

# UNIFORM TRENDS IN NON-MARITAL REGISTERED RELATIONSHIPS IN EUROPE<sup>1</sup>

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## 1. INTRODUCTION

### 1.1. PRELUDE

Romeo and Juliet. A story of forbidden love. A story of how society can determine how and when one person may express his or her love for another. A story of names and terminology. Caught in the crossfire of a social order beyond their control, Romeo and Juliet must combat power, politics, and family relationships.

Tis but thy name that is my enemy;  
*Thou art thyself, though not a Montague.*  
*What's Montague? it is nor hand, nor foot,*  
*Nor arm, nor face, nor any other part*  
*Belonging to a man. O, be some other name!*  
*What's in a name? that which we call a rose*  
By any other name would smell as sweet.<sup>2</sup>

Although written in the late 1590s, Romeo and Juliet reminds us of the ever-present impact of social norms on the very private, intimate nature of a couple's relationship. Society's disapproval can quite literally end in the death of a relationship. Yet SHAKESPEARE delves deeper, asking the question whether it is really this love that we despise or simply the name we assign to it. Throughout the play SHAKESPEARE stresses the importance of nomenclature. Was it not for Romeo's name this young couple's love would have known no bounds nor acceptance. The forbidden love depicted by SHAKESPEARE is ubiquitous and evident even in today's modern, and comparably liberal, social order.

The two themes of social norms and nomenclature are indicative of the social debate that has raged for the past few decades surrounding the regulation of same-sex relationships. Homosexuality, once dubbed the "love that dare not speak its name",<sup>3</sup> has broken free of the shackles of social repugnance and fought those dominant social norms. Yet the way in which we afford recognition to a couple's intimate relationship has been approached very differently around the world. Juliet's question, "what's in a name?", may at first glance seem a rather flippant remark, yet it pinpoints a crucial dilemma facing legislatures today: how can one afford recognition to same-sex relationships without upturning the dominant social order? Can the traditional definition of marriage really be changed?

<sup>1</sup> This article is based on doctoral research conducted between September 2001 and September 2005. The results of this research will be published in the European Family Law Series in November: I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005.

<sup>2</sup> Act II, Scene 2, *Romeo and Juliet*.

<sup>3</sup> "What is 'the love that dare not speak its name'?" was asked of OSCAR WILDE by the prosecutor during his trial for sodomy. The trial took place between 26<sup>th</sup> April to 1<sup>st</sup> May 1895. See H.M. HYDE, *The love that dared not speak its name*, Boston: Little Brown & Co, 1970, p. 1.

As well as 1989 being the year that democracy brought the Berlin Wall tumbling, brought an end to a military dictatorship in Chile and saw many students lose their lives in Tiananmen Square, it was also an historic moment for the gay rights movement. In 1989, unaware of the domino effect about to be unleashed, **Denmark** became the first country in the world to grant legal recognition to same-sex couples.<sup>4</sup> Since then not only has **Denmark** granted more rights to same-sex couples and relaxed the initial stringent entry requirements,<sup>5</sup> but other jurisdictions around the world have followed suit, with some countries even opening such registration schemes to different-sex couples. The dawning of a new millennium has also witnessed the dawning of a new era in the recognition of same-sex relationships. For the first time in history, same-sex couples have been afforded the benefit of civil marriage.<sup>6</sup> Yet legal systems are not bubbles floating independently of each other. They are constantly interacting with each other by means of legal transplants, the migration of nationals or the confrontation with foreign systems of law. The impact of these phenomena on the regulation of such new registered relationships cannot be ignored.

However, the sheer diversity of regulations and the ever increasing number of jurisdictions regulating for such relationships raises the question whether there are indeed general trends or uniform patterns apparent in such regulation. This article aims to prove that uniform trends are apparent, and furthermore that a number of general models can be used to organise and classify current legislative schemes, as well as predict future legislative moves in other countries. In order to achieve this goal, this article has been divided into four sections, dealing in turn with the issues relating to the establishment of (**Section 2**), the dissolution of (**Section 3**) and the legal effects attributed to forms of non-marital registered relationships (**Section 4**). The final section of this article (**Section 5**) will be devoted to an overall evaluation of the comparisons in this field, providing an overview of the various models identified. However, before launching into the core of these aspirations, it is important to first address a number of preliminary issues relating to the jurisdictions chosen (**Section 1.2**) and the terminology used (**Section 1.3**).

