples have to become parents, the fact that a country grants them all sorts of rights but denies them the access to becoming a family can make the word "almost" lose part of its meaning.

The case of Australia[97] presents an interesting dichotomy. While some Australian jurisdictions continued to criminalize homosexual conduct between males until the 1990s, other states and territories had already begun to legally recognize and protect same sex relationships in specific contexts.[98] Hopes for the introduction of same sex marriage were dashed when the Commonwealth in 2004 amended the Marriage Act of 1961 to define marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered for life."[99] This statutory definition closed the door to potential attempts to expand the meaning of marriage in the courts. Australian law at present, therefore, seems to firmly reject the notion of same sex marriage. Instead, Australia has used its existing *de facto* legislation to give same sex couples legal protection.[100] Similar to the Canadian approach, the direction taken by Australia has been towards the "equalization" of non married and married couples. At the beginning, this assimilation of married and unmarried couples was aimed at heterosexual couples only. Today, all states and territories have legislation that recognizes and protects *de facto* couples regardless of the sex of the partners.[101] Also, in 2008 the Commonwealth passed comprehensive legislation to equalize treatment of opposite sex as well as same sex *de facto* couples in federal legislation.[102]

What constitutes a *de facto* couple varies slightly from state to state. Dr Witzleb gives a detailed account of these differences, including whether a certain time of cohabitation is required.[103] In states with registered relationships, these couples enjoy full legal protection from the date of registration.[104] Australia has gone above and beyond the Canadian model where unmarried couples have to prove cohabitation for some specific periods of time to enjoy the rights and benefits provided by law.[105]

Adoption is the only area where same sex couples are still treated differently than heterosexual couples. Only the Australian Capital Territory and Western Australia allow same sex couples to apply for joint adoption, and Tasmania allows stepchild adoption.[106] Queensland passed a new adoption statute in 2009 allowing opposite sex *de facto* couples to adopt but continuing to withhold this option from same sex

[95] *Id.*; *see also* Lov 2010-05-26 nr. 537 (Den.), *available at* https://www.retsinformation.dk/Forms/R0710.aspx?id=10291 (last visited November 9, 2010).

[96] Denmark Report, *supra* note 90, at 120.

[97] Report on Australia prepared by Dr Normann Witzleb [hereinafter Australia Report]. I want to thank Dr. Witzleb for his edits to this part of the work.

[98] *Id.* at 9.

[99] Marriage Act, 1961, § 5(1) (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/05431B4AAF75F0F5CA2576E8000392EA?OpenDocument.

[100] Australia Report, *supra* note 97, at 8–10.

[101] *Id.* at 9.

[102] *Id.*

[103] *Id.* at 12.

[104] *Id.* at 11.

[105] Nancy Polikoff, Beyond (Straight and Gay) Marriage 116 (Beacon Press 2008).

[106] Australia Report, *supra* note 97, at 25.

couples.[107] While adoption rights continue to be a sticking point in most jurisdictions, concerns about same sex parenting are not pervasive. This is evidenced by the fact that assisted reproductive technology is available to women regardless of their sexual orientation.[108] Furthermore, Dr Witzleb points out that in most of Australia the same sex partner of a woman who has undergone a fertilization procedure with her partner's consent is legally recognized as the parent of her partner's child.[109]

In New Zealand same sex couples do not have access to marriage but they are recognized through the Civil Union Act of 2004, open to both same and opposite sex couples.[110] The statute allows couples to transition from marriage to civil union and vice versa without the need of a prior divorce.[111] The most important differences between marriage and civil unions are in the area of parental rights. Couples registered in a civil union cannot jointly adopt and do not get parental rights over the child of the other partner.[112] The distinction is not between same sex and opposite sex couples but mainly between married couples and registered civil unions.[113] At the same time, however, New Zealand has followed a similar direction to that of Australia by assimilating married and *de facto* couples. Unmarried couples, regardless of their sex, get recognition of property rights, domestic violence, tax and social security.[114] There are, however, conflicting lower court decisions as to whether "spouses" include unmarried partners too.[115]

Germany follows a model similar to that of Denmark by providing a parallel institution exclusive to same sex couples with limitations in the area of adoption.[116] Dr. Jens Scherpe notes that the Regime of Life Partnership (ELp) enacted in 2001 was meant to be the "functional equivalent" of marriage.[117] But there are still, as he states, important differences between ELp and marriage.

Article 6 of the German Constitution protects marriage and family.[118] The German Constitutional Court (BVerfG) has interpreted this article to protect marriage between a man and a woman.[119] It has also indicated that the special protection afforded to marriage only prevented the legislature from creating a legal regime that was more favorable than marriage but it did not prevent the legislature from providing similar rights to other institutions.[120] As stated in the press release in English for case 1BvR 1164/07:

> For the authority of giving favourable treatment to marriage does not give rise to a requirement contained in Article 6.1 GG to disadvantage other ways of life in comparison to marriage. It cannot be justified constitutionally to derive from the special protection of marriage a rule that such partnerships are to be structured in a way distant from marriage and to be given lesser rights.[121]

Given the jurisprudential development towards recognition of marriage as a heterosexual constitutionally protected institution, Germany opted for the construction of a parallel institution with no cross references to marriage. The legislature wanted to give a clear sign that ELp was a different institution than marriage. Despite this intention, there are more similarities than differences between ELp and marriage.

Similar to the situation of other countries reviewed here, the authority who can register a life partnership in Germany was also a point of debate. The LPartG did not establish the authority who could register life partnerships because this is a state regulated matter.[122] More conservative states left the registration of ELp to public notaries or local authorities and kept civil registrars as the exclusive authority to provide marriage licenses.[123]

[107] Adoption Act, 2009, Queensl. Stat. 2009 (Austl.), *available at* http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2009/09AC029.pdf.

[108] Australia Report, *supra* note 97, at 24–25.

[109] *Id.* at 24.

[110] Kenneth Norrie, *National Report: New Zealand*, 19 Am. U. J. Gender Soc. Pol'y & L. 265 (2011) [hereinafter New Zealand Report].

[111] *Id.* at 266–67, 268.

[112] *Id.* at 267–268; *see also* Yuval Merin, *Equality for Same-Sex Couples: The legal recognition of gay partnerships in Europe and the United States* (Chicago: University of Chicago Press 2002), 175.

[113] New Zealand Report, *supra* note 110, at 267.

[114] *Id.* at 268.

[115] *Id.*

[116] Dr. Jens M. Scherpe, *National Report: Germany*, 19 Am. U. J. Gender Soc. Pol'y & L. 151, 154 (2011) [hereinafter Germany Report]; *see also* de Groot, *supra* note 78, at 6.

[117] Germany Report, *supra* note 116, at 154.

[118] *Id.* at 153.

[119] *Id.* (citing Bundesverfassungsgericht [Constitutional Court], July 7, 2009, 1BvR 1164/07 BVerfGE (Ger.)).

[120] Germany Report, *supra* note 116, at 153.

[121] Federal Constitutional Court (Ger.), Press Office, Press Release No. 121/2009, Oct. 22, 2009, *available at* http://www.bverfg.de/pressemitteilungen/bvg09-121en.html.

[122] Germany Report, *supra* note 116, at 170

[123] *Id.*

Substantive differences between marriage and ELp are less noticeable today than when ELp was first enacted. The ELp even establishes kinship between a life partner and the family of the other partner.[124] But as with most countries that have established parallel regimes for same sex couples, the main restriction to civil unions under ELp is parenting. Originally, Germany forbade all access to parenting for couples of the same sex. Today, joint adoption is still unavailable but stepchild adoption is allowed.[125] Same sex couples, however, do not have access to assisted reproductive technologies, including surrogacy, completely forbidden in Germany.[126]

Formally, Austria[127] follows the original registered partnership models of other European countries such as Denmark, the Netherlands, and Norway. Substantively, nonetheless, there are more similarities with the situation of same sex couples in Australia or in Germany: many rights have been granted but access to parenting is restricted.

