

# Are Wedding Bells Ringing for Same-Sex Marriages? The Legal Trends and Social Perspectives of Europe, Canada and the United States

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## A. Introduction

The word ‘marriage’ connotes the traditional image of a union between a man and a woman. In the United States, the federal laws codified marriage as a “legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”<sup>1</sup> However, this traditional notion of marriage is currently being challenged and undergoing reforms globally to include same-sex marriage. These transformations are not without oppositions as the Vatican has weighed in on the debate by reasserting that “marriage exists solely between a man and a woman.”<sup>2</sup> Currently, only two European countries, the Netherlands and Belgium, Canada and now the state of Massachusetts in America recognize same-sex marriages.

Marriage is important because it gives legal status, as well as further cements the commitment and love between two people. This multi-faceted institution symbolizes the furtherance of life and love to the next level. At one point, marriage was the only recognized family form. Unmarried cohabitating couples were seen as indulging in meretricious relationships and these binds were legally unrecognized. Later on, cohabitation laws were passed acknowledging and accepting unmarried cohabitation in the United States and in European countries. Additionally, in the United States, marriages between African Americans and Caucasians were prohibited, but this too has changed with time.

Wedlock automatically establishes status, which entitles spouses to a broad range of benefits, rights and protections under the law. Some of these advantages include: making medical decisions for a spouse; hospital and jail visitation, which are restricted to only immediate family members; enjoyment of the

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<sup>1</sup> 1 U.S.C.S. §7 (2003). The Federal Defense of Marriage Act is applicable at the federal level and does not prohibit states from recognizing same-sex marriage.

<sup>2</sup> Congregation for the Doctrine of the Faith, Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons, (3 June 2003), at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html) (last visited 9 March 2006); see also S. Arie, *EU Goes Dutch on Gay Rights*, Guardian Unlimited, 25 Sept. 2003, at <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,1049374,00.html> (last visited 9 March 2006).

spouse's employment benefits, such as health, dental and medical insurance; inheritance; spousal testimonial privilege; and custody of children. Couples also enjoy preferences in being appointed as a representative of an intestate decedent; standing to bring an action for wrongful death of the spouse; and various social security benefits.

This essay will review some of same-sex legislations in Europe, Canada and the United States. In the past decade, strides have been made in granting same-sex couples those benefits and rights associated with marriage as mentioned above. Several European countries, such as Denmark and Sweden, have enacted registered partnership acts which recognize same-sex relationships by granting them similar privileges as those granted in heterosexual marriages. The registered partnership laws allow same-sex couples to register their relationship with the government thus providing the same liberties to couples. Sweden also provides cohabitating homosexuals limited rights by only regulating property rights between the couple. Going beyond registered partnerships, the Netherlands and Belgium have also granted same-sex couples the right to legally marry.

In the age of globalisation, the effects of the same-sex legislation in some European countries are bound to affect laws in North America, particularly Canada and the United States. Canada has been the more liberal country with its focus on human rights as opposed to the United States. In the summer of 2003, judicial decisions in Canada caused a national debate over same-sex marriage legislation in the United States. Canada appears to be following the European pioneers in same-sex legislation.

Unlike its neighbouring country to the North, the United States does not recognize same-sex marriage or civil unions. Here the attitudes toward same-sex marriage are mostly negative. However, a few states, such as Vermont and California recognize a form of civil union between same-sex couples. Recently, the Massachusetts Supreme Court ruled that same-sex couples must be given the right to marry. Additionally, other states in America grant domestic partnership, which is largely a symbolic gesture rather than a law that provides substantial protection, benefits and rights to same-sex couples.

## **B. The European Pioneers**

### **I. Denmark's Registered Partnership Act**

The mobilization for legislation in Denmark on legalising same-sex relationships began in the late 1960s. During this period, the Danish National Association for Gays and Lesbians became more visible as student movements pushed for a more liberal view of sexuality. In 1984, this Association proposed legislation on homosexual relationships. Two members of the Association were appointed to the Commission created by the Parliament to study the legal, social and cultural aspect of homosexuals. Before the Commission had completed its report, the partnership legislation was introduced in Parliament. The partnership

legislation passed with seventy-one votes in favour of legalisation as opposed to forty-one votes against it.<sup>3</sup>

Thus in 1989, Denmark became the first western country to recognize same-sex relationships with the enactment of the Registered Partnership Act.<sup>4</sup> This legislation was significant because it meant social acceptance of homosexuals by providing them with a similar framework as married couples. Similar to marriage, the registered partnership “constitute[s] a legally binding relationship between two people.”<sup>5</sup> However, the main difference is that marriage is between a man and a woman whereas registered partnership is between two persons of the same sex.

## II. The Netherlands: ‘Opening Up Marriage to Same-Sex Partners’

The Netherlands is unique in that it was the first country to legally recognize same-sex marriages in April 2001. It thus appears to be a leader in novelising marriage law, but it was almost a decade after Denmark passed its Registered Partnership Act, that the Netherlands in 1998 passed similar same-sex partnership legislation. The main difference between the two countries’ registered partnership law is that in the Netherlands, the registered partnership legislation allows both opposite sex couples and same-sex couples to register for marriage.

Recognizing that same-sex couples have full equality under the Dutch Registered Partnership law was a huge step, so there were some limitations imposed. Similar to the Danish Registered Partnership passed in 1989, the Dutch Registered Partnership law excluded same-sex couples from adopting children and foreigners were excluded from registering under this act. Also, pension benefits for same-sex couples were smaller because the calculation of benefits began after 1997. The main thrust to change the adoption law with respect to same-sex couples led to the change in the marriage law in 2001.

The Kortmann Committee consisting of legal experts established by the Dutch government, concluded that it was “undesirable to have too many legal forms of two-person relationship with only minor difference between them.”<sup>6</sup> The opponents believed that the Netherlands should not move too far away from the majority of the world view by allowing same-sex marriages as this could

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<sup>3</sup> See, e.g., I. Lund-Andersen, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?*, in R. Wintemute & M. Andenaes (Eds.), *Legal Recognition of Same Sex Partnership: A Study of National, European, and International Law* 417-419 (2001). See also *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 Harv. L. Rev. 2004 (2003) [hereinafter *Inching Down*].

<sup>4</sup> See C.J. Sgalla McClure, *A Case for Same Sex Marriage: A Look At Change Around the Globe And In The United States, Including Baker v. Vermont*, 29 Cap. U.L. Rev. 783, 803-804 (2002).

<sup>5</sup> Lund, *supra* note 3, at 423.

<sup>6</sup> See N.G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 Ariz. J. Int’l & Comp. L. 141 (2001), see also Press Release, Dutch Ministry of Justice, *Kortmann Committee: Unanimous When It Comes to Protecting Children, Divided Over Legal Form for Couples*, (Oct. 1997).

lead to international ramifications. Thus, the majority of the Committee believed that these partners could only be equal if they were allowed to marry.

The Dutch law ‘Opening Up Marriage for Same-Sex Partners,’<sup>7</sup> changed the definition of marriage to include same-sex couples along with heterosexual couples. Same-sex couples may adopt children “regardless of their marital status”, but must be able to show that they have lived together for at least three years and cared for the child for at least a year. The marriage law provides that foreigners may also marry provided that at least one partner is a resident of the Netherlands. In their statement of reasons, the Kortmann Committee members claimed that allowing same-sex couples to marry did not “break with tradition” and that “marriage has always been a flexible institution which has kept pace with changes in society.”<sup>8</sup>

### III. Sweden’s Cohabitee Act

Sweden passed a Registered Partnership Act in 1995 based on the Danish model. Years before the enactment of the registered partnership legislation, Sweden already gave limited recognition to same-sex relationships by passing the Homosexual Cohabitee Act in 1988. The Cohabitee (Joint Homes) Act of 1987<sup>9</sup> regulated property rights and benefits to cohabitating homosexuals. This was significant because it also applied to other laws, such as the inheritance codes, tax codes and housing codes regulating the lives of cohabitating homosexuals.

The Cohabitee Act regulates property rights only with respect to household goods and the dwelling of the couple. Cohabitees are defined as “two people who live together on a permanent basis as a couple and who have a joint household.” To qualify as a cohabitee, the two people must live with each other on a permanent basis, live together as a couple, and share in household expenses and chores. The general rule is that each cohabitee is responsible for his or her own debts and property. The Cohabitee Act merely regulates property acquired during the course of the relationship and does not have any affect on the cohabitee’s bank funds, car or a second home. The goal of the Act is to provide

<sup>7</sup> See University of Leiden for summary translation of the Dutch legislation on opening up marriage for same-sex partners provided by K. Waaldijk, at <http://athena.leidenuniv.nl/rechten/meijers/index.php3?c=86> (last visited 9 March 2006). Book 1 of BW Civil Code, Art. 30, § 1. provides that “a marriage can be contracted by two persons of different sex or of the same sex.”

<sup>8</sup> See, e.g., Dutch Same-Sex Marriage Fact Sheet, at [http://www.justitie.nl/english/Publications/factsheets/same-sex\\_marriages.asp](http://www.justitie.nl/english/Publications/factsheets/same-sex_marriages.asp). (last visited 9 March 2006). See also K. Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in R. Wintemute & M. Andeneas (Eds.), *Legal Recognition of Same-Sex Partnership: A Study of National, European and International Law* 437 (2001).