## 1.2. JURISDICTIONAL ACCOUNTABILITY

The selection of legal systems necessarily depends on the subject chosen, the aims of the research and the accessibility of the legal systems to the comparatist. However, a number of selection criteria were conceived in order to distil the exponentially increasing wealth of material. These criteria are summarised below.

Firstly, the aim of this research was to identify whether uniform trends or patterns can be identified in this field of law in Europe. A geographical restriction was thus imposed in the research question itself. However, such a restriction must not be confused with a restriction to Member States of the European Union. Secondly, and rather obviously, it was decided that the countries eventually chosen must have legislated for a domestic form of non-marital registered relationship. As a result of these two criteria, the countries to be studied had to be selected from: **Andorra, Belgium, Denmark, Finland, France, Germany, Iceland, Luxembourg, The Netherlands, Norway, Sweden, Spain,**<sup>7</sup> **Switzerland** and the **United Kingdom**.<sup>8</sup>

<sup>4</sup> Act No. 372 of 7<sup>th</sup> June 1989.

<sup>5</sup> Amendments to the original Registered Partnership Act have been realised by virtue of the Act No. 821 of 19<sup>th</sup> December 1989 and Act No. 360 of 2<sup>nd</sup> June 1999.

<sup>6</sup> Same-sex marriage is now possible in The Netherlands, Belgium, Spain, Canada and Massachusetts, USA.

<sup>7</sup> Wherever reference in this section has been to **Spain** the reader must note that this only refers to the eleven regions of **Spain** which have introduced forms of non-marital registered relationships.

<sup>8</sup> For a complete list of countries with forms of non-marital registered relationship see I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that end's registered? The substantive and private international law aspects of non-marital registered*

Turning one's attention to the function of these particular legislative enactments, one is immediately confronted with two different sorts of legislation. On the one hand there are registration schemes open to couples regardless of sex (**Andorra, Belgium, France, Luxembourg, The Netherlands and Spain**) and, on the other, those restricted to same-sex couples (**Denmark, Finland, Germany, Iceland, Norway, Sweden, Switzerland and the United Kingdom**). It was decided to ensure that the countries selected were representative of both approaches. Furthermore, a brief glimpse into the literature published on this field, indicates a sliding scale of rights and duties afforded to those registering such a relationship. As far as possible, jurisdictions were selected covering the entire spectrum.<sup>9</sup>

An added complication to the entire field is the opening of marriage to same-sex couples (**Belgium, The Netherlands and Spain**). Although, as already stated, these relationships fall outside the scope of this research, their impact on non-marital registered relationship legislation cannot be overestimated. It was thus decided to ensure that the countries represented both those jurisdictions where marriage is restricted to different-sex couples, as well as those countries where this prohibition has been lifted.

Turning one's attention to the more traditional selection criteria, there are as many legal systems as there are attempts to divide them into groupings. Although from the very outset of this research this author has questioned the usefulness of such a division for the purposes of this topic,<sup>10</sup> attention must nonetheless be paid to these categorisations. Therefore, although not ultimately determinative, countries have, as far as possible, been selected to be representative of the traditional legal families present in Europe, *i.e.* Romanistic (**Andorra, France, Belgium, Luxembourg, The Netherlands,<sup>11</sup> Spain**), Germanic (**The Netherlands, Germany, Switzerland**), Anglo-American (**United Kingdom**) and Nordic (**Denmark, Finland, Iceland, Norway and Sweden**).<sup>12</sup>

In analysing all these various facets<sup>13</sup> it was decided to study the laws of **Belgium,<sup>14</sup> France,<sup>15</sup> The Netherlands,<sup>16</sup> Switzerland<sup>17</sup>** and the **United Kingdom**.<sup>18</sup> These countries provide the broadest possible

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*relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005 (published in November).

<sup>9</sup> Although it is impossible here to categorise the various countries with any degree of accuracy, it must be noted that it is generally accepted that **Belgium** has provided one of the weakest forms of non-marital registered relationship, whilst **The Netherlands** and the **Scandinavian** countries have created some of the strongest,

<sup>10</sup> See, for example, W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven: UPL, 1999, p. 89, who signals the limited usefulness of such classifications for micro-comparisons.

<sup>11</sup> The **Dutch** legal system although historically based on the French legal system has, over the course of time, shown more resemblance to the German legal system. It is therefore placed in both groupings.