In 2003 the Austrian Constitutional Court affirmed that the legal definition of marriage as a union between a man and a woman was not unconstitutional and it did not violate the right to family set forth in article 12 of the European Convention of Human Rights.[128] The Court, however, recognized that same sex couples were protected by the right to privacy and should be granted the same rights given to heterosexual unmarried couples.[129] Cohabitation, therefore, should be treated equally regardless of the sex of the parties. On January 1st 2010 the new Registered Partnership Act ("Eingetragene Partnerschaft-Gesetz," EPG) entered into force, open only to same sex couples.[130] According to Professor Aichberger-Beig, "[t]he EPG does not contain a general reference to marriage law. (…) However, the provisions of the Act to a great extent are taken almost verbatim from marriage law. In essence, although under a different name, the Act introduces marriage for same-sex couples."[131]

Some of the differences between marriage and registered partnership in Austria, as it has been the common trend in different countries, relate to treating partnership as a family unit. In addition to keeping parental rights as an exclusive prerogative of marriage, the EPG regulates the change of name after registration only as a "last name." In the case of marriage, instead, the PStG refers to the new last name as the "family name."[132] This is another example of the relevancy of symbolism. Married couples become a unit called family. Registered partners are instead two people associated through a legal contract with limited effects. Consistent with this rationale, registered partners do not have access to joint or stepchild adoption.[133] Assisted reproductive technologies are open to unmarried couples but only of different sex.[134]

The PStG did not replicate marriage regulations that dealt with gender stereotypes. The Austrian legislature assumed that partnership was based on equality between parties and did not consider necessary to regulate in this area. Marriage, instead, is regulated as to insure equality between parties.[135]

In the same tradition of Germany, the Constitution of Switzerland[136] protects the right to marry and to have a family. Here, too, the courts have interpreted marriage as the union between a man and a woman.[137] And just like in Germany and Austria, the legal recognition of same sex couples has come through the enactment in 2004 of a registered partnership statute applicable only to same sex couples (LPart).[138] The statute entered into effect in 2007.[139]

[124] *Id.* at 173.

[125] de Groot, *supra* note 78.

[126] Germany Report, *supra* note 116, at 173; *see also* John A Robertson, Reproductive Technology in Germany and the United States: An Essay in comparative Law and Bioethics, 43 Colum. J. Transnat'l L. 189, 210 (2004).

[127] Dr. Daphne Aichberger-Beig, "Registered Partnership for Same-Sex Couples," *in Austrian Law – An International Perspective*, ed. Bea Verschraegen (Wien: Jan Sramek Verlag, 2010) [hereinafter Austria Report].

[128] *Schalk and Kopf*, *supra* note 86, reaffirms this idea.

[129] Aichberger-Beig, *supra* note 127, at 65.

[130] *Id.* at 68, (citing Eingetragene Partnerschaft-Gesetz [Registered Partnership Act], *available at* http://www.gesetze-im-internet.de/bundesrecht/lpartg/gesamt.pdf).

[131] *Id.*

[132] *Id.* at 71.

[133] *Id.* at 73.

[134] *Id.*

[135] *Id.* at 72–73.

[136] Annelot Peters, *National Report: Switzerland*, 19 Am. U. J. Gender Soc. Pol'y & L. 309 (2011) [hereinafter Switzerland Report].

[137] *Id.* at 311 (citing ATF 119 II 264, 3 mars 1993 (Switz.)).

[138] Loi fédérale sur le partenariat enregistré entre personnes du même sexe [Federal law on the partnership recorded between people of the same sex] (Switz.), *available at* http://www.admin.ch/ch/f/ff/2004/2935.pdf.

[139] Switzerland Report, *supra* note 136, at 311.

The LPart assimilates registered partnership and marriage in many areas: inheritance rights, taxes, hospital visitation, property rights, social security, pensions, immigration and citizenship, tenancy, employment law, and civil and criminal procedure, among others.[140] Registered partnerships have restricted access to parenting and to the symbols of marriage. For example, witnesses are required for the conclusion of a marriage but not for the registration of a partnership.[141] In the case of marriage the parties can adopt a common last name but this is not possible through the LPart.[142] In spite of these differences, registration of both marriages and partnerships take place before the same officers and are recorded in the same registries.[143]

Hungary follows a similar regime to that of Germany and Switzerland, having established a registered civil union regime open only to same sex couples in 2009.[144] The Hungarian Constitution protects the institutions of marriage and the family and, just as the German Constitutional Court, the Hungarian Constitutional Court has concluded that marriage in Hungary means the union between a man and a woman.[145]

In 2007, there was an attempt to pass a registered civil union law very similar to marriage, open to both same and opposite sex couples.[146] The Constitutional Court, however, declared the bill unconstitutional because it was providing opposite sex couples with an institution alternative to marriage. At the same time, it stated that a registered partnership for same sex couples would be constitutional.[147] In 2009, following the recommendations of the Constitutional Court a new registered civil union law was passed, granting to same sex couples rights similar to those enjoyed by married couples.[148] As it has usually been the case in other countries, including Germany, the law excluded same sex partners from adoption and assisted reproductive technologies.[149] In addition to the typical restrictions to access parenting, the law kept some symbols of marriage from registered civil unions. Similar to Austria, the registered civil union did not allow a name change along with registration.[150] This is clearly a matter of symbolism rather than a substantive rights problem because registered civil partners can follow the traditional name change procedure open to anyone in Hungary.

Israel[151] could be viewed as one of the countries that recognizes same sex couples and grants them almost all rights that married couples enjoy. At the same time, it could also be viewed as a country with full invisibility of same sex couples. Although it is true that Israel does not legally recognize same sex couples, this is due to the fact that marriage and divorce are matters of personal law, regulated, therefore, by the religion of the parties or, in the case of foreign nationals, their nationality.[152] Israel is more of a hybrid situation than a case of full invisibility or full recognition. On one hand, marriage is left to religions recognized in Israel. On the other hand, civil courts have jurisdiction to hear cases of interfaith marriages or of people with no religion at all.[153] In the latter case, marriage must take place abroad since no secular marriage institution exists in the country.[154] Religion is not a matter of personal choice; it depends on the rules of each religion, regardless of personal preferences. Since no religion in Israel currently allows same sex marriage, there can be no conclusion of same sex marriages in the country.

Same sex couples and also people who cannot get married due to their lack of religion or because both individuals belong to different religions may decide to conclude their unions outside Israel. Marriages registered abroad are included in the Israeli Population Registry.[155] Although this Registry formally serves only as a statistic gathering center, the reality is that it

[140] A detailed account can be found in the Austria Report, *supra* note 127, at 5–9.

[141] Switzerland Report, *supra* note 136, at 312.

[142] *Id.* at 315.

[143] *Id.* at 312.

[144] András L. Pap & Zsolt Körtvélyesi, *National Report: Hungary*, 19 Am. U. J. Gender Soc. Pol'y & L. 211, 212 (2011) [hereinafter Hungary Report].

[145] *Id.* at 215.

[146] *Id.* at 212.

[147] *Id.* at 213.

[148] *Id.* at 212.

[149] *Id.* at 212.

[150] *Id.*

[151] Report on Israel prepared by Dr. Ayelet Blecher-Prigat [hereinafter Israel Report].

[152] *Id.* at 1–2.

[153] *Id.*

[154] *Id.* at 6.

[155] *Id.* at 6–7.

has been used as a signifier of married marital status. A Supreme Court decision in 2006 mandated the registration of five same sex couples married in Canada.[156] The decision stated that registration was not indicative of the validity of a marriage in Israel.[157] These couples, nonetheless, have access to the same benefits that all married couples enjoy in Israel.[158]

Another factor that makes Israel unique is that parallel to the lack of civil marriage, it has gradually been granting rights, both through legislation and through case law, to unmarried couples or "reputed spouses," along the lines of Australia or Canada.[159] Requirements to be considered reputed spouses vary from one statute to another but in general the definition is very flexible.[160] Some statutes do not even require a minimum time of cohabitation or monogamy.[161] Each specific statute or benefit can have a different scope of application.[162] In many cases, determination of the couples that fall under the category of reputed spouses is a matter of interpretation. For example, there are differing decisions as to whether same sex couples fall within this concept for the purpose of having access to family law courts, and if the Domestic Violence Act applies to them or not.[163] It seems to be uncontested, however, that same sex couples have access to stepchild and joint adoption, and to assisted reproductive technologies.[164] Surrogacy, on the contrary, is open only to heterosexual couples.[165]

6.2.3 Separate and Unequal: Partial Recognition of Same Sex Couples

France, Colombia, Uruguay, and Croatia are among countries that have amended their systems to give formal recognition to same sex couples albeit providing them with limited rights. In these countries, not only are parental rights and the symbolic nature of marriage denied to same sex couples, but they also enjoy limited access to property, succession, and pension rights, to name a few.