<sup>9</sup> See, e.g., Swedish Ministry of Justice, *Cohabitees and their Joint Homes: A Brief Presentation of the Cohabitees Act 3* (June 2003), at <http://www.regeringen.se/content/1/c4/33/39/9aabdf51.pdf#search='cohabitee%20act%20of%201987'> (last visited 9 March 2006). The Cohabitee Act was amended and entered into effect on 1 July 2003. See also Y. Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* 161 (2002).

protection to the weaker party, but there is no automatic inheritance, no maintenance obligation, or the ability for the cohabitants to adopt a child.

### C. Same-Sex Marriage and Homosexuality in Europe

This Section will focus on the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) and the Charter of the European Union (EU Charter) as two approaches to combating discrimination based on sexual orientation.

The Council of Europe was created at the end of World War II in response to the atrocities that had plagued Europe. The main objective was to promote European unity, protect human rights and enhance economic and social progress. Currently, the Council of Europe boasts a membership of forty-six countries, including all Member States of the European Union.<sup>10</sup> The Council of Europe drafted and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950 and this Convention represents the “lowest common denominator” of rights among its Member States.<sup>11</sup> The European Court of Human Rights (ECHR) has jurisdiction over actions brought by individuals under the European Convention for the Protection of Human Rights and Freedoms.

Before an action based on the Convention may be filed with the ECHR in Strasbourg, France, the complaining party must exhaust all domestic remedies.<sup>12</sup> This procedure allows that state courts get involved and try to resolve their own domestic matters. The petition to the ECHR must be rooted in the provisions of the Convention and carry the proof that the particular state failed to protect those rights.

Another governing body, the European Union (EU) was also created at the end of World War II to promote unity among the European countries through laying down certain economic objectives. Today the EU has become more powerful and successful in bringing together Europe than the Council of Europe<sup>13</sup> and currently, there are twenty-five Member States who are a part of this organization.<sup>14</sup>

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<sup>10</sup> L.J. Clements, N. Mole & A. Simmons, *European Human Rights: Taking a Case Under the Convention 2* (1999). See also, Convention for the Protection of Human Rights as amended by Protocol No. 11 [hereinafter *Convention*], available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited 9 March 2006). In the prelude of the Convention, it states, “[c]onsidering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms.”

<sup>11</sup> Clements, *supra* note 10, at 3.

<sup>12</sup> *Id.*, at 25; see also *Convention supra* note 10, at Art. 35. It requires, “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law.” *Id.*

<sup>13</sup> Clements, *supra* note 10, at 2. See generally Europa: The European Union Online, at <http://europa.eu.int> (last visited 12 Oct. 2003). The origin of the EU began with six countries,

In December 2000, the EU adopted the Charter of Fundamental Rights of the European Union (EU Charter) where the Member States committed themselves to respecting citizens' rights and freedoms.<sup>15</sup> The EU Charter is "an affirmation, in one single document, of the fundamental rights that European Union citizens already enjoy."<sup>16</sup> Then there is the European Court of Justice (ECJ) in Luxembourg which decides disputes arising out of EU law and – potentially – the EU Charter, which provides civil and political rights as well as social and economic rights.<sup>17</sup> However, for the time being, the EU Charter is not binding because it has not been incorporated into the Treaties establishing the EU.<sup>18</sup>

The EU embraces the Convention principles and fundamental rights.<sup>19</sup> Article 52 of the EU Charter provides that "any rights that 'correspond' to those already articulated by the Human Rights Convention shall have the same meaning and scope."<sup>20</sup> The EU Charter also maintains that EU laws are not precluded from providing higher levels of protection to European citizens and Member States.

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Luxembourg, France, Germany, Belgium, Italy, and the Netherlands, all joined together to achieve economic integration and rebuild Europe after the devastation of World War II. These countries pooled their resources in the coal and steel industries by forming the European Coal and Steel Community Treaty in 1951. The success of the six countries resulted in further agreements to develop a single market. This became known as the Rome Treaty, signed by the countries in 1957. The goal of the EU is to eliminate barriers to the movement of goods, services, people, and capital and to promote collaboration of the Member States to maximize economic integration and legal harmonization. *Id.*

<sup>14</sup> In May 2004, ten more countries joined the EU. EU membership now extends to Luxembourg, the Netherlands, France, Germany, Belgium, Italy, Spain, Portugal, United Kingdom, Ireland, Sweden, Denmark, Austria, Finland, Greece, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

<sup>15</sup> Charter of Fundamental Rights of the European Union [hereinafter *EU Charter*], OJ 2000 C 364/01).

<sup>16</sup> European Commission, Justice and Home affairs, *Free Movement within the EU – A Fundamental Right*, at [http://europa.eu.int/comm/justice\\_home/fsj/freetravel/fsj\\_freetravel\\_intro\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/freetravel/fsj_freetravel_intro_en.htm) (last visited 3 March 2006) [hereinafter *Justice and Home Affairs*].

<sup>17</sup> T. Kirkhope, *Charter of Fundamental Rights, the Enhancement of Humans and the Curtailment of Human Rights?*, in K. Feus (Ed.), *The EU Charter of Fundamental Rights* 42 (2000).

<sup>18</sup> European Commission, Justice and Home Affairs, *Frequently Asked Questions* [hereinafter *Frequently Asked Questions*], at [http://europa.eu.int/comm/justice\\_home/faq/rights/wai/faq\\_rights\\_en.htm](http://europa.eu.int/comm/justice_home/faq/rights/wai/faq_rights_en.htm) (last visited 3 March 2006).

<sup>19</sup> EU Charter, *supra* note 15, at Preamble. It provides:

This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights.

<sup>20</sup> Justice and Home Affairs of the European Commission, *The Charter in the European Context: Two Systems Working Together for Human Rights*, at [http://europa.eu.int/comm/justice\\_home/unit/charte/en/european-context-2-systems.html](http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-2-systems.html) (last visited 9 March 2006).

The Convention and the EU Charter are “two systems working together for human rights.”<sup>21</sup> The ECHR has jurisdiction over claims based on the Convention while the ECJ has jurisdiction over claims based on EU law. Thus the EU Charter incorporating the same fundamental rights as the Convention leads to the possibility of contradictory judgments of two similar cases in the ECHR and the ECJ. A way to resolve that problem is for the EU to accede to the Convention and allow the ECHR to overlook the way in which the EU handles issues relating to fundamental rights. Another resolution would be for the EU to adopt the EU Charter, thus making it binding upon all Member States. There is also the possibility to develop a co-operation system between the two legal institutions. So far, the ECHR and ECJ have reviewed each other’s judicial decision while studying their own cases to eliminate such contradictory judgments.<sup>22</sup>

Currently, the Member States have drafted the Treaty Establishing the Constitution for the European Union. This draft EU Constitution incorporates the EU Charter.<sup>23</sup> If the EU Constitution is adopted, the ECJ would have jurisdiction over cases involving civil and political rights. Consequently, the laws and case laws under both the EU and the Convention would become inter-related.

## **I. European Convention for the Protection of Human Rights and Fundamental Freedoms: Preventing Discrimination Based on Sexual Orientation**

The Convention has become an important legal instrument in protecting a citizen’s rights in Europe as it outlines several human rights and fundamental freedoms that are essential for the foundation of peace and justice.<sup>24</sup> The most applicable provisions that are raised to protect the rights of homosexuals are the right to respect for private and family life, the right to marry and freedom from discrimination. Despite the Convention’s penchant for protecting human rights, there are few safeguarding measures for homosexuals.

Its provision on the right to marry does not include same-sex couples and so these couples cannot bring a claim to protect their right to marry under the Convention. Article 12 specifically provides “[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”<sup>25</sup> The ECHR has not recognized their right to marry and instead has chosen to interpret the language of the provision as being limited to heterosexual couples. It has done so because marriage laws

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<sup>21</sup> *Id.*

<sup>22</sup> Frequently Asked Questions, *supra* note 18.

<sup>23</sup> Draft Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome on 18 July 2003 [hereinafter *Draft Constitution*].

<sup>24</sup> See Convention, *supra* note 10, at Preamble.

<sup>25</sup> Convention, *supra* note 10, at Art. 12.

are based on national law rather than the Convention or any other international agreements.<sup>26</sup>

The right to private, home and family life under Article 8 of the Convention has afforded some protection to homosexuals.<sup>27</sup> Under Article 8, the ECHR has held that Member States may not interfere with an individual's 'private life' and a homosexual's right to this 'private life' was recognized in *Dudgeon v. United Kingdom* and in *Norris v. Ireland*, two cases under Article 8.<sup>28</sup> In both cases, there were laws prohibiting and criminalizing homosexual activities between consenting adult males but in the *Dudgeon* and *Norris* trial, the ECHR held that the legislation criminalising homosexual activity between two compliant mature men violated Article 8 of the Convention.