<sup>12</sup> K. ZWIEGERT and H. KÖTZ (translated by T. WEIR), *Introduction to Comparative Law*, London: Clarendon, 1998, 3<sup>rd</sup> Edition, p. 63-73; W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven: UPL, 1999, p. 65 *et seq.* Reference has also been made to the modern classifications of MATTEI and HUSA, see further J. HUSA, "Classification of legal families today. Is it time for a memorial hymn?", *Rev. int. dr. com.*, 2004, p. 11-38. In this field it is perhaps more noticeable that the instance of legal transplants is exceedingly high. See, for example, M. JÄNTERÄ-JAREBORG, "Registered partnerships in private international law: Scandinavian approach", in: K. BOELE-WOELKI and A. FUCHS (eds.), *EFL Series: Volume 1. Legal recognition of same-sex couples in Europe*, Antwerp: Intersentia, 2003, p. 137-158 and M. ANTOKOLSKAIA, *Harmonisation of family law in Europe – An historical perspective*, Antwerp: Intersentia, 2006, Chapter 4 (to be published).

<sup>13</sup> The exclusion of **Germany** and a **Nordic** country, primarily on the basis of linguistic ability, has not affected the representative nature of the countries selected, which embrace all aspects of the chosen criteria. Furthermore, as will be shown, the grouping into legal families is certainly not decisive in this field of law.

<sup>14</sup> An EU country, with a weak registration scheme open to both same-sex and different-sex couples, as well as to couples within the prohibited degrees of marriage. Same-sex marriage is permitted and Belgium represents the *Romanistic* legal tradition.

<sup>15</sup> An EU country, with a weak registration scheme open to both same-sex and different-sex couples. Same-sex marriage is not currently permitted in **France** and France represents the *Romanistic* legal tradition.

<sup>16</sup> An EU country, with a strong registration scheme open to both same-sex and different-sex couples. Same-sex marriage is permitted and **The Netherlands** represents an interesting mix of *Romanistic* and *Germanic* legal traditions. Reference to **The Netherlands** only refers to the Kingdom in Europe, thus excluding the Netherlands Antilles and Aruba. The

coverage of the various divisions outlined above within the restrictions imposed by virtue of the author's language ability and time constraints.<sup>19</sup> No comparison to be carried out by an individual researcher within a restricted period of time can wish to include all available jurisdictions; a selection has to be made.

### 1.3. TERMINOLOGY

The term "non-marital registered relationship" has been selected to describe all the different forms of national legislation.<sup>20</sup> A neutral, overarching term has thus been created in which every individual State can find solace. Terms such as "registered partnership", "civil union" or "domestic partnership" have been avoided so as to prevent confusion with any particular national system. In choosing such an all-embracing term, care has been taken to ensure that the phrase adequately reflects the notions inherent in domestic substantive legislation. Hence, the term consists of three independent, yet equally important facets.

- "Non-marital". This serves to indicate that a distinction has been drawn between marital relationships and other forms of regulated relationships. Same-sex marriages do not, therefore, fall within the scope of this research.
- "Registered". This indicates that unregistered forms of cohabitation prevalent in many societies are not included.
- "Relationship". Although somewhat obvious, this term highlights the loving, familial nature of each party's commitment to the other.

Together, these three terms form the overarching phrase used throughout this research to describe the various forms of domestic, substantive legislation (*i.e.* the *wettelijke samenwoning*, *pacte civil de solidarité*, *geregistreerd partnerschap*, *partenariat enregistré* and civil partnership).

## 2. ESTABLISHMENT OF THE RELATIONSHIP

Six specific eligibility criteria for the establishment of a non-marital registered relationship have been selected to determine the comparability of the various forms of non-marital registered relationship, namely exclusivity, sex, age, residency, prohibited degrees of relationship and, competency and consent. These criteria, as well as providing the basic building blocks for any analysis in the field of relationships,<sup>21</sup> are also the most widely discussed and regulated in the jurisdictions selected.

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*Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba* has recently held that same-sex marriages celebrated in The Netherlands must be registered in the population registers in Aruba: *Aruba v. Oduber*, 23<sup>rd</sup> August 2005, Registration No. EJ2101/04 – H 12/05.

<sup>17</sup> A non-EU country, with a strong registration scheme restricted to same-sex couples, and same-sex marriage is not permitted. **Swiss** law represents a *Germanic* legal family tradition.