In France[166] same and opposite sex couples can sign a *Pacte Civil de Solidarité* (PACS) that provide rights and obligations similar but not equal to marriage.[167] Marriage is an exclusively heterosexual institution.[168] In 2007 the *Cour de Casassion*, reviewing a case of marriage annulment performed in Bordeaux between two individuals of the same sex, affirmed that marriage in France could only exist between a man and a woman.[169] The definition of marriage in France, however, does not expressly require a man and a woman.[170] Professor Hughes Fulchiron gives historical reasons for this omission. It was so evident that marriage could only take place between a man and a woman that there was no need for this requirement to be expressed in the *Code Civil*.[171] In the Preamble of the Civil Code of 1804, however, Portalis did state that marriage was the union between a man and a woman.[172]

Professor Fulchiron makes a distinction between marriage and partnership, with the former statute covering the family and the latter statute covering the couple.[173] This distinction would explain why the rights granted to couples registered under the PACS, unlike marriage, pertain exclusively to the relationship

[156] H.J., 3045/05 Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior (2006) (Isr.) (unpublished decision), *translated in* http://www.scribd.com/doc/22564351/Ben-Ari-v-%D7%92%D7%A8%D7%A1%D7%94-%D7%A1%D7%95%D7%A4%D7%99%D7%AA-Director-of-Population-Administration-official-translation (last visited October 22, 2010).

[157] Israel Report, *supra* note 151, at 8.

[158] *Id.*

[159] *Id.* at 17.

[160] *Id.* at 18.

[161] *Id.* at 19.

[162] *See* Talia Einhorn, "Same-sex family unions in Israel law," *Utrecht L. Rev.* 4, no. 2 (2008): 225.

[163] Israel Report, *supra* note 151, at 19–20.

[164] *Id.* at 24–25.

[165] *Id.* at 25.

[166] Hugues Fulchiron, *National Report: France*, 19 Am. U. J. Gender Soc. Pol'y & L. 123 (2011) [hereinafter France Report].

[167] *Id.* at 124.

[168] *Id.* at 125, 126.

[169] Stéphane X. v. Procureur Général, Cass. 1e civ. (Fr.), March 3, 2007, No. 511, *available at* http://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2007_2640/quatrieme_partie_jurisprudence_cour_2653/droit_personnes_famille_2655/mariage_11311.html.

[170] France Report, *supra* note 166, at 126.

[171] *Id.*

[172] *Id.* at 126 n.14.

[173] *Id.* at 132.

between the parties to the PACS and do not create kinship with the partner's family.[174] It would also explain the limited options that PACS partners would have regarding parenting; joint and stepchild adoption are open only to married couples.[175] Assisted reproductive technologies are open to married, PACS, and unmarried couples but only of the opposite sex.[176] Although stepchild adoption is not open to PACS couples, the Court of Cassation has been moving in the direction of slowly allowing a person to adopt the biological child of their same sex partner.[177]

Even if PACS provides legal rights to the couple, it falls short of recognizing rights that affect the couple only. For example, under PACS the foreign partner of a French national cannot apply for the French nationality.[178] The PACS does not grant intestate succession rights nor does it contemplate the option for the partners to change their last name.[179] It provides with a very narrow framework of rights for non married couples, clearly less comprehensive than many equivalent regulations of other European countries.

Colombia[180] seems to follow the same rationale as Australia. Instead of granting rights to same sex couples by giving them access to marriage or registered partnerships, it started to assimilate married and unmarried heterosexual couples. Today in Colombia there is no registered partnership or equivalent regime open to same sex couples. Marriage, as stated in the Constitution, is an exclusively heterosexual institution.[181] In 1990, however, Colombia formally granted some rights to *de facto* heterosexual couples by enacting Law 54.[182] The statute provided several property rights to *de facto* marital unions when cohabitation had been continuous and monogamous for a minimum period of 2 years.[183] This regulation opened the door for the Colombian Constitutional Court to rule in 2007 that any rights granted to *de facto* opposite sex couples under Law 54 had to be granted to same sex couples as well.[184] Following this decision, same sex and opposite sex couples that meet certain legal standards are considered *de facto* marital unions.[185]

Although Law 54 referred only to patrimonial rights of *de facto* marital unions, today these couples enjoy additional rights in the areas of health care, pensions, citizenship, and criminal law, among others.[186] In spite of this assimilation between same and opposite sex unions, there are still several areas where distinctions are legally permitted. These are especially apparent with regards to parenting. Consequently, only heterosexual *de facto* marital unions are allowed to adopt children.[187] There is a pending case before the Constitutional Court challenging the constitutionality of this exclusion but there is precedent from 2001 against granting adoption to same sex couples.[188]

In the late eighties, Uruguay[189] also started regulating heterosexual unmarried couples. Different statutes recognized the existence of the "concubine" and granted rights such as compensation in cases of work related accidents, stepchild adoption, succession rights in special circumstances, and the right to make medical decisions on behalf of the partner, among others.[190]

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[174] *Id.*

[175] *Id.* at 125.

[176] Nancy D. Polikoff, Recognizing Partners But Not Parents/Recognizing Parents But Not Partners: Gay and Lesbian Family Law in Europe and the United States, 17 N.Y.L. Sch. J. Hum. Rts. 711, 726 (2000) (citing L-94-653 of 1994, The Bioethics Act (Fr.)).

[177] *See* decision N. 703 of July 8, 2010 (09–12.623), Cass. 1e civ. (Fr.), *available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/703_8_16930.html.

[178] Aaron Xavier Fellmeth, State Regulation of Sexuality in International Human Rights Law and Theory, 50 Wm. & Mary L. Rev. 797, 859 (2008).

[179] *Id.*

[180] Daniel Bonilla & Natalia Ramirez, *National Report: Colombia*, 19 Am. U. J. Gender Soc. Pol'y & L. 97 (2011) [hereinafter Colombia Report].

[181] *Id.* at 100.

[182] Law 54 of 1990, art. 1 (Colom.), *available at* http://www.dmsjuridica.com/CODIGOS/LEGISLACION/LEYES/L0054de1990.htm (last visited October 22, 2010).

[183] Colombia Report, *supra* note 180, at 103.

[184] Sentencia C-075/07, Corte Constitucional [Constitutional Court] (2007), *available at* http://www.corteconstitucional.gov.co/relatoria/2007/C-075-07.htm (last visited October 22, 2010).

[185] *Id.* at 103.

[186] *Id.* at 104–109.

[187] *Id.*

[188] *Id.* (citing Sentencia C-814-01, Corte Consitucional [Constitutional Court]), *available at* http://www.corteconstitucional.gov.co/relatoria/2001/C-814-01.htm (last visited October 22, 2010)).

[189] Walter Howard, *National Report: Uruguay*, 19 Am. U. J. Gender Soc. Pol'y & L. 343 (2011) [hereinafter Uruguay Report].

[190] *Id.* at 362–64.

Professor Walter Howard notes that the doctrinal development of *de facto* couples in Uruguay can be traced to 1934 with a decision that recognized that cohabitation had consequences that the legal system could not deny.[191] This recognition of cohabitation, however, did not, and does not amount to the assimilation of married and unmarried couples as in Canada or Australia.

In 2007 Uruguay passed a law to regulate "concubinarian unions." According to this statute, an unmarried couple no matter their sex, identity, and sexual orientation or option, who has continuously lived together in a sexual, exclusive, monogamous, stable and permanent relationship for at least 5 years, will be considered a "concubinarian union."[192] The definition also names restrictions on kinship, age, and state of mind.[193] The effect of the statute is the recognition of same sex unions that until then had been absolutely invisible to the Uruguayan legal system.