However, the right to privacy, home, and family life are not absolute. The second provision to Article 8 provides that this benefit is limited by government's concerns for national security, public safety and the protection of health or morals.<sup>29</sup> Such apprehensions are usually raised by the government in cases where homosexuals are discharged from the military solely because of their sexual orientation. The state's interference with private life may only be found valid if it serves as a legitimate aim and the measures are proportionate. The government in *Lustig-Prean and Beckett v. United Kingdom* argued that discharging homosexuals from the military was legitimate in order to maintain the morale and cohesiveness of the military unit.<sup>30</sup> The policy against homosexuals in the military was a hindrance of the applicant's "most intimate part of an individual's private life." Thus the inference with the fundamental right to privacy would only be justified if it served a legitimate aim and was considered "necessary in a democratic society." The ECHR in *Lustig-Prean* held that the intervention was legitimate enough to serve the interests of national security and disorder in the military but the prohibition of homosexuals in the military was not proportionate to the legitimate aim.

Moreover, the ECHR has not recognized that a homosexual relationship constitutes 'family life'. The word 'family' connotes the traditional view of a heterosexual couple with children.<sup>31</sup> Although this view is slowly changing, the

<sup>26</sup> Clements, *supra* note 1, at 209.

<sup>27</sup> Convention, *supra* note 10, at Art. 8(1). It provides, "[e]veryone has the right to respect for his private and family life, his home and his correspondence."

<sup>28</sup> *Dudgeon v. United Kingdom*, Application no. 7525/76, Judgment of 22 October 1981, Ser.A 45, and *Norris v. Ireland*, Case 6/1987/129/180, Judgment of 29 September 1988, Ser.A 142.

<sup>29</sup> Convention, *supra* note 10, at Art. 8(2). Art. 8(2) provides:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>30</sup> *Lustig-Prean and Beckett v. United Kingdom*, Applications Nos. 31417/96 and 32377/96, Judgment of 27 September 1999, published in 7 BHRC 65.

<sup>31</sup> D. Gomien, D.J. Harris & L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* 239 (1996).



ECHR has not entirely recognized nor has extended ‘family life’ to include same-sex relationships. The courts have defined ‘family life’ based upon marriage or other relationships, which were conventional and determined factors such as the length of the association, demonstrated commitment to each other etc.<sup>32</sup> Also, the ECHR has held that the right to adoption of children does not fall within the ambit of Article 8.

Recently the ECHR had declined the opportunity to expand the definition of ‘family life’ or ‘private life’ to include same-sex relationships in *Karner v. Austria*.<sup>33</sup> Instead, the ECHR based its holding on the difference in treatment between heterosexual and homosexual relationships as it adversely affected the enjoyment of the right to home guaranteed under Article 8. In *Karner*, a same-sex partner was evicted from his apartment after his spouse, who was the contractual tenant, died. Austrian law provided that a spouse, life companion, siblings or other relatives may succeed to the tenancy after the death of the main tenant. The Austrian Supreme Court had held that the title of ‘life companion’ was inapplicable to persons in a same-sex relationship, thus the surviving partner could not succeed as tenant after the death of his partner. The ECHR found a violation of the Convention. Although the Court’s ruling is based on ‘home life,’ this case is significant because the Court explicitly based its decision on discrimination of sexual orientation.<sup>34</sup> Also, the Court found that the Austrian government failed to show that it was “necessary to exclude persons living in a homosexual relationship from the scope of application of section 14 of the Rent Act” in order to achieve the aim of protecting the traditional notion of family.<sup>35</sup> The *Karner* case indicates that the argument asserted by governments and religious organizations for protecting the traditional notion of family as a justification for the discriminatory treatment is no longer viable.

Further, Article 14 of the Convention prohibits inequity in relation to the substantive rights provided in the Convention<sup>36</sup> but it does not explicitly list sexual orientation as one of the basis to prohibit discrimination. Consequently, prohibiting discrimination based on sexual orientation would have to be a judicial construction. In 2001, the ECHR established that sexual preference fell within Article 14 in *Salgueiro da Silva Mouta v. Portugal*.<sup>37</sup> The father in *Salgueiro da Silva Mouta*, who was denied custody of his daughter because he

<sup>32</sup> *X, Y and Z v. United Kingdom*, Application No. 21830/93, Judgment of 20 March 1997, [1997] 24 EHRR 143.

<sup>33</sup> *Karner v. Austria*, Application No. 40016/98, Judgment of 24 July 2003.

<sup>34</sup> The ECHR stated, “[t]he applicant had been living in the flat that had been let to Mr. W. and if it had not been for his sex, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, pursuant to s 14 of the Rent Act.” *Karner* [2003] ECHR 40016/98.

<sup>35</sup> *Id.*

<sup>36</sup> Convention, *supra* note 10, at Art. 14. It provides, “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>37</sup> *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgment of 21 December 1999, [2001] ECHR 176.

was living with another man, argued that the Court of Appeals judgment interfered with his right to respect family life. The Lisbon Court of Appeals had determined that the “child should live in a traditional Portuguese family” and “not grow up in the shadow of abnormal situations.” The ECHR held that the Court of Appeals based its decision on sexual orientation and that there was no objective and reasonable justification, thus, denial of custody violated Article 8 and Article 14.

The Convention provides few protections for homosexuals despite the recent judgments expanding the scope of Article 14 to prohibit discrimination based on sexual orientation. Same-sex couples are not considered ‘family’ nor do they have the right to marry. The Netherlands and Belgium have passed laws allowing same-sex couples to marry and more Member States are recognizing same-sex relationships but the changes in these laws are creating a tension between the protection guaranteed by the Convention and the Member States’ laws. An example of such a tension is where a same-sex couple married in the Netherlands or in Belgium travel or relocate to other countries. The Convention does not protect registered partners or married same-sex couples where Member States do not recognize such relationships. This is compounded by judicial decisions holding that homosexual relationships do not constitute family. Thus, travelling and relocating to other countries may result in losing rights that flow from marriage.

## **II. EU’s Progress Regarding Anti-Sexual Orientation Discrimination Laws**

The Amsterdam Treaty adopted in 2002 was significant because for the first time, there was a provision prohibiting discrimination based on sexual orientation.<sup>38</sup> Article 13 of the Amsterdam Treaty provides:

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

The importance of this Treaty is that it is binding upon all Member States as well as future members of the EU. An important limitation is that any legislation prohibiting discrimination based on sexual orientation needs the unanimous approval of the EU Council and the EU Parliament is merely consulted. The Amsterdam Treaty does not prevent discrimination based on sexual orientation, rather it provides a structure for passing legislation.

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<sup>38</sup> Consolidated Version of the Treaty Establishing the European Community, OJ 2002 C 325/33 [hereinafter *Amsterdam Treaty*]. The Amsterdam Treaty amended the Treaty on European Union, the Treaties establishing the European Communities and certain related acts; it was signed on 2 October 2002. *Id.*

The EU passed two binding Framework Directives in December 2000, which not only required the integration of anti-discriminatory legislation in each applicant country prior to joining the EU, but in the Member States as well. These directives prohibit discrimination in employment on the basis of religion, belief, disability, age, sexual orientation and discrimination based on racial or ethnic origin. The Member States had to implement these directives into their national law by 2003.

Also, in February 2003, the EU Parliament adopted the report on the Commission's proposal for a Directive on the Free Movement of EU Citizens. This Directive provides same-sex spouses similar free movement rights as opposite-sex couples. The Directive seeks to ensure that registered partners "enjoy equal free movement rights with married couples" according to national law. Unmarried partners classified as being in a 'durable relationship' would also enjoy these privileges where the law or practice of either the state they are leaving or the receiving state, treated unmarried cohorts in a corresponding manner to married spouses. Further family law is determined by Member State legislation, not by EU law. In April 2003, the Commission's rejection of the amendment which would have granted right of residence to relatives of registered partners illustrated the EU's reluctance to intrude upon legislation involving family law. The Commission also reinforced that position by explicitly stating that the "Directive must not force the Member States to change their family law legislation."<sup>39</sup> It acquiesced to the current judicial interpretation that marriage was only between two individuals of the opposite sex.<sup>40</sup>

On 26 September 2003, the EU Council of Ministers reached a compromise resulting in a watered-down provision on same-sex partnership in the Directive. The Council's proposal removed the reference to same-sex couples and it does not extend the "right to free movement and residence to gay and lesbian EU citizens and their families."<sup>41</sup>

### **III. The EU Charter: To What Extent Will It Protect Homosexuals' Rights?**

The EU Charter provides similar rights and freedoms as guaranteed in the Convention. In many respects, it actually goes further. For example, it provides several provisions to combat discrimination based on sexual orientation and perhaps even a basis for legal recognition of same-sex marriage. However, the EU Charter is not binding on the Member States and there is – as yet – no case

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<sup>39</sup> European Report, *Free Movement of People: Commission Opposes Extending Right of Residence to Same-Sex Spouses*, 18 Aug. 2003, available at [http://www.hrc.org/Template.cfm?Section=Marriage\\_and\\_Your\\_Workplace&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18546](http://www.hrc.org/Template.cfm?Section=Marriage_and_Your_Workplace&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18546) (last visited 11 March 2006).

<sup>40</sup> See *id.*

<sup>41</sup> See, e.g., B. Hardt, *Council Position on Free Movement Directive a Significant Blow to Recognition of Same-Sex Partnerships in Europe*, *The Village*, 26 Sept. 2003, at <http://www.thevillage.org.uk/displaystory.php?recordID=121> (last visited 9 March 2006).

law based on the EU Charter's fundamental rights. Consequently, the adoption of the EU Constitution including the EU Charter is necessary for married same-sex couples or registered partners to attain the full force of their fundamental rights.