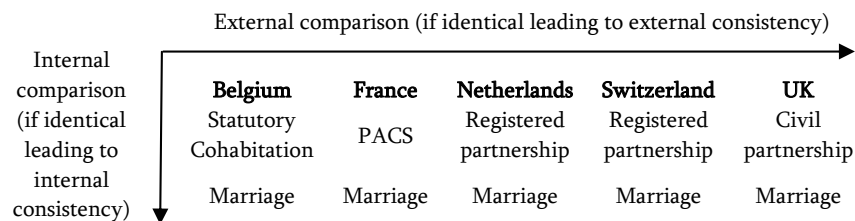
<sup>18</sup> An EU country, with a strong registration scheme restricted to same-sex couples. Marriage is currently restricted to different-sex couples and although the **United Kingdom** represents a *common law* legal tradition, **Scots** law is often identified as a *mixed* legal system.

<sup>19</sup> W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven: UPL, 1999, p. 49 and 52-53.

<sup>20</sup> D. KOKKINI-IATRIDOU, "Some methodological aspects of comparative law", *NILR*, 1986, p. 94-95; W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven: UPL, 1999, p. 90, §100.

<sup>21</sup> With respect to a similar analysis in relation to the institution of marriage, see R. GAFFNEY-RHYS, "The international concept of marriage", *IFL*, 2005, p. 86-98.

As one is well aware, the substantive law rules for the celebration of a marriage are diverse,<sup>22</sup> yet the possibility for comparison is still evident. As long as one is able to identify a *tertium comparationis*, one is able to group these often very different institutions in the same legal category. It is, however, imperative that one first recognise the existence of two different types of comparison.<sup>23</sup> The first, *external comparison*, involves the comparison of legal rules relating to putative equivalent legal institutions in different countries, *e.g.* a comparison of the legal rules relating to the PACS in **France** with the rules relating to statutory cohabitation in **Belgium**. If the rules are identical the result has been termed *external consistency*. The second type of comparison is *internal comparison*, whereby different legal institutions in the same jurisdiction are compared, *e.g.* a comparison of marriage and registered partnership in **The Netherlands**. If the rules are identical the result has been termed *internal consistency*.



Both of these forms of comparison are important in this research and will be employed throughout this article. This section is accordingly divided into three sub-sections. The first sub-section identifies those areas in which total consistency of result has been achieved, both internally and externally (**Section 2.1**). The second sub-section deals with those aspects of the registration process that although externally inconsistent achieve internal consistency with the respective rules on marriage (**Section 2.2**). The third sub-section deals with those situations in which neither internal nor external consistency has been achieved (**Section 2.3**).

## 2.1. INTERNAL AND EXTERNAL CONSISTENCY

Two criteria, namely exclusivity and competency/consent, can be isolated which provide for total consistency of result, both internally in a given legal system and externally across the seven jurisdictions studied. Each of these criteria will be examined in turn with the aim of explaining the precise ambit of this consistency.

The principle of exclusivity consists of two discrete facets. Firstly, the relationship must only consist of two persons, and secondly the parties are not able to possess a status in combination with another status of the same type.<sup>24</sup> In dealing sequentially with both of these components one is able to discern total unanimity. All seven jurisdictions restrict these new forms of partnership regulation to two people, replicating the equivalent rules for marriage.<sup>25</sup> “Polygamous” non-marital registered relationships are thus prohibited in all the jurisdictions studied.<sup>26</sup> Furthermore, all seven jurisdictions also satisfy the

<sup>22</sup> See the individual country reports in Part 2 of each section in C. HAMILTON and A. PERRY (eds.), *Family law in Europe*, London: Butterworths, 2002, 2<sup>nd</sup> Edition.

<sup>23</sup> This is also highlighted by D. KOKKINI-IATRIDOU, *Een inleiding tot het rechtsvergelijkende onderzoek*, Deventer: Kluwer, 1988, p. 3.

<sup>24</sup> That is to say that the parties cannot already be married or involved in a non-marital registered relationship.

<sup>25</sup> See **Belgium**: Art. 1465(1), Belgian Civil Code; **France**: Art. 515-1, French Civil Code; **The Netherlands**: Art. 1:80a(1), Dutch Civil Code; **Switzerland**: Art. 2(1), Swiss Registered Partnership Act; **United Kingdom**: Sec. 1(1), Civil Partnership Act 2004.

<sup>26</sup> The term “polygamous” has been inserted between inverted commas since etymologically speaking the word polygamous refers to marriages. Stemming from the Greek word *polugamos*: *polu* meaning much or often, and *gamos* meaning marrying. Although not a correct etymological use of the word, it clearly indicates the issue in question.

second facet to the exclusivity requirement, not only with respect to non-marital registered relationships but also with respect to marriage. In other words, the existence of a marriage prohibits either of the parties from celebrating a non-marital registered relationship, whilst the existence of a non-marital registered relationship prevents either of the parties from celebrating a marriage.