De facto couples who fit the definition of a concubinarian union can access a set of rights established in the 2007 statute, mostly on property and succession rights.[194] Couples that do not meet the statute's requirement can still obtain limited rights recognized to unmarried couples prior to the establishment of this Act.[195]

Among its provisions, the 2007 statute provides a more egalitarian regime to claim for alimony after the dissolution of the concubinarian union than the one provided in the case of marriage dissolution. In the latter, a judge can reduce or eliminate the right to alimony of the partner held responsible for the dissolution of his marriage.[196] The concubine's right to alimony, however, is not affected by her or his responsibility in the dissolution of the union.[197]

The concubinarian union regime in many respects mirrors marriage regulation but in most areas it gives limited versions of the rights that married couples enjoy. Although stepchild adoption was provided to unmarried couples, joint adoption may be restricted to heterosexual couples only.[198] The statute that regulates adoption does not expressly ban same sex concubine unions from adoption. Professor Howard, however, thinks that the spirit of the law was to restrict joint adoption to heterosexual couples only.[199]

Croatia,[200] with its 2003 Same Sex Union Statute, is also one of several countries that provide some formal recognition to same sex couples.[201] Article 61 of the Croatian Constitution states that "[t]he family shall enjoy special protection of the State; Marriage and legal relations in marriage, common-law marriage and families shall be regulated by law."[202] This text seems to indicate that different types of families, even those created outside legal marriage, enjoy constitutional protection. Marriage, however, is still confined to heterosexual couples.[203]

According to the Same Sex Union Statute, a same sex union is a "life union of two persons of the same sex (partners) who are not married, who are not in a heterosexual or another same-sex union, and which union lasts for at least 3 years and it is based on the principles of equality of the partners, of mutual respect and help, as well as on emotional ties between the partners."[204] The statue does not require registration of the union and it is limited to the regulation of "financial support between the partners, property rights and the right to mutual help."[205] The Statute applies only to same sex unions but unmarried heterosexual couples can access the same benefits through the Croatian Family Law Act.[206] Same sex couples, therefore, are recognized as an entity that does not fit within family law, regulated outside the Croatian Family Law Act.

[191] Uruguay Report (Spanish version) at 13 (on file with autor) (citing L.J.U., T. V, case 1129, and Salvagno Campos, *La sociedad de hecho en el concubinato more uxorio,* Revista de Derecho, Jurisprudencia y Administración, T. XXXVIII, 221 (1940)).

[192] Uruguay Report, *supra* note 189, at 348; *see also* Law N. 18.246 of Dec. 27, 2007, (Uru.), *available at* http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=18246&Anchor=.

[193] Law N. 18.246 of Dec. 27, 2007, (Uru.) at art 2.

[194] Uruguay Report, *supra* note 189, at 359.

[195] *Id.* at 349.

[196] *Id.* at 350.

[197] *Id.*

[198] *Id.* at 363.

[199] *Id.*

[200] Report on Croatia prepared by Professor Nenad Hlača [hereinafter Croatia Report].

[201] Law on Same Sex Civil Unions, OG RC 116/2003 (2003) (Croat.), *translated in* http://iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/583.html (last visited October 22, 2010).

[202] Constitution of Croatia, art. 61.

[203] Croatia Report, *supra* note 200, at 2.

[204] *Id.* at 3 (citing Article 1 of the OG RC 116/2003).

[205] Croatia Report, *supra* note 200, at 4.

[206] *Id.*

The Czech Republic[207] also provides recognition for same sex couples, with a registered partnership statute of 2006 applicable exclusively to same sex couples. Section 1(1) of this statute states that "[a] registered partnership is a permanent association of two individuals of the same sex established in the manner prescribed by this law."[208] The requirements to enter into a registered partnership are similar to those established for marriage.[209] The benefits, however, are more limited than those for marriage. There are no inheritance rights or joint ownership comparable to those of married couples, there is no creation of kinship but just recognition that for certain matters the partners can act on behalf of each other.[210]

Until recently Ireland[211] did not provide any formal recognition to same sex couples. The Irish Constitution protects marriage using a strong choice of words: "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."[212] This protection, although it does not expressly refer to heterosexual marriage, has been interpreted by the Irish High Court as requiring a man and a woman for a legal marriage.[213] In July 2010 the President of Ireland signed the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.[214] The new statute applies only to same sex couples and it provides them with several rights such as household protection, succession, pension, and property rights, among others.[215]

In Ireland there is no formal recognition of families formed by same sex couples and the Supreme Court of Ireland has recently affirmed that "there is no institution of a *de facto* family in Ireland."[216] The decision, however, may be interpreted as a step towards recognition of same sex families since it denied custody to a biological father who was the sperm donor for a lesbian couple.[217] The decision stated that the child lived in a "loving and caring situation for the child."[218]

6.2.4 The Absolute Divide Between Law and Practice: The Invisibility of Same Sex Couples

A majority of countries do not give any formal recognition to same sex couples. A more in depth review of each country, however, may reveal more visibility for same sex couples than what statutes cover. Greece, Italy, and Romania are among the European Union countries that provide no rights to same sex couples. The Council of Europe and the European Court of Human Rights encourage the recognition of same sex couples.[219] These countries, therefore, should soon move towards some type of recognition of same sex couples, even if with limited rights.

In Italy[220] the Constitution states that "the Republic recognizes the rights of the family as a natural society based on marriage."[221] There have been several attempts to recognize same sex couples through registered partnerships regimes but all have failed.[222] Although there is no

[207] Report on the Czech Republic prepared by Professor Michaela Zuklínová [hereinafter Czech Report]. I would like to thank Mr. Peter Polasek for his assistance translating into English relevant parts of Czech's legislation.

[208] Zákon č 115/2006 Sb. (Czech Rep.), *available at* http://www.epravo.cz/top/zakony/sbirka-zakonu/zakon-ze-dne-26-ledna-2006-o-registrovanem-partnerstvi-a-o-zmene-nekterych-souvisejicich-zakonu-15257.html (last visited October 22, 2010).

[209] Czech Report, *supra* note 207, at 1.

[210] *Id.* at 1–2.

[211] Dr. Aisling Parkes, *National Report: Ireland*, 19 Am. U. J. Gender Soc. Pol'y & L. 221 (2011) [hereinafter Ireland Report].

[212] Constitution of the Republic of Ireland, art. 41 (3.1).

[213] Zappone and Gilligan v. Revenue Commissioners and Others, [2008] 2 IR 417.

[214] Civil Partnership Bill, 2009 (Bill No. 44b/2009) (Ir.), *available at* http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b44b09d.pdf (last visited July 16, 2010).

[215] *Id.*

[216] Ireland Report, *supra* note 211, at 223 (citing McD v. L and Anor. [2009] I.E.S.C. 81 (12th October, 2009) (S.C.)), *available at* http://www.supremecourt.ie/Judgments.nsf/60f9f366f10958d1802572ba003d3f45/a6dc1f1e70fed71380257688003 1aacb?OpenDocument.

[217] Ireland Report, *supra* note 211, at 223.

[218] McD. -v- L. & anor at 81(i) (The Court granted visitation rights to the father.).

[219] *See, e.g.*, Council Resolution A3-0028/94, Resolution on equal rights for homosexuals and lesbians in the EC, 1994 O.J. (C 61), Council Resolution 1728, Discrimination on the basis of sexual orientation and gender identity, April 29, 2010; *Schalk & Kopf v. Austria*, *supra* note 86 (recognizing that same sex couples enjoy family life).

[220] Virginia Zambrano, *National Report: Italy*, 19 Am. U. J. Gender Soc. Pol'y & L. 225 (2011) [hereinafter Italy Report].

[221] Constituzione [Constitution] art. 29 (Italy) ("La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. Il matrimonio è ordinato sull'eguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unità familiare.")

[222] Italy Report, *supra* note 220, at 235.

general recognition of same sex unions, Professor Virginia Zambrano refers to some regulations that grant limited protection as "family" to same sex partners. For instance, articles 4 and 5 of Reg. N. 223/1989 define "family" for the exclusive purpose of gathering vital statistics.[223] Article 4 refers to "famiglia anagrafica," a concept that would also include same sex couples. This definition has "served the purpose of creating special Registries (Registri delle unioni civili) aimed at conferring to cohabitants some administrative rights, especially social housing benefits," and also benefits for inmates, hospital visitations and medical decisions, among others.[224]

Italy follows the civil law tradition where judges are not bound by precedent. This feature is apparent in the many contradictory decisions about the meaning of the anti- discrimination clause set forth in Article 3 of the Italian Constitution.[225] For some judges, this clause is the basis for allowing same sex unions in Italy. For others, instead, there is no constitutional mandate to allow such recognition. As an example of a change in these decisions, Professor Zambrano refers to the decision of a court in Turin where judges held that "there is no reason to distinguish between marriage and same-sex unions, because both have in common the idea of living together."[226] Regardless of different courts' opinions, the view of the Constitutional Court is that marriage is a union between a man and a woman. In a ruling of April 14, 2010, the Court stated that it was a prerogative of the legislature to define marriage and dismissed arguments from three gay couples against decisions of a Venice court and the Turin Court of Appeals that had also interpreted marriage as an exclusively heterosexual institution.[227]