Discrimination based on sexual orientation violates human dignity.<sup>42</sup> Dignity is the "quality or state of being worthy, honored or esteemed."<sup>43</sup> Any form of bias makes an individual less worthy. Consequently, denying same-sex couples the right to marriage automatically places them in an inferior position. The registered partnership laws or civil unions that parallel the marriage institution are similar to the racial segregation that existed in the United States when African Americans were not allowed to attend white schools, etc. The United States Supreme Court held that "separate is not equal" and the same argument can be made here: the registered partnership laws or civil unions are inferior to marriage laws. The explanation of human dignity given by the Praesidium stated that any rights of the EU Charter may not be used to "harm the dignity of another person." The separate institution of marriage and registered partnership devalues same-sex relationships, thus, ultimately sending the message that these couples or homosexuals are less worthy. As guaranteed by the EU Charter, "[h]uman dignity is inviolable. It must be respected and protected."

Homosexuals and same-sex couples are guaranteed the right to private and family life under the EU Charter<sup>44</sup>. The explanation provided by the Praesidium stated that the meaning and the scope of the right to private and family life was the same as those rights provided in the Article 8 of the Convention. The EU Charter also incorporated the same limitations to the right of private and family life as the Convention.

Same-sex couples have a stronger claim for the right to marry under the EU Charter than under the Convention. The EU Charter deleted "men and women of marriageable age" which suggests that marriage is no longer restricted specifically between men and women<sup>45</sup>. However, this is a hard argument because marriage laws are still based on national law.

Also, the EU Charter specifically provides for equality among people.<sup>46</sup> Unequivocally, the EU Charter provides that "[e]veryone is equal before the law." Furthermore, the following provision specifically provides that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."<sup>47</sup>

An anomalous outcome may result because the EU Charter – for the time being – has not become binding upon the Member States, let alone private indi-

<sup>42</sup> EU Charter, *supra* note 15, at Art. 1; *see also* draft EU Constitution, Art. 2(1).

<sup>43</sup> Merriam Webster Online, at <http://www.m-w.com/dictionary/dignity> (last visited 3 March 2006).

<sup>44</sup> EU Charter, *supra* note 15, at Art. 7; *see also* Draft Constitution, *supra* note 23, at Art. 2(7).

<sup>45</sup> EU Charter, *supra* note 15, at Art. 9; *see also* Draft Constitution, *supra* note 23, at Art. 2(9).

<sup>46</sup> EU Charter, *supra* note 15, at Art. 20; *see also* Draft Constitution, *supra* note 23, at Art. 2(20).

<sup>47</sup> EU Charter, *supra* note 15, at Art. 21; *see also* Draft Constitution, *supra* note 23, at Art. 2(21).

viduals in the Member States. This type of result can be seen in *Grant*,<sup>48</sup> a case decided prior to the Member States' commitment to the EU Charter and the adoption of the Amsterdam Treaty, which however would be decided the same way today because the EU Charter has not become binding. In *Grant*, a female worker was denied travel concessions for her female partner. However, a male worker who had a 'declared a meaningful relationship' with a woman for over two years had received the same travel concessions. The ECJ reasoned that there was no discrimination based on sex because a male worker requesting the travel concessions for his male partner would be denied those same benefits as the applicant in *Grant*. The decision was based on the finding that there was no discrimination based on sex rather than sexual orientation. In evaluating this case, there was a strong basis for discrimination based on sexual orientation. Same-sex couples cohabitating in a 'meaningful relationship' were denied benefits whereas opposite-sex couples cohabitating in a 'meaningful relationship' were given benefits. The Court failed to see that it perpetuated the discrimination against homosexuals.

The EU Charter would protect homosexuals, same-sex couples and families. Therefore, it is imperative that this Charter becomes binding. The best way to achieve this result would be the adoption of a Constitution including the EU Charter.

#### **IV. The Free Movement of Persons and its Application to Same-Sex Marriage and Registered Partnerships**

One of the basic pillars of the EU is the free movement of persons.<sup>49</sup> The principle underlying the idea of free mobility was to allow the working population to move freely within the EU to achieve the goal of a single European market. Originally, this right required the person to be a worker and a national of a Member State. Many working people were deterred from moving freely within the EU because they had family, they feared losing state benefits and there were cultural as well as language barriers they would have to face. To alleviate those concerns, the EU passed directives in the 1960s that have eroded the "link between economic activity and free movement."<sup>50</sup> In particular Article 10 of Regulation 1612/68 allowed the spouse and the dependants (children), along with the worker, to integrate into the host Member State.<sup>51</sup> To achieve the

<sup>48</sup> Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd.*, Judgment of 17 February 1998, [1998] ECR I-621; see also [1998] 3 BHRC 578.

<sup>49</sup> The four freedoms that are the basic pillars of the EU are free movement of goods, of persons and services and capital. See Justice and Home Affairs, *supra* note 16. See also Draft Constitution, *supra* note 23, at Art. 3(18) and EU Charter, *supra* note 15, at Art. 2(45). See also Art. 39 of the EU Treaty.

<sup>50</sup> Other directives have expanded the right to free movement to retired citizens and students. C. Barnard, *The Substantive Law of the EU: The Four Freedoms* 232 (2004). See also Justice and Home Affairs, *supra* note 16.

<sup>51</sup> EEC Regulation 1612/68, OJ 1968 L 257/2. Art. 10 specifically provides: "[t]he following shall, irrespective of their nationality, have the right to install themselves with a worker who is a

objective of a single European market, the EEC Treaty provisions prohibited the participating countries from discriminating persons based on nationality.<sup>52</sup> A non-national citizen must be treated the same way as a national when confronted in a similar situation. Additionally, the ECJ has recognized violations of the freedom of movement not based on nationality and determined that restrictions that prohibit or impede this mobility or access to the market may violate the right of free movement.

In the context of same-sex marriage and registered partnership, the right to free movement of persons presents two situations: same-sex couples moving to Member States that recognize same-sex marriage or registered partnerships and spouses who are married or registered moving to Member States that do not recognize such bonds. For instance same-sex couples wanting to marry or get a registered partnership may decide to move to the Netherlands or other countries recognizing such relationships and find the respective laws restricted to nationals of the host Member State. Such a restriction would be problematic in light of the persons' right to free movement. The Scandinavian countries have remedied this situation by recognizing other countries' registered partnerships.

On the other hand, the recognition of same-sex marriages and registered partnerships of immigrants by Member States that otherwise do not recognize such relationships presents a more difficult situation. Married same-sex couples and registered partners have two lines of attack to establish that such a regulation violates their fundamental rights and freedoms.

The first argument is that a Member State's refusal to recognize the valid and legal marriage of these unions or registered partnership is an obstacle to the privilege of free movement of persons. Married same-sex couples, families or registered partners are reluctant or are precluded from moving to a host Member State that does not recognize such relationships because they are likely to lose their rights and benefits, such as a spouse's right to make medical decisions, pensions, inheritance, etc., if they move to this particular Member State. Article 10 of Regulation 1612/68 allows a worker's spouse or dependants (children) to move with the worker and to be integrated into the host Member State. The right to free movement is undoubtedly violated if those particular Member States do not recognize same-sex relationships or extend the benefits and rights enjoyed by heterosexual couples.

There is no case law where a married same-sex couple or registered partner asserted that their right to free movement was violated because the host Member State refused to recognize their relationship. But, there are tensions among the ECJ's decision that a homosexual relationship does not constitute family and that homosexual partners are not spouses under EU law and the right to free movement of persons. The ECJ has struggled with defining the term 'spouse.' The ECJ held in *The Netherlands v. Reed*, that the word 'spouse' meant married

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national of one member state and who is employed in the territory of another member state: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse."

<sup>52</sup> Barnard, *supra* note 50, at 231.

partners, not cohabitating couples.<sup>53</sup> In *Reed*, a worker's girlfriend applied for a residence permit based on her stable five-year relationship with her boyfriend, who moved to the Netherlands for employment. The application for the residence permit was rejected. The ECJ reasoned that the word 'spouse' cannot be defined according to social developments in a few Member States and that there was no reason to interpret the word "beyond the legal implications of the term, which embrace rights and obligations which do not exist between unmarried companions."<sup>54</sup> Applying the definition of 'spouse' as used in *Reed*, implies that a spouse may be a married same-sex couple. Also, in the instance of registered partners, the relationship is more than mere cohabitation and can be distinguished from the facts in *Reed*. Also, the ECJ in *D. and Sweden v. Council* distinguished 'spouse' and registered partners.<sup>55</sup>

The EU and the Member States must work together to reconcile the differences but must not compromise fundamental freedoms and human rights. In the future, the ECJ should determine that a host Member State's failure to recognize same-sex relationships and extend the benefits enjoyed by heterosexual couples to same-sex to those in such relationships violate the EU principle of free movement.

The second argument that may be asserted by same-sex couples is based on the EU Charter's sexual orientation and equality provisions. The violation of the right to free movement based on sexual orientation is more likely to be recognized by the ECJ if the EU Charter becomes binding upon the Member States. The EU Charter prohibits discrimination based on sexual orientation and protects human dignity and equality. Consequently, the Member States' refusal to extend the same rights to married or registered same-sex couples would be contrary to the EU Charter. Failure to recognize such relationships constitutes discrimination based on sexual orientation and creates inequality between homosexuals and heterosexuals.