This last proposition must however be justified with regard to **Belgium** and **France**. In both these jurisdictions the existence of a non-marital registered relationship does not form a prohibition to celebrating a marriage.<sup>27</sup> However, if a non-marital relationship has already been registered it will be automatically and immediately terminated upon the celebration of a marriage.<sup>28</sup> As a result, both institutions remain independent of each other. The fact that the parties cannot be involved simultaneously in a non-marital registered relationship or marriage signifies that these two institutions are independent, or perhaps better said, exclusive of each other. The key factor remains thus mutual exclusivity. Such a result, however, is not surprising if one considers the total absence of laws permitting polygamy in Europe. Although many legal systems around the world permit polygamous marriages,<sup>29</sup> European nations have tended to prevent such relationship forms.<sup>30</sup> It is therefore to be expected that such fundamental tenets of European society would be echoed in forms of non-marital registered relationships.

When one turns one's attention to the concepts of competency and consent, one is also able to discern a veritable unanimity of approach. Without exception, all those countries surveyed impose the requirement that both parties must validly consent to the registration and must be competent according to domestic substantive law.<sup>31</sup> This statement must, however, be tempered. Although superficially identical with respect to the basic requirement of valid consent and competency, the countries surveyed impose different requirements with respect to when such competency and consent will be deemed to be absent. It is, therefore, on this level impossible to speak of external consistency. In comparing the rules on consent one must also, therefore, take into account the respective laws on annulment.<sup>32</sup>

Only **The Netherlands** provides for total internal consistency in the laws on consent and annulment.<sup>33</sup> In the **United Kingdom** the grounds for annulling a civil partnership are more stringent than the equivalent rules for marriage. This difference is a logical result of the removal of all references to the sexual obligation imposed on parties to a civil partnership.<sup>34</sup> The heterosexual nature of the duty to consummate made it virtually impossible to extend such annulment grounds to civil partners in **England & Wales** and **Northern Ireland**. It was, therefore, thought better to simply avoid all reference to consummation. Instead, in **England & Wales** and **Northern Ireland** the inability to consummate or the wilful refusal to

<sup>27</sup> **Belgium**: Art. 147, Belgian Civil Code; **France**: Art. 147, French Civil Code.

<sup>28</sup> **Belgium**: Art. 1476(2)(1), Belgian Civil Code; **France**: Art. 515-7(3), French Civil Code.

<sup>29</sup> I. SUMNER, "Comparative analysis and assessment of the gradual recognition of homosexuality with respect to The Netherlands and England", *MJ*, 2002, p. 29-55 at 30.

<sup>30</sup> Polygamy, in either form of polygyny (a man with multiple wives) or polyandry (a woman with multiple husbands), has never been permitted by Christianity, nor by the Greek and Roman Empires. Early Mormonism provides a notable exception to picture.

<sup>31</sup> See **Belgium**: Art. 1475(1), Belgian Civil Code; **France**: Art. 1109 *et seq*, French Civil Code; **The Netherlands**: Art. 1:80a(6), Dutch Civil Code; **Switzerland**: Art. 3(2), Swiss Registered Partnership Act; **Scotland**: Sec. 86(1)(e)(i), Civil Partnership Act 2004; **England & Wales**: Sec. 50(1)(a) and (b), Civil Partnerships Act 2004; **Northern Ireland**: Sec. 174(1)(a) and (b), Civil Partnerships Act 2004.

<sup>32</sup> See **Belgium**: Art. 1109-1118, Belgian Civil Code; **France**: Conseil Constitutionnel, 9<sup>th</sup> November 1999, Decision No. 99-149, *JO*, 16<sup>th</sup> November 1999, §62-63; **The Netherlands**: Arts. 1:31-42, Dutch Civil Code; **Switzerland**: Arts. 4(1), 4(2), 9(1)(a) and 9(1)(b), Swiss Registered Partnership Act; **England & Wales**: Sec. 49, Civil Partnerships Act 2004; **Scotland**: Sec. 123, Civil Partnerships Act 2004; **Northern Ireland**: Sec. 173, Civil Partnerships Act 2004.

<sup>33</sup> See Art. 1:31-42, Dutch Civil Code are analogously applicable by virtue of 1:80a(6), Dutch Civil Code.