Professor Zambrano states that protection of same sex couples has come through contractual law.[228] It is common for same sex couples to enter into contractual obligations to distribute property, care, and make medical decisions on behalf of each other.[229] There are, however, many areas where contracts cannot replace the lack of public regulation. This is especially true with regards to Family Law but it also applies to other areas where no recognition of the partner as a next kin relegates that person to a secondary role in terms of inheritance rights, pensions, and tax, to name a few.[230]

Invisibility of same sex couples may be more evident in Greece[231] where its Parliament enacted in 2008 a "Free Unions Pact" that only applies to unmarried heterosexual partners.[232] The Greek Constitution protects the family using a language that could be interpreted as disconnected from marriage: "Article 21. 1. Family, being the cornerstone of the preservation and advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State." [233] According to Professor Alexander Fessas, this means that the Constitution protects all types of families and not only those originated in marriage. Additionally, the Constitution protects marriage without defining it and there seems to be no consensus as to what the constitutional protection of marriage covers.[234] One opinion is that the Constitution protects marriage as the Greek society understands it, including the requirement of opposite sex among the parties. If this was the case, Congress could not redefine marriage to include same sex couples. A different interpretation indicates that marriage can be viewed as a concept "detached of social perceptions,"[235] in constant evolution. According to this interpretation, same sex marriage could enjoy constitutional protection. For now, Greece maintains the traditional interpretation of marriage.

[223] *Id.* at 233.

[224] *Id.*

[225] Constituzione [Constitution] art. 3(Italy) ("Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali. È compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese.").

[226] Italy Report, *supra* note 220, at 234 (citing Corte d'assise Turin, sect. I, ord., 19th November 1999 (Italy)).

[227] *Matrimoni gay, no della Consulta ai ricorsi "Materia di competenza del Parlamento,"* La Republicca (It.), April 14, 2010, *available at* http://www.repubblica.it/cronaca/2010/04/14/news/consulta_matrimoni_gay-3344318/ (last visited Nov. 20, 2010).

[228] Italy Report, *supra* note 220, at 236.

[229] *Id.*

[230] *Id.* at 237.

[231] Alexander G. Fessas, *National Report: Greece*, 19 Am. U. J. Gender Soc. Pol'y & L. 187 (2011) [hereinafter Greece Report].

[232] *Id.* at 200.

[233] *Id.* at 191.

[234] *Id.* at 191–92.

[235] *Id* at 192.

In Romania[236] there is no civil union or registered partnership for opposite or same sex couples but unions registered in other European countries are recognized as such for purposes of entry to Romania.[237] Thus, while same sex partners are recognized as family members of a European citizen for immigration purposes, no rights derived from such unions are recognized in the country.

Outside the European Union, but with a special interest in joining it, Turkey[238] is also among those countries that deny all rights to same sex couples. The Turkish Constitution does not contain express mention to marriage. It states that family is the foundation of Turkish society but it does not provide any specific definition.[239] Legally, marriage requires the union of a man and a woman and no other form of civil union exists for opposite or same sex couples.[240] There seems to be no cases of same sex couples legally challenging Turkish law. There are, however, several decisions of the Court of Cassation that rule out granting rights to heterosexual unmarried couples because such arrangements would be against morality.[241]

Despite this strict interpretation of the concept of marriage, Professors Başoğlu and Yasan believe that contract law may be used to regulate property between same sex couples and that Turkish torts law allows the surviving same sex partner to recover damages in case of wrongful death of her partner, as long as she can prove that the deceased was her financial provider.[242]

Turkey's official stance on same sex couples is very clear. Gay marriage and same sex families have expressly been rejected by the Turkish government.

Last, a very interesting case of legal invisibility of same sex couples is that of Japan.[243] The Japanese Constitution defines marriage as between a man and a woman by stating that "[m]arriage shall be based only on the mutual consent of both sexes and it shall be maintained through co-operation with the equal rights of husband and wife as a basis."[244] Same sex marriage, therefore, would likely require a constitutional amendment. Regulation of same sex couples through registered partnership would be constitutionally acceptable but according to Professor Teiko Tamaki there have been no attempts, nor even discussions, about recognizing rights to same sex couples.[245]

As with other countries where there is no recognition of rights for same sex couples, gay and lesbian individuals have found alternative means to regulate their relationships. Just as in Italy, Japanese same sex couples can enter into a contractual relationship through a notary deed.[246] Another practice is to use adoption of one partner by the other partner to create kinship and family rights and obligations.[247] As Professor Tamaki states, "[o]nce the ordinary adoption arrangement is successfully made between same-sex couples, they are in a parent-child relationship on the surface with the same legal rights enjoyed by any other natural parent-child relationship and adopted parent-child relationship, the mutual rights and duties of support and succession."[248]

In Japan there are two types of adoption: ordinary adoption (*futsu yo-shi*) and special adoption (*tokubetsu yo-shi*).[249] Ordinary adoption allows an adult to adopt another adult. It is a simple procedure that does not require a court authorization and can be requested before a municipal officer. Professor Tamaki points out that according to statistics, the majority of adoptions are of this kind and special adoptions, which would be the procedure for adopting a child, amount to around 1% of all adoptions.[250] This does not mean, however, that most of these adoptions are done by same sex couples. But even if a small number of couples use this method of forming a family, it is still interesting how pervasive the knowledge of this practice is.[251]

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[236] Report on Romania prepared by Professors Cristiana Craciunescu and Dan Lupascu [hereinafter Romania Report].

[237] *Id.* at 3–4

[238] Başak Başoğlu & Candan Yasan, National Report: Turkey, 19 AM. U. J. Gender Soc. Pol'y & L. 319 (2011) [hereinafter Turkey Report].

[239] *Id.* at 320.

[240] *Id.* at 321.

[241] *Id.* at 325 (citing decision 355/6349, 13th Civil Chamber of the Court of Cassation (Turk.), April 24, 2006).

[242] *Id.* at 322.

[243] Teiko Tamaki, National Report: Japan, 19 Am. U. J. Gender Soc. Pol'y & L. 251 (2011) [hereinafter Japan Report].

[244] Kenpō [Constitution] art. 24.

[245] Japan Report, *supra* note 243, at 255.

[246] *Id.* at 260.

[247] *Id.* at 259–60.

[248] *Id.*

[249] *Id.* at 259.

[250] *Id.*

[251] For a description of both adoption and notary deeds by same sex couples in Japan, see Claire Maree, "Same–Sex Partnerships in Japan: Bypasses and Other Alternatives," Women's Studies 33.4 (2004): 541–549.

6.3 The Most Recurrent Arguments for and Against Same Sex Marriage

6.3.1 The Essentialist Arguments

Professors Martínez de Aguirre Aldaz and De Pablo Contreras advance this type of argument by claiming that the correct interpretation of article 32 of the Spanish constitution should have not led to the authorization of same sex marriage.[252] In their opinion, the grammatical interpretation of this article should take the constitutional interpreter to the Dictionary of the Royal Academy of the Spanish Language where marriage is defined as a long term union between a man and a woman.[253] The word "marriage", therefore, would *require* a man and a woman. This argument would be reaffirmed by looking at the etymology of the word matrimony that comes from the Latin "Matri," meaning "mother," and Mony or Monium, meaning "status, role, or function."[254] They argue, therefore, that matrimony is a concept intrinsically linked to becoming a mother and the possibility of procreation.

In opinion of Professors Martínez de Aguirre and De Pablo "[i]f the union is between two men or two women it is then not marriage, but rather another different human and social phenomenon, for the same reason that the sale of something for no money is not a sale but a donation, and saying that a donation is not a sale is not pejorative against the donation, but simply defining substantially different truths, subject to different legal treatment."[255]

A similar argument can be found in the French report. Professor Fulchiron states that in the core of the definition of marriage, the difference of sex is embedded in culture.[256] He claims that even beyond the Judeo Christian culture, marriage has historically been conceived as a union between a man and a woman, regardless of each society's acceptance or not of homosexuality.[257]

According to these arguments, there was no need to define marriage as between a man and a woman because it was structurally required to have two sexes for it to exist as such. The reports for Portugal, Greece, Italy, and Uruguay rely on what is known in the civil law tradition as "the theory of the inexistence" to explain why the lack of two opposite sex individuals in a marriage contract did not make that contract null but rather inexistent.[258] The theory of the inexistence was adopted in article 146 of the French Civil Code for the case of lack of consent.[259] It has been used by legal scholars to explain that a marriage between two individuals of the same sex would be inexistent too.[260] Professors Martinez de Aguirre and De Pablo Contreras give the example of a sales contract.[261] If there is no price to be paid, the sales contract is not null; it does not exist as a sales contract and it exists as a donation. Same sex marriage, according to this theory, would not be a marriage but something different that needs to be named differently. That was also the position of a court in Italy to justify its holding that in Italy, though not expressly established by the Civil Code, marriage is a union between a man and a woman. Professor Zambrano explains that the rationale of the court was that "[t]he fact that the Italian legislator, in establishing the eligibility conditions for marriage did not make any reference to the difference of sex was interpreted by these judges as the proof that same sex marriage must be seen as non-existent (*inesistente*) at all."[262] Another example of the ontological position is Sect. 1 of the Michigan Marriage Protection Act of 1996: "Marriage is *inherently* a unique relationship between a man and a woman…"[263]

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[252] Spain Report, *supra* note 18, at 295.