A recent decision by the ECJ indicates the reluctance of the court to force a host Member State to recognize same-sex relationships by distinguishing the meaning of a 'spouse' and a 'registered partner.' In *D. and Sweden v. Council*, a registered partner was not recognized as a spouse by the Council and was denied the household allowance benefit which is normally provided to married officials. The ECJ dismissed the petitioner's case, pointing out that a 'registered partner' did not equal 'spouse', rather the term spouse is associated with marriage. Critics believe the judgment in *D. and Sweden v. Council* "entrenched the obstacles impeding the free movement of legally recognized same-sex

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<sup>53</sup> Case 59/85, *The Netherlands v. Ann Florence Reed*, Judgment of 17 April 1986, [1986] ECR 1283.

<sup>54</sup> *Id.* However, the ECJ also held that the Netherlands had to apply its immigration law without discrimination on grounds of nationality. Since the Netherlands did allow their own citizens to bring a foreign partner into the country on the basis of a stable relationship but in the absence of marriage, the same "social benefit" had to be extended to other EU nationals, including Ms. Reed and her boyfriend.

<sup>55</sup> Cases C-122/99 P and C-125/99 P, *D. and Sweden v. Council*, Judgment of 31 May 2001.

couples within the Union” and “missed an opportunity to stress the importance of this Charter.”<sup>56</sup> Despite the criticisms of this case and the fine line distinction, it indicates that if the case was brought by a married same-sex partner, the ECJ would probably rule that the married same-sex partner is entitled to the household allowance benefits. A ruling against the married same-sex partner would constitute discrimination based on sexual orientation and unequal treatment of homosexuals under the EU Charter.

The EU has not tried to establish a uniform law on same-sex marriage. This is because Member States decide their own laws on marriage.<sup>57</sup> However, anti-discrimination and equality provisions of the EU Charter cannot be completely disregarded by the Member States. As more Member States allow same-sex marriage and registered partnership, it will become necessary for the EU to pass legislation. The absence of legislation at the EU level leads to discrimination of lawfully married same-sex couples and registered partners.<sup>58</sup>

## D. Canada

### I. A Brief History of the Legal Battle for Same-Sex Legislation

The Canadian federal government has “exclusive legislative jurisdiction over marriage and divorce.” In February 2000, it passed The Modernization of Benefits and Obligations Bill (Bill C-23) which amended sixty-eight federal laws so that same-sex partners may receive their rights and benefits.<sup>59</sup> The bill equalized same-sex relationships with unmarried heterosexual bonding. However, the government clarified its position that the bill did not permit same-sex marriage.

Traditionally, Canada has a strong commitment to human rights at the federal and provincial levels. Despite the Canadian government’s position on same-sex marriage, several provinces have enacted civil registry regulations, allowing same-sex couples to register their relationship. In contrast, Alberta amended its Marriage Act to specifically state that marriage is “between a man and a woman.” More importantly, the enactment of the Canadian Charter of Rights and Freedoms (Canadian Charter) in 1982 has directly impacted and transformed the fight for same-sex marriage in Canada. The Canadian Charter’s equality provision serves as a basis for same-sex marriage parity.

The Canadian Supreme Court decision in *Egan v. Canada* was significant because it held for the first time that lesbians and gays were protected by the

<sup>56</sup> ILGA-Europe, *On The Judgment Of The European Court of Justice in Case D. and Sweden v. Council*, 7 June 2001, at <http://www.france.qrd.org/assocs/ilga/euroletter/89.html> (last visited 11 March 2006).

<sup>57</sup> J. Joan Lee, *Gay ‘Marriages’ Tangle European Laws*, *The Washington Times*, 8 Dec. 2003, at <http://www.washtimes.com/world/20031208-125711-6338r.htm> (last visited 12 March 2006).

<sup>58</sup> ILGA-Europe, *supra* note 58.

<sup>59</sup> Merin, *supra* note 9, at 161.



Canadian Charter. In 1986, James Egan filed an application so that his long time partner could receive spousal allowance under the Old Age Security Act. The application was denied because 'spouse' was defined under the Old Age Security Act as a person of the opposite-sex. The Canadian Supreme Court in *Egan* held that the Old Age Security Act did not violate the equality provision of the Canadian Charter by restricting the spousal allowance to heterosexual couples. But all the judges agreed that the Canadian Charter prohibited discrimination against gays and lesbians.

Next, in a lawsuit between two former female partners, *M and H*, M argued that the exclusion of same-sex cohabitating partners violated section fifteen of the Canadian Charter. The Canadian Supreme Court held that M was entitled to get relief under the Ontario Family Law Act. The act recognized cohabitating heterosexual couples as spouses in considering spousal support. The ruling was significant in that it changed the notion of 'spouse'. The court's remedy suspended the ruling and allowed the legislature to cure the situation and, as a consequence, the Ontario legislature enacted a same-sex partner act.

The British Columbia Supreme Court in *Egale v. Canada* decided against same-sex marriage on 21 October 2001. Despite this ruling, same-sex couples were given hope when the court recognized discrimination against homosexuals. Relying on section one of the Canadian Charter, the court found that discrimination was acceptable when the government shows that a "Charter breach is demonstrably justifiable."

## II. Current Events in Canada

After the decision on 10 June 2003 of the Ontario Court of Appeals in *Halpern v. Canada*, same-sex couples began celebrating their commitment to one another by getting married. The *Halpern* court held that the Canadian government must allow same-sex couples the right to marry. The Court also reformulated the definition of marriage as "the voluntary union for the life of two persons to the exclusion of all others." About a month later, the British Columbia court in *Barbeau v. British Columbia* lifted the one year moratorium on same-sex marriage in light of the court ruling in *Halpern*. The British Columbia Court of Appeals, on 5 May 2003, imposed a moratorium in order to give the legislature an opportunity to bring the laws in conformity with the decision.

In the wake of the two court decisions, the Canadian government decided not to pursue the litigation to the highest court in Canada. Rather, the former Canadian Prime Minister, Jean Chrétien, announced that he would support national legislation extending marriage rights to same-sex couples. The draft marriage legislation entitled Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purpose provided

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious

groups to refuse to perform marriages that are not in accordance with their religious beliefs.

This draft marriage legislation was submitted to the Supreme Court of Canada for review on 16 July 2003. The Canadian government requested the Supreme Court to review the proposed legislation and to consider three questions in deciding the validity of the legislation.<sup>60</sup>

The Canadian government also made clear that it would oppose any opponents attempting to use the courts to intervene against same-sex marriage. Additionally, the former Canadian Minister of Justice, Martin Cauchon, took the position that he would defend the legislation. He also encouraged the Canadian provinces and territories to start the process for draft legislation.

The public attitude in Canada indicates that changes are occurring too rapidly. While a majority of the citizens in British Columbia and Quebec support same-sex marriage, sixty-three percent of the citizens in Alberta reject it. Also, about forty to sixty percent in Manitoba and Saskatchewan oppose same-sex marriage. The opponents, like Alberta Premier Ralph Klein, have expressed their intent to use the Canadian Charter's Section Thirty-Three (the notwithstanding clause of the Canadian Charter), to invalidate same-sex marriage.

There is a clear division along generational lines, where sixty percent under the age of thirty favour the legislation, which means that in the long run, more Canadians will support same-sex marriage. But, the current backlash in Canada against same-sex marriage is rooted in tradition and the sanctity of the marital institution. One citizen stated that the government has no right to change an institution that predates the government. Many Canadians have been caught off guard to face the reality that suddenly same-sex marriages have become an actuality.

The position of the new Canadian government, led by Prime Minister Paul Martin and Minister of Justice Irwin Cotler, on the same-sex marriage issue appears to be uncertain. On 20 February 2004, the Canadian Supreme Court responded to the Attorney General's request to revise the questions (sent by the government to the Supreme Court in their proposal for making same-sex marriages official), thereby delaying the Supreme Court's ruling on the questions originally presented in July 2003. The Martin government added a fourth question,

[i]s the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the *Federal Law-Civil Law*

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<sup>60</sup> See, e.g., Associated Press, *Canada Supreme Court Rules for Gay Marriage*, MSNBC World News, at <http://www.msnbc.msn.com/id/6685653> (last visited 9 March 2006). The three questions posed to the Canadian Supreme Court by the government were:

1. Does the federal government have exclusive authority to define marriage? 2. Does the charter protect religious groups from having to perform gay weddings against their beliefs? 3. Is the proposed same-sex marriage law constitutional?

*Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?<sup>61</sup>

Proponents of homosexual marriages observed that this tactic by the Martin government was undertaken to place this issue in the background during the Spring 2004 election.

While the federal government waits for the Supreme Court's opinion on the proposed same-sex legislation, the highest court in Quebec declared that homosexual couples have the right to marry. Three Canadian provinces, Quebec, Ontario and British Columbia, now allow same-sex marriage.

## E. The United States

Marriage and divorce laws in the United States are governed by the individual states. At the federal level, the United States does not recognize same-sex marriage or partnership. Consequently, same-sex couples are barred from the 1,049 federal benefits and rights that arises from marriage. Thirty-seven states have laws prohibiting same-sex marriage or its recognition. Despite the federal government's refusal to recognize these relations, some states do recognize such associations. But again, the rights and benefits afforded to same-sex couples vary by state.