<sup>34</sup> WOMEN AND EQUALITY UNIT, "Responses to Civil Partnership: A framework for the legal recognition of same-sex couples", London: Department of Trade and Industry, 2003, p. 36.

consummate may be taken into account in a dissolution based on the “unreasonable behaviour” of the partner.<sup>35</sup> Similar argumentation can also be used to explain the absence of impotency as a ground of voidability in **Scotland**.

In **Belgium, France and Switzerland** the reverse is true, with the rules for annulling a marriage being more stringent than the equivalent rules for annulling a non-marital registered relationship. These differences are of a more intrinsic nature and stem from the compromises struck between various political parties during the legislative parliamentary process.<sup>36</sup> As a result, in all three jurisdictions, the annulment grounds mirror those applicable to normal contracts and not marriages, where the *favor matrimonii* principle tends to restrict the possibilities for annulment. Nonetheless, the requirement that the parties must have voluntarily registered the relationship while legally competent to do so, forms one of the most crucial and fundamental elements of the registration process in all those countries researched regarding both the celebration of a marriage and the registration of non-marital relationships.

## 2.2. EXTERNAL INCONSISTENCY BUT INTERNAL CONSISTENCY

Certain differences in the laws on non-marital registered relationships have their origins in the national differences in the respective laws on marriage. This is the case in relation to two of the six eligibility criteria studied, namely age requirements and prohibited degrees of relationship. Each of these criteria will thus be examined in turn.

Although all seven jurisdictions impose a minimum age requirement on those wishing to register a non-marital relationship, certain important differences are patent. The fact the relevant age for non-marital registered relationships is different in the seven jurisdictions studied reflects the corresponding disparity of marital age limits. Three approaches can be identified. Firstly, there are those countries where the minimum age is set at eighteen without exception both for couples wishing to marry as well as for those registering a non-marital relationship (**Switzerland and Scotland**).<sup>37</sup> Secondly, there are those countries where although the minimum age to marry or register a non-marital relationship is set at eighteen, those under the age of eighteen are permitted to either marry or register a relationship should certain other conditions be fulfilled (**England & Wales, Northern Ireland and The Netherlands**).<sup>38</sup> In both of these approaches internal consistency is achieved. In the third and final approach, although the minimum age is set at eighteen for both marriage and non-marital registered relationships,<sup>39</sup> the exceptions provided for those wishing to marry are not duly extended to those wishing to register their non-marital

<sup>35</sup> *Ibid.*

<sup>36</sup> See **Belgium**: Arts. 180 and 181, Belgian Civil Code (marriage) and Art. 1109-1118, Belgian Civil Code (statutory cohabitants); **France**: Art. 181 to 184, French Civil Code (marriage) and Arts. 1109 *et seq.*, French Civil Code, by virtue of the decision of the French Constitutional Court: Conseil Constitutionnel, 9<sup>th</sup> November 1999, Decision no. 99-149, *JO*, 16<sup>th</sup> November 1999, §62-63 (PACS); **Switzerland**: Arts. 96 and 105, Swiss Civil Code (marriage) and Arts. 4 and 9(1), Swiss Registered Partnership Act (registered partnership).

<sup>37</sup> **Switzerland**: Art., 96(2), Swiss Civil Code (marriage) and Art. 3(1), Swiss Registered Partnership Act (registered partnership); **Scotland**: Sec. 1(1), Marriage (Scotland) Act 1977 (marriage) and Sec. 83(1)(c), Civil Partnerships Act 2004.

<sup>38</sup> In **England & Wales** and **Northern Ireland**, parental consent must be obtained for those parties between the ages of 16 and 18 (**England & Wales**: Sec. 2, Marriage Act 1949 (marriage) and Sec. 4, Civil Partnerships Act 2004 (civil partnerships); **Northern Ireland**: Art. 22, Marriage (Northern Ireland) Order 2003 (marriage) and Sec. 141, Civil Partnerships Act 2004 (civil partnerships)). In **The Netherlands**, permission must be sought from the Minister of Justice (Art. 1:80a(6), in conjunction with Art. 1:35(2), Dutch Civil Code).

<sup>39</sup> Although the current age at which women are allowed to marry in **France** is set at fifteen, persons under the age of eighteen require parental consent. It is therefore only once both parties have reached the age of eighteen that they are free to celebrate a marriage without first obtaining parental consent: See Art. 144, French Civil Code

relationship (**Belgium** and **France**).<sup>40</sup> Once again this can be explained with reference to the political compromises struck in these two countries. The *favor matrimonii* principle has thus once again not found replication in either of these jurisdictions with respect to non-marital registered relationships.