[253] *Id.*

[254] The Random House Dictionary of the English Language (unabridged) 1186, 1247 (2nd ed. 1982).

[255] Spain Report, *supra* note 18, at 295.

[256] France Report, *supra* note 166, at 130.

[257] *Id.*

[258] See Henry Capitant, *Introduction à l'étude du droit civil: Notions générales* (Paris: A. Pedone, 1898), 250–251.

[259] Code civil [C. civ.] Article 146 (Fr.) ("Il n'y a pas de mariage lorsqu'il n'y a point de consentement.").

[260] For a brief account on the theory of the inexistence, see Ricardo Victor Guarinoni, "De lo que no hay. La Inexistencia Jurídica" Cuadernos de Filosofía del Derecho (Spain), Doxa N. 25, 2002. 637–653. Reference to the use of the theory of inexistence in the context of same sex marriage in Germany can be found in W. Müller-Freienfels, "Family Law and the Law of Succession in Germany," *International and Comparative Law Quaterly* 16 (1967): 431.

[261] Spain Report, *supra* note 18, at 295.

[262] Italy Report, *supra* note 220, at 247, referring to Trib. Latina (Italy), 10th June 2005.

[263] MICH. COMP. LAWS SERV. § 551.1 (2007) (emphasis added).

Professor Duarte mentions in his report that marriage between two individuals of the same sex was inexistent in Portugal before last May.[264] Now, same sex marriage exists and it is legal.[265] If the argument on the nature of things is right, it would be irrelevant that same sex marriage was legal in Portugal, or in Spain or in any other country. All these countries would be mistaken by calling marriage something that is not marriage. If things are what they are and not a different thing, then it would not be possible for the law to order them to be something different.

There are three different options with regards to the ontological argument. The first option is to take the position that countries that have passed same sex marriage laws have made a conceptual mistake. Under this argument, countries where marriage is a union between a man and a woman should not recognize any effects to same sex marriage because it is not a real marriage. Each country may decide to call a same sex union a marriage and give it the effects of marriage, but because it is structurally not a marriage, no one should be forced to recognize such unions as marriage. This position is not necessarily incompatible with believing in the recognition of rights for same sex couples, but only with the option of opening up marriage to same sex couples. There is, nonetheless, a stronger version of this argument that is incompatible with same sex unions in general. The stronger version is usually based on a faith argument that cannot be disputed because it goes beyond rationality. Some reports tangentially touched on religious bases for regulating marriage but it was not thoroughly advanced by any. I will not refer to this argument here since no report elaborated on these types of arguments.[266]

[264] Portugal Report, *supra* note 50, at 2.

[265] *Id.*

[266] For an overview of such arguments, see John M. Finnis, "Law, Morality, and "Sexual Orientation,"" *Notre Dame Law Review* 69 (1994), 1062–1063 ("At the heart of the Platonic–Aristotelian and later ancient philosophical rejections of all homosexual conduct, and thus of the modern "gay" ideology, are three fundamental theses: (1) The commitment of a man and woman to each other in the sexual union of marriage is intrinsically good and reasonable, and is incompatible with sexual relations outside marriage. (2) Homosexual acts are radically and peculiarly non-marital, and for that reason intrinsically unreasonable and unnatural. (3) Furthermore, according to Plato, if not Aristotle, homosexual acts have a special similarity to solitary masturbation, and both types of radically non-marital act are manifestly unworthy of the human being and immoral.").

The second option is to argue that it is a mistake t affirm that different sex is essential to marriag Marriage could be defined as a union between individu als emotionally tied to each other. Even if historicall the most common definition of marriage has require two individuals of different sex, it would be possible t argue that marriage remains a marriage if more tha two people enter into a relationship, or if people of th same sex do so. Professor Fulchiron states that polyg amy and same sex are not the same variables in the con ceptualization of marriage.[267] Polygamy is marriage although not accepted by French law, but same se marriage is not.[268]

The question is, then, what is essential to marriage Indisputably, it requires the participation of at leas two individuals. One person alone cannot marry. I also requires that all parties to the marriage be recognized as individuals by a legal system but it is still marriage if some of the parties to a marriage are legally treated as individuals of lesser value. Also, most legal systems today pose some restrictions on kinship. Are these restrictions essential to marriage? Does marriage require sexual activity between the parties? Does it require emotional support between the parties? There are conflicting answers to these questions and greater issues about family, citizenship and moral values lie behind each position.

In theory there can be essentialist arguments in favor of same sex marriage but essentialists are found primarily on the side of heterosexual marriage advocates.

The third option is to reject essentialism completely and argue that the concept of marriage can mutate from one thing to another. In other words, the law would have the power to define legal concepts. Marriage, thus, may have been a union between a man and a woman but it can now be a union between two individuals of any sex. Marriage can be a union between several men and one woman, or it can be a union between several women and one man, or any combination in between.

It seems that legal systems define and redefine things rather often. Law defines, for legal purposes, life and death. In the Catholic tradition, many women and men baptize the unborn dead fetus and give the fetus a Christian burial. In most Western traditions, however, a dead fetus was never a person. The same happens

[267] France Report, *supra* note 166, at 138.

[268] *Id.*

with death. Law defines the moment of death even if for religious purposes, or even by medical standards, the person may still be alive. Historically, personhood has been legally defined and redefined, sex has been defined and redefined, and many other concepts have been created by laws only to be recreated by different laws. Marriage, therefore, could change too. But there are limits to the process of definition and redefinition, and legal marriage must keep some relation to the social understanding of marriage. At the same time, all legal definitions must respect a framework of human rights. With these restrictions in mind, it would be possible to redefine marriage to include other unions such as those between same-sex couples.

6.3.2 The Teleological Arguments

A second set of arguments that recur in the reports as well as in general literature about marriage relates to the purposes of marriage, or more specifically, the purpose of the state protection of marriage. Many reports assert that refusal to recognize rights to same sex couples have been based on a belief that the state has an interest in protecting heterosexual couples as the only units capable of procreating. That would be the fundamental difference between a couple where both parties are of the same sex and one where they are of different sex. It is not the fact that they will procreate or that in a particular union the goal will be to procreate. It is the general interest of the state to protect associations that will secure procreation. This argument was used in Canada before they granted full recognition of same sex marriage. The Supreme Court of Canada stated then that marriage's "ultimate *raison d'être* (...) is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship."[269] In Belgium this was also an important argument against the recognition of same sex marriage.[270]

A more complex teleological argument is one that links marriage to family in general. The purpose of marriage would not only be to ensure procreation but it would also be to protect family in general by maintaining marriage as the exclusive option to create kinship outside consanguinity. Marriage creates parents who are linked to their children and are also linked to the families of their spouses.

These two reasons are the ones that make Professor Fulchiron affirm that in France, marriage covers the family and PACS is intended to cover the partnership.[271] Marriage would be naturally linked to procreation and to family. This is not the same in the case of same sex couples, who are not naturally linked to procreation.

The question behind the teleological arguments is what the meaning of legal marriage is. Why would a country protect some types of associations over others? Historically, marriage has served several distinct purposes that range from controlling women, controlling sex, controlling offspring, and controlling property, among others.[272] Before the rise of DNA tests, marriage was the most efficient signaling of paternity, and the most efficient tool, therefore, to claim alimony from estranged or irresponsible fathers.

Gradually different countries have been relaxing their rules regarding parenting, but have kept marriage as the ideal of family formation. Countries reviewed for this report show a tension between equality and family rights. Portugal even redefined marriage but was unable to provide adoption rights and access to parenting to same sex couples.[273] Countries such as Denmark or the Netherlands were also hesitant to open the door to parenting to same sex couples, and many countries seem to be ready to equalize all aspects of a same sex relationship with all aspects of marriage but parenting.