### I. Review of the Different Types of Same-Sex Legislations in the United States

#### 1. Vermont's Civil Union

The Vermont Supreme Court in 1999 held that same-sex couples were entitled to the rights and protections that its laws provide to heterosexual married couples under the Common Benefits Clause of the Vermont Constitution. For example, in the *Baker v. Vermont* case, the plaintiffs were three same-sex couples who were all denied marriage licenses.<sup>62</sup> The Vermont Supreme Court left open the decision for the legislature to include same-sex under the marriage laws or to create a 'parallel' system.

In response to the *Baker* decision, the legislature passed the Vermont Civil Union Act in 2000.<sup>63</sup> In this act, Vermont defined civil union as "two eligible persons [who] have established a relationship." Further, the Civil Union Act provides the same benefits, protections and responsibilities to a same-sex union

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<sup>61</sup> Equal Marriage for Same-Sex Couples, *The Fourth Question: Trading Votes for Rights*, 15 April 2004 available at <http://www.samesexmarriage.ca/legal/AGC050404.htm> (last visited 27 August 2004).

<sup>62</sup> See, e.g., *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

<sup>63</sup> See, e.g., Vt. Stat. Ann. tit 15 §1204 (2003) (defining the benefits, rights and responsibilities accorded in a civil union); see also Vermont Secretary of State website, Civil Unions and Marriage, at [http://www.sec.state.vt.us/municipal/civil\\_mar.htm](http://www.sec.state.vt.us/municipal/civil_mar.htm) (last visited 9 March 2006).

ending in marriage. However, the legislature specifically reserved marriage as a “union of one man and one woman.” Also, there is no residency requirement to form a union but, for separation, there is a one year residency requirement.

## 2. Hawaii’s Reciprocal Beneficiaries

The Hawaii Supreme Court in *Baehr v. Lewin* held that the denial of marriage licenses to three same-sex couples established a prima facie discrimination case.<sup>64</sup> It also maintained that “sex is a ‘suspect category’ for purposes of equal protection analysis under Article I, section 5 of the Hawaii Constitution” and subject to the strict scrutiny test. Under the strict scrutiny standard, the government failed to show compelling interests in denying marriage licenses to the plaintiffs and was also unsuccessful to show it is narrowly tailored to avoid unnecessary infringements. On remand, the circuit court held that the Hawaii marriage law was unconstitutional.<sup>65</sup>

The Hawaii Supreme Court’s ruling that same-sex couples established a prima facie case created a backlash against the gay and lesbian community. The public responded against same-sex marriage by passing an amendment to the Hawaii Constitution in 1997 reserving for its legislature the power to restrict marriage only to heterosexual couples. Additionally, in the same year, the legislators enacted the Reciprocal Beneficiaries Act which provides fewer rights and benefits than those enjoyed by married couples.<sup>66</sup> Reciprocal beneficiaries are two adults who are over the age of eighteen, not currently married or in a registered partnership, where the consent to is not obtained by fraud or duress and the parties have signed a declaration of reciprocal beneficiary.

The *Baehr* case on appeal to the Hawaii Supreme Court was reversed because the legislature passed an amendment restricting marriage to opposite-sex couples. Thus, in Hawaii marriage is still reserved for heterosexuals.

## 3. California’s Domestic Partnership Law

In September 2003, then California Governor Gray Davis signed into law the California Domestic Partner Rights and Responsibilities Act of 2003 (California Act). This new law is similar to the Vermont Civil Union law because it provides same-sex couples the same benefits and responsibilities granted to married opposite-sex partners. The decree became effective on 1 January 2005 and allows persons in a domestic partnership to terminate their relationship so that they would not be subject to the new rights and responsibilities. Similar to the European registered partnership acts, the California Act specifically recognizes same-sex unions formed in another jurisdiction to be valid in California. This

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<sup>64</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>65</sup> See, e.g., *Baehr v. Miike*, 1996 WL 694235 p. 16-17 (Haw. Cir. Ct. 1996).

<sup>66</sup> See, e.g., Haw. Rev. Stat. §572C-1 (2003) (noting that the legislature’s purpose in enacting the act was to “extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law”).

was a significant provision as the law now recognizes registered partnerships formed in Europe, Canada, Vermont and Massachusetts, which allows couples to move from one state to another without losing their rights and benefits.

Several months after this legislation passed, on 10 February 2004, the San Francisco Mayor, Gavin Newsom, requested the city clerk to make changes to ensure that marriage licenses were issued without regard to gender and sexual orientation. Mayor Newsom based his decision on the California State Constitution's equality provision and California courts interpreting the provision to apply to homosexuals. Additionally, lawmakers in California introduced legislation that would legalize same-sex marriage. The legislation Assembly Bill 1967, if passed by the state legislatures, would amend the definition of marriage as "a personal relation arising out of a civil contract between two persons."

Despite Mayor Newsom's bold action, more than 4,000 same-sex marriages were invalidated by the California Supreme Court on 12 August 2004.<sup>67</sup> The California Supreme Court reasoned that allowing same-sex couples to marry violated Proposition 22 passed by voters in 2000. Proposition 22, also known as the California Defense of Marriage Act, restricts marriage pertaining only between a man and a woman.

## II. Current Trends & Attitudes on Same-Sex Marriage in the United States

On the one hand, the United States Supreme Court in *Lawrence v. Texas* declared a Texas statute unconstitutional because it criminalised the action of two consenting homosexual persons to engage in intimate sexual conduct.<sup>68</sup> The *Lawrence* decision overturned *Bowers v. Hardwick*, which held that the there was no fundamental right to engage in homosexual activity.<sup>69</sup> On the other hand, homosexuals are given no constitutional rights to form intimate relationships and to sexual expression. This recognition was the basis for invalidating same-sex relationships. For example, the State of Alabama prohibited homosexuals from gaining custody of children because of its sodomy law. Now, Alabama cannot give preference to heterosexual couples in child custody cases. The United States does not recognize same-sex marriage and has explicitly rejected it with the enactment of the Defenses of Marriage Act (DOMA) in 1996, which specifically limits marriage to heterosexual couples.

The United States Supreme Court's decision in *Lawrence* is seen by some as opening the door to same-sex marriage. Justice Scalia in his dissenting opinion stated that:

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<sup>67</sup> *Lockyer v. City and County of San Francisco*, 17 Cal. Rptr. 3d 225, 230 (Ca. 2004). See also CNN.com Law Center, *California High Court Voids Same-Sex Marriages*, 13 Aug. 2004, at <http://www.cnn.com/2004/LAW/08/12/samesex.marriage/> (last visited 10 March 2006).

<sup>68</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>69</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[M]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teacher in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.

The backlash against the gay and lesbian culture was immediately felt in the United States after the decision in the *Lawrence* case. The traditional concept of marriage is further engrained by the recent statement made by President George W. Bush, that "marriage is between a man and a woman, and I think we ought to codify that one way or another."

Legislators have introduced a bill proposing to add an amendment to the US Constitution defining marriage as a union between a man and a woman. This was introduced in the House of Representatives on 21 May 2003. The amended draft provides:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

In 2004, the proposed amendment was introduced in the Senate, however, it failed to gain enough support. It is evident that most Americans do not accept same-sex marriage. In the same year, thirteen states amended their state constitution to ban same-sex marriage.<sup>70</sup>

While the public opinion and the legislatures are against same-sex marriage, the courts in the United States are moving against the current sentiment. The courts in Hawaii and Alaska held that banning same-sex marriage was unconstitutional.<sup>71</sup> But, the legislatures overruled the courts' decisions by enacting laws prohibiting same-sex marriages. The Supreme Court in Vermont held that denying same-sex couples to marriage licenses violated the state constitution. In this case, the Vermont legislature responded positively by enacting the civil union law which recognized same-sex relationship.

Against this political and social climate, there is the pretense that gays and lesbians have made progress in mainstream popular culture. Television shows, such as *Queer Eye for the Straight Guy*, *Will and Grace*, and *Boy Meets Boy*, which reflect upon the gay culture, have received huge ratings. But these shows have also fueled the backlash on gays by portraying them as "one-dimensional, fashion and sex enthralled, stereotypical inhabitants."<sup>72</sup> In the reality TV show *Boy Meets Boy*, a bachelor gay male is searching for a partner but unknown to

<sup>70</sup> K. Peterson, *Washington Gay Marriage Ruling Looms*, Stateline.org, 7 March 2006, at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20695> (last visited 9 March 2006). See also National Conference of State Legislatures, *Measures Before Congress on Same-Sex Marriage*, 15 July 2004, at <https://www.ncsl.org/statefed/humserv/congressact.htm> (last visited 9 March 2006).

<sup>71</sup> *Inching Down*, *supra* note 3, at 2015-2019.