In six of the seven jurisdictions studied, internal consistency has also been accomplished with respect to “exogamy”.<sup>41</sup> In **France**, **The Netherlands**, **Switzerland**, **England & Wales**, **Scotland** and **Northern Ireland**, the prohibitions placed upon those wishing to register a non-marital relationship are identical to those imposed upon couples wishing to marry.<sup>42</sup> In **Belgium**, however, these marital prohibitions have not been impressed on those wishing to register their relationship. The opening of statutory cohabitation to couples within the prohibited degrees of relationship was nevertheless heavily criticised during the parliamentary debates<sup>43</sup> and a Bill currently before the **Belgian** Chamber of Representatives would, if passed, introduce equivalent exogamous prohibitions as those imposed on aspirant spouses.<sup>44</sup> The precise reasons for removing such prohibitions can be traced to the relatively weak legal effects attached to the institution.<sup>45</sup> As a result the legal and social distance established between marriage and statutory cohabitation is relatively large, therefore weakening the arguments for imposing such prohibitions; the more contractual an institution appears, the weaker the arguments for imposing “exogamous” restrictions. It is also to be noted that in **France**, **The Netherlands** and the **United Kingdom**, a similar debate also took place, yet in these countries, due to the relatively extensive legal effects attached to the registration,<sup>46</sup> it was thought that such a solution would have resulted in impractical and disadvantageous results.<sup>47</sup>

### 2.3. INTERNAL AND EXTERNAL INCONSISTENCY

With respect to the final two eligibility criteria, namely sex and residency, one is unable to identify either internal or external consistency. With respect to the parties’ sex, two approaches can be distinguished. The first approach, evidenced by the legislation in **Switzerland** and the **United Kingdom**, permits only same-sex couples to register their non-marital registered relationship. The other approach, adopted by **Belgium**, **France** and **The Netherlands**, opens non-marital registered relationship schemes to both different-sex and same-sex couples. In **Belgium** and **The Netherlands** this step has subsequently been followed by the opening-up of civil marriage to couples of the same-sex.

<sup>40</sup> **Belgium**: Art. 144, Belgian Civil Code (marriage) and Art. 1123 and 1124, Belgian Civil Code (statutory cohabitants); **France**: Art. 144, French Civil Code (marriage) and Art. 515-1, French Civil Code (PACS).

<sup>41</sup> Exogamy is the word used to describe the custom of marrying outside a specified group of people to which one belongs. Once again, as explained in footnote 30 the term exogamy is etymologically speaking restricted to use with marriage (Stems from Greek *exo* meaning outside and *gamos* meaning marrying).

<sup>42</sup> See **France**: Art. 515-2(1), French Civil Code; **The Netherlands**: Art. 1:80a(6), in conjunction with Art. 1:41, Dutch Civil Code; **Switzerland**: Art. 4(1), Swiss Registered Partnership Act; **England & Wales**: Sec. 3(1)(d), with reference to Part 1, Schedule 1, Civil Partnership Act 2004; **Scotland**: Sec. 82(1)(b), with reference to Schedule 10, Civil Partnerships Act 2004; **Northern Ireland**: Sec. 132(1)(d), with reference to Schedule 12, Civil Partnership Act 2004.

<sup>43</sup> *Belgian Chamber*, 1996-1997, No. 170/8, p. 18.

<sup>44</sup> *Belgian Chamber*, 2002-2003, No. 110/1, p. 21.

<sup>45</sup> See **Section 4.1.2**.

<sup>46</sup> Although the legal effects attributed to the PACS are not as extensive as those in **The Netherlands** or the **United Kingdom**, the fact that the PACS legislation is to be found in Book 1, Fr. CC, clearly indicates the innate connection between marriage and the PACS. See further I. CURRY-SUMNER, *EFL Series: Volume 11. All’s well that end’s registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, p. 95-97.

<sup>47</sup> See for example the discussions surrounding the *contrat de partenariat civil* in France (D. BORRILLO, “The Pacte Civil de Solidarité in France”, in: R. WINTEMUTE and M. ANDENÆS (eds.), *Legal recognition of same-sex partnerships*, Oxford: Hart Publishers, 2001, p. 475-489 at 476), the original proposals for registered partnership in The Netherlands (*Second Chamber*, 1993-1994, 23761, No. 3, p. 2) and the debate in the House of Lords surrounding the civil partnerships bill (*House of Lords*, Hansard, Vol. 662, Cols. 1362-1391 (24<sup>th</sup> June 2004), Baroness O’CATHAIN).