There is a recurrent tension between the right to privacy and the right to family. We learn from Professor

[269] Egan v. Canada, (1995) 2 S.C.R. 515 (Can.). Professor Bureau states in the Canada Report that this argument was then abandoned in other decisions such as EGALE Canada Inc. v. Canada, (2003) 13 B.C.L.R.2d 1 (B.C. Ct. App.).

[270] Belgium Report, *supra* note 12, at 66–67.

[271] France Report, *supra* note 166, at 131.

[272] In medieval Europe, marriage was "an institution by which men were confirmed as the masters of their wives on religious and legal grounds. But it was also a union intended to provide for the well-being of both parties and eventually their children. At the peasant level marriage was largely an economic arrangement (...). A bride's dowry consisting of money, goods, animals, or land was essential to the founding of a new household." Marilyn Yalom, *A History of the Wife* (New York: HarperCollins 2001), 47.

[273] Portugal Report, *supra* note 50, at 2.

Aichberger-Beig that the right to private life guaranteed in Article 8 of the European Convention of Human Rights was used by the Austrian Constitutional Court to base its decision to treat unmarried couples of opposite or same sex equally.[274] Countries that accept same sex unions have done so by recognizing that individuals have the right to engage in relationships of their desire. This right, however, seems to end when it clashes with the right to family. Professors Swennen and Leleu state that the constitutional challenge to the legal recognition of same sex marriage in Belgium was based in part in the idea that the law was assimilating different situations: on one hand, people who wish to found a family with a person of the opposite sex, and, on the other, people who wish to enter into a cohabitation regime with a person from the same sex.[275] The claim implies that individuals would have a right to form a partnership with whomever they wish, but that this would be a different situation than wishing to form a family, which could only be done by individuals of opposite sex.

This has been the approach of the ECHR to encourage European countries to recognize rights to same sex couples, and at the same time, maintain that marriage is still a heterosexual institution. Article 8 of the European Convention of Human Rights protects the right to private and family life, whereas Article 12 protects the right to marry and to found a family.[276] Professor Norrie states that the ECHR has been hesitant to use the "right to family life" of Article 8 to decide cases that involve sexual orientation claims. Instead, it has focused its attention on the "right to private life" of the same Article.[277]

There are additional teleological arguments in favor of same sex marriage. The exposition of reasons to introduce same sex marriage (*Exposé des motifs*) in the Belgian Bill stated that "in our contemporary society, marriage is lived and felt as a (formal) relationship between two people, whose primary goal is the creation of a lasting cohabitation. (...)"[278] "Today, the purpose of marriage is essentially to show and affirm the intimate relationship between two people, and marriage loses its procreative character -, there is no reason not to expand marriage to same sex persons."[279]

The argument that the state must protect marriage because of its procreative nature may be the strongest argument against same sex marriage. The state, after all, has an interest in ensuring that new citizens will be born. It has an interest also in ensuring that these new citizens will be raised in loving environments. At the same time, states also have an interest in protecting their own citizens from discrimination and providing an environment that tends toward the pursuit of happiness and self realization. Is it necessary to restrict one in order to protect the other? Is restricting marriage to opposite sex couples the least harmful means to protect procreation? And is it the most effective way to do so?

6.3.3 Marriage as Symbol, but of What?

Several reports refer to the importance of marriage as a symbol, "[s]omething used for or regarded as representing something else."[280] With marriage states are protecting something beyond the solemn act of marriage. Nonetheless, it seems that in some cases the symbol has transcended the idea or thing that it was meant to represent becoming at the same time the signifier and the signified.

Professor Witzleb states, regarding Australia, that "(s)ame-sex marriage is generally no longer needed to achieve equal entitlements and protection before the law. The inequality now lies predominantly in withholding from gay men and lesbians the possibility of giving status to their relationship through an official act celebrating and confirming the existence of that relationship."[281] In South Africa, the Marriage Act remained intact and a different institution, also called marriage but under a different Act, was created.[282]

Registration authority and name change have been recurrent concerns in countries passing registered partnership or civil union regulations. Whether the

[274] Austria Report, *supra* note 127, at 3.

[275] Belgium report, *supra* note 12, at 69.

[276] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 8 and 12, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

[277] UK Report, *supra* note 79, at 331.

[278] Belgium Report, *supra* note 12, at 68.

[279] *Id.* at n.49.

[280] The Random House Dictionary of the English Language (unabridged) 1926 (2nd ed. 1982).

[281] Australia Report, *supra* note 97, at 12.

[282] South Africa Report, *supra* note 35, at 280–81.

authority that can register same sex partners (or partners in general) will be the same one that registers marriages was an issue in Denmark and Austria.[283] In Germany those states who opposed ELp left registration to public notaries instead of giving it to the same authority that registers marriages.[284] In Hungary name change was not allowed for registered partners.[285] In Austria registered partnership contemplates the option of name change but as oppose to marriage, the new statute did not refer to this new name as "family name."[286]

The use of marriage as primarily a symbol is found in countries that have created parallel institutions to marriage via registration or recognition of cohabitation and have granted these unions the same rights enjoyed by married couples. United Kingdom and, to great extent, Australia are good examples of this model.[287] If married and unmarried couples or registered partners enjoy the same benefits, rights and obligations, the only added value provided to married couples is a social signifier of their status. As a social signal, the act of marriage is twofold: it facilitates the matching process by acting as a *prima facie* guarantee of commitment, and it is a sign to the rest of society that the relationship between two individuals has an expectancy of a long-term commitment.[288] But why would the State have to facilitate this process for some groups only? It seems that either marriage must stand for something more substantive than a social signifier, or it may well surrender to the fact that it is the standing façade of an old structure that with time has ceded.

If the purposes of marriage—the signified—have lost meaning, the signifier loses meaning too. In those countries where access to parenting is fully restricted to heterosexual married couples, the symbolic nature of marriage makes sense because there is a direct correlation between symbol and purpose: procreation within marriage. Regardless of whether this norm is fair, the symbolism and the substantive objectives behind it are tied together. For example, today marriage makes sense in Romania where only heterosexual couples can marry and no one but married couples can form co-parental families.[289] This, however, is not a statement about the appropriateness of the substantive norm that marriage protects. It may well be that the reasons that lie behind marriage in a particular country do not conform to current standards of treatment of individuals in the eyes of international law or in the eyes of the country's own constitutional values. It can also mean that in practical terms marriage is not fulfilling the purpose that it was meant to carry out. This would be the case, for example, of a country whose statutes recognize only heterosexual married couples but the number of out of wedlock children is almost as large as or larger than the number of children born within marriages. In cases where the purpose of marriage fails, so should the symbol.

Marriage as a symbol can also be analyzed from a different perspective, as the need for legal systems to rely on forms. This is simply the formalist feature of the law. Atiyah and Summers, state that legal reasoning can be formal or substantive. Substantive reasons are those based on "moral, economic, political, institutional or other social consideration[s]."[290] They "serve as primary ingredients of most constitutions, statutes, precedents, and other legally recognized phenomena (...) which give rise to formal reasoning."[291] Formal reasons give judges the power to decide on the bases of a rule that usually excludes any other consideration. "Unlike a substantive reason, a formal reason necessarily presupposes a valid law or other valid legal phenomenon, such as a contract or a verdict."[292]

Formal reasons presuppose that someone else, at a different level, has already weighed all substantive reasons that could be behind the signifier that will replace all other reasons. In this sense, a formal reason has to be created taking into account substantive objectives that the legal system wants to protect. Age requirements to exercise the right to vote or to obtain a driver's

[283] Denmark Report, *supra* note 90, at 120; Austria Report, *supra* note 130, at 6–7.

[284] Germany Report, *supra* note 116, at 167.

[285] Hungary Report, *supra* note 144, at 212.

[286] Austria Report, *supra* note 127, at 7.

[287] UK Report, *supra* note 79, at 333; Australia Report, *supra* note 97, at 6–7.

[288] *See* Robert Rowthorn, "Marriage as a signal," in *The Law and Economics of Marriage and Divorce*, ed. Anthony W. Dnes and Robert Rowthorn (Cambridge: Cambridge University Press, 2002), 141.

[289] Romania Report, *supra* note 236, at 5.