<sup>72</sup> See, e.g., D. Ireland, *Marriage of Convenience*, 6 (6) *Nation*, 1 Sept. 2003.

the bachelor some of the suitors are heterosexual men. Such a twist indicates that gay people are “entertainment for straight people.”<sup>73</sup>

### III. The Canadian and the EU Impact on the United States

The Ontario Court of Appeals’ ruling in the *Halpern* case on 10 June 2003 had an impact in the United States. Unlike the Dutch law, there is no residency requirement for same-sex couples to get married in Canada. Reverend Troy Perry of the Los Angeles based Metropolitan Community Church stated that he intended to fly to Canada with his partner to be “legally married under Canadian law.”<sup>74</sup> By 20 June 2003, the City of Toronto issued 175 marriage licenses to same-sex couples, including ten Americans.<sup>75</sup> Another statistic showed 362 marriage licenses were issued to same-sex couples between 10 June and 15 July 2003 and fifty-six of these licenses were issued to American partners.<sup>76</sup>

The United States has taken a strong position against same-sex marriage. Reverend Perry’s marriage in Canada will not be valid in the United States. Homosexual couples rushing to get married in Canada should be warned that a divorce is much harder to obtain than getting married. Divorce requires a one year residency in Canada. Moreover, for same-sex couples married in Canada, the courts in the United States will not grant a divorce decree if their marriage here is not recognized.

Another impact of the Canadian court decision can be seen in the Vermont Supreme Court’s conduct in the *Baker* case. The Canadian Supreme Court in the *M v. H* case allowed the Ontario government to remedy the situation just as the Vermont Supreme Court gave the legislators an opportunity to pass legislation allowing same-sex couples the same freedoms as are provided in the Vermont Constitution for heterosexual couples.

Pressure is on the United States to recognize same-sex marriage. In September 2003, a Canadian gay married couple was denied entry into the United States because this country did not recognize their union. The foreign ministry spokesman stated that “the law in Canada does not have extra-territorial application. Each country is free to impose conditions of entry to its territory.”<sup>77</sup> However, if Canada passes same-sex legislation it will affect the

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<sup>73</sup> See, e.g., S. Rogers, *Bravo’s ‘Boy Meets Boy’ Gay Bachelor Star: “I Felt Betrayed”*, Reality TV World, (20 Jul. 2003), at <http://www.realitytvworld.com/index/articles/story.php?s=1465> (last visited 20 Nov. 2003); *Queer Eye for the Straight Guy* (Bravo broadcast television); *Will and Grace* (NBC television broadcast); *Boy Meets Boy* (Bravo broadcast television).

<sup>74</sup> A. Moore, ‘Gay’ Wedding Licenses Issued in Toronto, World Net Daily, 10 June 2003, available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=33007](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=33007) (last visited 10 March 2006).

<sup>75</sup> *Toronto Dash to Gay Unions*, N.Y. TIMES, June 24, 2003, at p. 6, sec. A, col. 1.

<sup>76</sup> See, e.g., Equal Marriage For Same-Sex Couples Website, *Toronto Marriage License Statistics*, 23 July 2003, at [http://www.samesexmarriage.ca/legal/toronto\\_marriage\\_stats.htm](http://www.samesexmarriage.ca/legal/toronto_marriage_stats.htm) (last visited 10 March 2006).

<sup>77</sup> See, e.g., *Canadian Gay Married Couple Denied Entry into U.S.*, World Net Daily, 18 Sept. 2003, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=34673](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=34673) (last visited 10

United States, as gays in the United States are likely to view the changes in Canada as a “harbinger for American society.”<sup>78</sup> Also, politicians in the United States have begun to inquire into the situation, as four Democrats have written to the Commissioner of the Customs Service questioning its policy.

As more European countries recognize same-sex relationships, the United States is under increasing pressure. Since the Netherlands opened its marriage laws to same-sex couples in 2001, these couples have “settled into the mundane routine of daily life together.”<sup>79</sup> Opponents of these types of marriage in the United States fear that raising children in such a relationship harms them. To the contrary, the Dutch believe that a same-sex family is “functioning very well” and have come to view the relationship as a “traditional family.”<sup>80</sup> In 2003, Belgium opened up its marriage law to include homosexuals and countries like Denmark, Sweden, Norway, and Germany provide most of the same benefits and rights to same-sex couples as to heterosexual couples.

Another instance in which Europe has had an influence on the United States is seen in the *Lawrence* decision. The Court stated that “the sweeping references by Chief Justice Burger in *Bowers v. Hardwick*, to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.”<sup>81</sup> The Court found that in 1957, the British Parliament recommended laws criminalising homosexual conduct be repealed. The Supreme Court indicated that while the sodomy laws were upheld under *Bowers*, the European Court of Human Rights had invalidated sodomy laws five years earlier in *Dudgeon v. United Kingdom*. Thus, it is evident that Europe has had some influence on the United States’ laws and social perspective regarding same-sex legislation.

#### IV. A Compromise for the United States: Rejection of Same-Sex Marriage, but Perhaps Permission of Domestic Partnerships?

Unlike the European countries that have same-sex partnership laws or same-sex marriage, the United States is the “most religious of any industrialized democracy.”<sup>82</sup> Having just decriminalised homosexual conduct in the United States, the next step is to pass anti-discrimination laws to include sexual orientation.<sup>83</sup> Currently, there are only a handful of States that prohibit employ-

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March 2006).

<sup>78</sup> See, e.g., C. Krauss, *Free To Marry, Canada’s Gays Say, ‘I Do’*, N.Y. Times, 30 Aug. 2003, available at <http://www.nytimes.com/2003/08/31/international/americas/31CANA.html?ex=1377662400&en=84da4b09175c31df&ei=5007&partner=USERLAND> (last visited 10 March 2006).

<sup>79</sup> See, e.g., K. B. Richburg, *Gay Marriage Becomes Routine for Dutch*, Washington Post Foreign Service, 23 Sept. 2003, available at <http://personal.ecu.edu/conradtd/pols3234/3234Fall03/F033234032.htm> (last visited 10 March 2006).

<sup>80</sup> *Id.*

<sup>81</sup> *Lawrence*, 559 U.S., at 572, 573.

<sup>82</sup> See, e.g., Ireland I, *supra* note 69.

<sup>83</sup> See Inching Down, *supra* note 3, at 2009; see also K. Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law*, in



ment discrimination based on sexual orientation and even fewer States that provide protection only to public employees.<sup>84</sup> The image of homosexuals in the United States must change before it can accept same-sex legislation rules.<sup>85</sup> In the meantime, perhaps the United States will consider adopting domestic partnerships, registered partnerships or civil unions?

## V. Equal Partnership Rights for Homosexuals?

While the backlash swept across the United States, Vermont, managed to withstand the trend against same-sex legislation by passing a civil union law.<sup>86</sup> The civil union law was unprecedented in the United States<sup>87</sup> and although civil union is not synonymous with marriage, it was a “big step forward in the politics of recognition” of same-sex relationships.<sup>88</sup>

Some believe that registered partnerships and civil unions do not stigmatise the homosexual community, but rather it is a political compromise intended to extend the privileges associated with marriage for same-sex couples.<sup>89</sup> The statistics reveal that about 2,500 civil unions have been obtained in Vermont<sup>90</sup> and included in these figures are same-sex couples from other states as well as other countries.<sup>91</sup> These duos would not view civil unions as stigmatising, but rather as a ‘powerful moment’ in their lives.<sup>92</sup>

Marriage for homosexuals means assimilation into the heterosexual lifestyle and may dilute the gay and lesbian voices.<sup>93</sup> The gay and lesbian movement advocates the “affirmation of gay identity and culture and the validation of

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R. Wintemute and M. Andeneas (Eds.), *Legal Recognition of Same-Sex Partnership: A Study of National, European and International Law* 635, 539-640 (2001) [hereinafter *Waaldijk II*].

<sup>84</sup> Lambda Legal, *States Which Prohibit Sexual Orientation Employment Discrimination*, at <http://www.lambdalegal.org/cgi-bin/iowa/states/anti-discrimi-map> (last visited 30 Oct. 2003). The states that prohibit employment discrimination are California, Nevada, Minnesota, New York, Maryland, New Jersey, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut and Hawaii. The states that protect only public employees are Washington, Montana, Colorado, New Mexico, Illinois, Indiana, Pennsylvania and Delaware.

<sup>85</sup> See *Inching Down*, *supra* note 3, at 2012-2020.

<sup>86</sup> See G. Johnson, *In Praise of Civil Unions*, 30 *Cap. U.L. Rev.* 315 (2002) [hereinafter *Johnson I*].

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*, at 336.

<sup>89</sup> See, e.g., G. Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 *Vt. L. Rev.* 15, 18 (2000) [hereinafter *Johnson II*].

<sup>90</sup> See, e.g., Johnson I, *supra* note 83, at 334.

<sup>91</sup> *Id.* About three-quarters of the civil union obtained are same-sex couples who are not residents of Vermont.

<sup>92</sup> *Id.*, at 334-335.

<sup>93</sup> See, e.g., P. Ettlbrick, *Since When Is Marriage A Path to Liberation?*, in R.M. Baird & S.E. Rosenbaum (Eds.), *Same-Sex Marriage: The Moral and Legal Debate* 164, 165 (1997).

many forms of relationships”<sup>94</sup> and being a ‘queer’ is a person’s identity which culture and marriage would strip.<sup>95</sup>

Accordingly, the institution of civil unions and registered partnerships provide the gay and lesbian community with their own identity.<sup>96</sup> This society can tailor the civil union laws to their lifestyle<sup>97</sup> and the pink triangle which once symbolized hate (used in Nazi Germany to identify homosexuals) is now an “emblem of the gay and lesbian community.”<sup>98</sup> So, it is an opportunity for the same-sex groups to define their relationships and their own culture without being “swallowed up in the straight community.”<sup>99</sup> Not all gays and lesbians favour marriage, so a civil union or a registered partnership is a viable alternative.<sup>100</sup>

Taking a step further than Vermont is the State of Massachusetts. The Massachusetts Supreme Court in *Goodridge v. Department of Public Health*, declared that the ban on same-sex marriage violated the state constitution and the state legislature was given 180 days to change the law.<sup>101</sup> The Massachusetts legislature proposed a civil union bill but the justices of the Massachusetts Supreme Court concluded that the proposed legislation violated the equal protection and due process clauses of the state constitution.<sup>102</sup> On 17 May 2004, same-sex marriage became legal in the state of Massachusetts.

## VI. The Stigma on Same-Sex Marriage

Opponents of civil unions argue that by creating a different institution for same-sex couples, these persons are stigmatised as inferior and considered to be second class citizens.<sup>103</sup> The European registered partnership acts, Vermont’s civil union, and the California Act essentially provide the same benefits and rights associated with marriage<sup>104</sup> but there are certain differences between

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*, at 164-165.

<sup>96</sup> Johnson II, *supra* note 86, at 19.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., Johnson II, *supra* note 86, at 57-58, quoting K.D. Lang, a lesbian singer on the topic of same-sex marriage, “I think you’re playing with something that is a tradition and an institution to a certain majority of people. Why go there? Create a new language, create a new tradition ... Instead of fitting into something that’s not ours, we have to build our own culture.” *Id.*, at 15.

<sup>99</sup> See, e.g., Johnson I, *supra* note 83, at 339.

<sup>100</sup> Krauss, *supra* note 75.

<sup>101</sup> *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>102</sup> Opinions of the Justice to the Senate, available at <http://www.mass.gov/courts/opinions/tothesenate.pdf#search='In%20re%20Opinions%20of%20the%20Justices%20to%20the%20Senate'> (last visited 10 March 2006). See also Boston University School of Law, Law Library, *Same-Sex Marriage in Massachusetts*, at <http://www.bu.edu/lawlibrary/research/hottopic/marriage.htm> (last visited 10 March 2006).

<sup>103</sup> See, e.g., Merin, *supra* note 9, at 279.

<sup>104</sup> See, e.g., Danish Registered Partnership Act No. 372 § 3, 1; see also, Vt. Stat. Ann. tit.15 § 1204 (a)(2003); see also Cal. Fam. Code § 297.5, § 4, (a).

various registered partnerships acts and marriage.<sup>105</sup> Some of the dissimilarities are that a same-sex partner is labeled as a ‘registered partner’ or a ‘party to a civil union’ rather than called a ‘spouse’. Similarly, this kind of a relationship is “registered” or gets a “certificate of civil union” as opposed to procuring a “marriage license.”<sup>106</sup> The differentiation in the terminology is a “denial by the state to recognize same-sex permanent unions on equal terms as heterosexual permanent unions.”<sup>107</sup>

Moreover, the Swedish Parliament established an Office of the Ombudsman against Discrimination on Grounds of Sexual Orientation in 1999 to “combat homophobia and discrimination on grounds of sexual orientation in all areas of Swedish society.”<sup>108</sup> Yet, there is a separate Homosexual Cohabitee Act which extends the rights governing heterosexual couples under the Cohabitee Act to homosexual groups.<sup>109</sup> By enacting the Homosexual Cohabitee Act, Sweden made it evident that same-sex couples are treated differently which furthers the stigmatisation that same-sex couples are a separate class of people.<sup>110</sup> Also, the Registered Partnership Act enacted by the Danish government was intended to preserve the institution of marriage<sup>111</sup> and even the Vermont Statute and the California Act expressly reserve marriage exclusively for heterosexuals.<sup>112</sup> Thus, marriage is specifically set aside as a heterosexual institution and the registered partnerships and civil union acts preserve this status quo.<sup>113</sup>

This division has led to the argument that the alternative institution to marriage is discriminatory against homosexuals.<sup>114</sup> It is analogous to the ‘separate but equal’ rationale that existed in the United States with respect to racial segregation<sup>115</sup> and Andrew Sullivan, a gay author who advocates for equality in marriage for homosexuals, says that:

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<sup>105</sup> See C.A. Sloane, *A Rose By Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 Cardozo J. Int’l & Comp. L. (1997).

<sup>106</sup> *Id.*, at 204; see also Vt. Stat. Ann. tit. 15, § 1201 (2003) (defining “certificate of union” as a “document that certifies that the persons named on the certificate have established a civil union.” And “party to a civil union” means “a person who has established a civil union.”).

<sup>107</sup> See, e.g., Sloane, *supra* note 100, at 204.

<sup>108</sup> See, e.g., The Office of the Ombudsman Against Discrimination On Grounds of Sexual Orientation Website, at <http://www.homo.se> (last visited 10 March 2003).

<sup>109</sup> See *supra* Part B.I.3.

<sup>110</sup> See Merin, *supra* note 9, at 279.

<sup>111</sup> See C. Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 Can. J. Fam. L. 375 (2000).

<sup>112</sup> See e.g., Vt. Stat. Ann. tit. 15 § 1201 (2003); see also Cal. Fam. Code § 299.2 (stating that “a legal union of two persons of the same sex, other than a marriage”).

<sup>113</sup> See D. D. Porter, *War Over Same-Sex Unions?: Some Will Go To Any Extreme To Keep Status Quo*, Orlando Sentinel, 30 August 2003, at A23.

<sup>114</sup> See Sloane, *supra* note 100, at 207-208.

<sup>115</sup> See, e.g., Merin *supra* note 9, at 279. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Merin writes “Plessy did not argue in his brief that the accommodation were not equal. Rather, he argued that the statute that required blacks and whites to ride in separate railroad cars when traveling intrastate was unconstitutional; he explicitly demanded the right to racially integrated train accommodations, not just ‘equal’ ones”. *Id.*, at 280.

To endorse one but not the other, to concede the substance of the matter while withholding the name and form of the relationship, is to engage in an act of pure stigmatization. It risks not only perpetuating public discrimination against a group of citizens but adding to the cultural balkanization that already plagues American public life.<sup>116</sup>

Same-sex legislation short of marriage is not true equality.<sup>117</sup> The inequality of the separate institutions adversely impacts the emotional and psychological well-being of an individual by perpetuating a feeling of inferiority.<sup>118</sup> Therefore, the Netherlands stands as a model for the rest of the world.<sup>119</sup> The Dutch could no longer validate the prohibition of same-sex marriage based on the principle of equal treatment.<sup>120</sup> All Dutch citizens have a choice between registered partnership and marriage regardless of their sexual orientation<sup>121</sup> and such an option places same-sex couples on an equal ground with heterosexual couples.<sup>122</sup>

The current trend with respect to same-sex legislation in the United States appears to favour civil union rather than marriage.<sup>123</sup> Although civil unions may be viewed as inferior, it is an incremental but necessary step in reaching marriage equality.<sup>124</sup> Prior to passing any same-sex legislations, the United States must take a stronger position in protecting gays and lesbians by passing anti-discrimination laws.<sup>125</sup>

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<sup>116</sup> See, e.g., Johnson II, *supra* note 86, at 17; see also Press Release, Egale Canada, *Registered Partnerships are Offensive and Unworkable Segregation*, (11 Aug. 2003) at <http://www.egale.ca/index.asp?lang=E&menu=20&item=121> (last visited 28 Oct. 2003). Egale Canada, a Canadian organization promoting gay, lesbian, bisexual and transgender equality, has used the term 'separate but equal' to argue that registered partnerships constitute segregation. *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Merin, *supra* note 9, at 283-284.

<sup>119</sup> *Id.* at 276.

<sup>120</sup> See Press Release, Dutch Ministry of Justice, *Same-sex Couples To Be Able To Marry* (Dec. 2000), at [http://www.ministerievanjustitie.nl:8080/A\\_BELEID/FACT/samesexm.htm](http://www.ministerievanjustitie.nl:8080/A_BELEID/FACT/samesexm.htm) (last visited 26 Sept. 2003). See also Maxwell, *supra* note 6, at 153-154. The Kortmann Committee was appointed by the Dutch Ministry of Justice where the majority viewed that "same-sex couples can only be afforded equal treatment if they are allowed to enter into civil marriages." *Id.*

<sup>121</sup> See Press Release, Dutch Ministry of Justice, *Bills for Same-Sex Marriages and Adoption by Same-Sex Couples Laid Before Lower House*, 25 June 1999, at [http://www.ministeriesvanjustitie.nl:8080/C\\_ACTUAL/PERSBER/PB0458.htm](http://www.ministeriesvanjustitie.nl:8080/C_ACTUAL/PERSBER/PB0458.htm) (last visited 26 Sept. 2003).

<sup>122</sup> See Merin, *supra* note 9, at 276.

<sup>123</sup> See *supra* Part D.I.1 and Part D.I.2.

<sup>124</sup> See Inching Down, *supra* note 3, at 2011.

<sup>125</sup> See Waaldijk II, *supra* note 86, at 637.