[290] P.S. Atiyah and Robert S. Summers, *Form and substance in Anglo-American law: a comparative study of legal reasoning, legal theory, and legal institutions*, 5 (Oxford: Clarendon Paperbacks, 1987).

[291] *Id.*

[292] *Id.* at 2.

license are examples of formal reasons. Just like voting age, marriage would be "a formal reason for making many decisions."[293] As Atiyah points out, marriage is used as a formal reason to allocate resources, define entitlements, and provide benefits. In his opinion, "[s]o many different questions arise about how we are to treat two parties in some sort of relationship that it is exceedingly convenient and cost-effective to make the answers turn uniformly on one simple formal proposition. Are they married or not?"[294] Formal reasons, however, must change when the substantive reasons that support them change. Marriage used to be evidence of meaningful relationships of one type. Once societies start accepting other meaningful relationships, either these relationships are also included in the formal reason by expanding marriage, or the formal reason loses all meaning. It is no longer efficient for the system to rely on that particular formal marker. Judges often find themselves reviewing a claim that a certain benefit, or a certain share of property, should be granted to the plaintiff as if she were in possession of a marriage certificate that she does not actually have. Individuals urge judges not to look at the formality—the existence of a marriage certificate—but to the substantive reasons that lie behind it.

Marriage used as a legal formal reason is a great argument for expanding the concept of marriage to same sex couples. It reduces claims in courts from gay and lesbian partners requesting the right to hospital visitations, the right to pension benefits, or the right to succession. The formality of marriage, on the contrary, works against assimilation of married and unmarried couples. A system where different forms of association may qualify for legal recognition is certainly more complex than one that attaches rights to a marriage certificate. Nonetheless, Atiyah's assertion that "special rules for long-term cohabitants and also for *intending* long term cohabitants would be an immensely costly and troublesome business"[295] has been already put to test in Canada, Australia, and the United Kingdom, among others. None of the reports have referred to complications, if any, that the change in their regulations may have brought to the adjudicative process.

[293] P.S. Atiyah, Essays on Contract 105 (Clarendon Paperbacks 1986).
[294] *Id.* at 107.
[295] *Id.*

All countries that have opened their legal systems to include same sex couples as legitimate associations worth of recognition (partial or total), have done so after their systems were challenged in court by same sex couples. These trials have been specific to a particular right, as in Colombia, or they have been directly aimed at claiming the right to marry, as in South Africa.

In countries where same-sex couples are invisible in legal statutes, they are very much visible in courts. Judges following their countries' formal signifiers may deny rights to same-sex couples, but these claims show a reality that clashes with the legal construction of emotional associations chosen by such country. What the national reports reviewed here show is that the formality of marriage is often outweighed by substantive reasons in courts.

6.4 Conclusions

Whether scholars and political scientists agree with the direction that family law is taking, it is undeniable that there is a movement towards the recognition of same sex couples as family units, at least in Europe and in the Americas. Same sex marriage, however, is not yet the common type of recognition. Instead, countries have accommodated same sex couples into their legal systems almost as a tacit admission that same sex cohabitation happens, and it has legal consequences that must be regulated. In countries with no recognition of same sex couples, gay and lesbian couples exist and find ways of accommodating at least their basic partnership needs within their legal systems.

These changes in family law pose several challenges both at local and international level. Among these challenges, three can be directly drawn from the country reports reviewed for this work. The first challenge is the relationship between international private law and family law; the second relates to parenting; and the final challenge is the role that international courts play in family law structures.

One of the main obstacles that same sex marriage and registered partnership regimes face in a global world is the recognition of these unions by different countries. The variety of legal regimes for same sex couples will most likely trigger a global change in international private law. Some countries have established rules about how to treat same sex marriages or partnerships performed or recognized abroad.

Most countries, however, have not thought of this issue yet. For a same sex couple, the uncertainty of whether their relationship will be recognized abroad creates a major difference from opposite sex couples.

As long as the majority of countries still define marriage as a union between a man and a woman, a lesbian couple married in Belgium will be less willing to move overseas than a heterosexual couple. At a minimum, same-sex couples thinking of relocation have to weigh arguments that heterosexual couples do not have to consider.

Another challenge that countries face is access to parenting by same sex couples. In some countries the redefinition of marriage as open to same and opposite sex couples has meant that not all marriages are the same. In those countries, as in Portugal, marriage is no longer one single institution but two different institutions that use the same name. In a way, redefining marriage in those terms is like redefining citizenship and having one group of citizens with the right to vote and another group without it.

Countries have moved from strict regulations where only children born within marriage were recognized as legitimate and had access to rights, to regimes where no difference or very little difference is made between children born within marriage and out of wedlock. Countries have also moved from strict adoption laws where only married couples could adopt children to systems in which single individuals can also become adoptive parents. Once parenting is recognized outside marriage, it is difficult to maintain privileges for only one model of parenting.

The complexity of biology must be added to the complexity of adoption regulation. Today procreation is possible in ways unthinkable 50 years ago. If contraception made possible for women to choose if or when to have children, assisted reproductive technologies have made possible for women to choose their family structure. Single women can decide to have a child alone, and lesbian couples can decide to become mothers, all this without emotional ties and even with anonymous sperm donors. In addition to the variety of assisted reproductive technologies, surrogacy is now a reality that opens up the possibility for gay male couples to become fathers too. As stated in this report, some countries treat assisted reproductive technologies as a health issue open to all women regardless of their sexual orientation and marital status.[296] Other countries restrict these technologies to married couples or to heterosexual couples.[297] Surrogacy is forbidden in many countries, others forbid it only if for profit, and other jurisdictions allow it completely.[298] Today there are many more alternatives to become a family than in past generations. Until recently, it was up to each country to determine if the legal concept of family and the social concept of family would coincide or not. In today's culture of universal human rights and international legal regulation, this may not be an exclusively national prerogative. The European Court of Human Rights reinforces this idea in its decision *Schalk and Kopf v. Austria.* Although the Court was not willing to recognize that under the European Convention of Human Rights there was a right for same sex couples to marry, it did change its past interpretation recognizing same sex couples a right to family life.[299]

This is precisely the third challenge that countries are facing with regards to family law. The "national" has become "international" and family law is not isolated from this phenomenon. Traditionally family law has been treated as a local construction that, although regulated by law, transcends its legal conceptualization to ultimately reflect the most intimate cultural values of a nation. For a long time, international law was seen as unrelated to family law. This was reasonable given that families were also shielded from local legal intervention. As inequalities within the family structure have been uncovered, countries have allowed more legal intervention within the family. International law started to intervene when family law issues were presented as human rights issues.

International systems of protection of human rights have evolved from a role of guarantors of a minimal treatment of respect of human rights to a role of authentic interpreters of the concepts of human rights. With this new role, its involvement in shaping family law is inevitable. The *Schalk and Kopf* case recently decided by the ECHR provides a good example of the current intervention of international courts in family law. The Court denied that a heterosexual definition of marriage amounts to discrimination, but it left the door open to revisit this decision as European countries evolve towards more comprehensive definitions of marriage.[300]

[296] This is the case of Denmark. Denmark Report, *supra* note 90, at 118.

[297] Israel Report, *supra* note 151, at 19–20.

[298] Germany Report, *supra* note 116, at 173; *see also* Belgium Report, *supra note* 12.

[299] *Schalk and Kopf*, *supra* note 86, at 94.

[300] *Id.* at 105.

The analysis of same sex couples in different countries shows unease in this area. Changes will keep coming and tensions within countries and among countries regarding same sex couples will continue. It seems that the statement made by Mr. Martin Cauchon as Minister of Justice and Attorney General of Canada in 2002 is still very much pertinent:

> Not just in Canada but around the world, individuals and their governments have debated whether marriage has a continuing value to society, and if so whether and how the state should recognize married relationships in law. The Canadian public, like those in many other countries, are divided on this question. Some feel strongly that governments should continue to support marriage as an opposite-sex institution, since married couples and their children are the principal social unit on which our society is based. Others believe that, for reasons of equality, governments should treat all conjugal relationships—opposite—sex and same-sex—identically. Still others believe that in a modern society, governments should cease to recognize any one form of relationship over another and that marriage should be removed from the law and left to individuals and their religious institutions.[40]

[40] Department of Justice of Canada, Discussion Paper, *Marriage and Legal Recognition of Same Sex Unions*, (November 2002). http://www.justice.gc.ca/eng/dept-min/pub/mar/mar.pdf (last visited October 22, 2010).