In the **United Kingdom** and **Switzerland**, the aim of introducing non-marital registered relationship regulation to the protection of intimate relationships between same-sex couples.<sup>48</sup> The discrimination faced by such couples formed the sole concern for the Government in introducing legislation. Although in **Belgium**, **France** and **The Netherlands** this was one of the aims of the legislature, the Governments in these countries also strived for the improvement in the situation of different-sex couples who choose not to get married.<sup>49</sup> One of the core or principle aims of all these jurisdictions is the same: the protection and recognition of intimate, exclusive same-sex relationships. The fact that the institutions in **Belgium**, **France** and **The Netherlands** are also open to couples of different-sex does not detract from the aforementioned common objective. This ancillary aim simply enlarges the extent or scope of the institution itself rather than changing its fundamental character.<sup>50</sup>

The second area of difference arises in relation to residency requirements. It is here that possibly the greatest diversity of solution is proffered. Nonetheless, two different approaches can be identified. In the first group of countries, namely **The Netherlands** and the **United Kingdom**, the residency requirements imposed on prospective registered partners are identical to those imposed on couples wishing to marry, with internal consistency accordingly having been achieved.<sup>51</sup> In **France**, **Belgium** and **Switzerland**, on the other hand, the residency requirements imposed on those wishing to register a non-marital relationship are less flexible than the equivalent rules for marriage.<sup>52</sup> However, the rules in these three countries cannot be analysed in isolation and the relevant choice of law rules with respect to the registration of a relationship must be taken into consideration when analysing this material.

The differences in the rules in this field can thus be explained with reference to the relatively flexible residency requirements imposed on aspirant married couples, coupled with the *lex loci registrationis* principle adopted with respect to the choice of law rules regarding the establishment of a non-marital registered relationship.<sup>53</sup> It was believed that these two factors combined would have led to a so-called phenomenon of “registration tourism”. Accordingly, the residency requirements imposed on those wishing to register their relationship are more stringent than the equivalent rules on marriage. The fear of opening Pandora’s box was sufficient to prevent these countries from emulating the marital residency requirements for non-marital registered relationships. Moreover, and perhaps indicative of a future trend, whilst **The Netherlands** currently adheres to a principle of internal consistency with respect to

<sup>48</sup> **Switzerland**: Art. 2(1), Swiss Registered Partnership Act; **United Kingdom**: Sec. 1(1), Civil Partnerships Act 2004.

<sup>49</sup> **Belgium**: *Chamber of Representatives*, 1997-1998, No. 170/2 (LANDUYT, VISER, DUQUESNE and WILLEMS) and see further P. SENAËVE, *Compendium van het personen- en familierecht. Deel 3*, p. 34, §1522-1; **France**: See E. STEINER, “The spirit of the new French registered partnership law – promoting autonomy and pluralism or weakening marriage?”, *CFLQ*, 2002, p. 1-14 at 1; **The Netherlands**: *Second Chamber*, 1994-1995, 22700, No. 5 (*Notitie Leefvormen*).

<sup>50</sup> This is explained in greater detail in **Section 2.4**.

<sup>51</sup> **The Netherlands**: Art. 1:80a(1), Dutch Civil Code, as amended by *Staatsblad*, 2001, No. 11; **England & Wales**: Sec. 27(1)(a), Marriage Act 1949 (marriage) and Sec. 8(1)(b), Civil Partnerships Act 2004 (civil partnership); **Scotland**: Marriage (Scotland) Act 1977 (marriage) and see SCOTTISH EXECUTIVE, *Civil partnership registration: a legal status for committed same-sex couples in Scotland*, Edinburgh: Scottish Executive, 2003, p. 22, §6.13; **Northern Ireland**: NORTHERN IRELAND LAW REFORM OFFICE, *Civil partnership: A legal status for committed same-sex couples in Northern Ireland*, Belfast: Northern Ireland Department of Finance and Personnel, p. 41, §9.1.

<sup>52</sup> **Belgium**: Art. 44, Belgian Code of Private International Law, in conjunction with Art. 63, Belgian Civil Code (marriage) and Art. 59(2), Belgian Code of Private International Law (statutory cohabitation); **France**: Art. 161, French Civil Code (marriage) and Art. 515-3, French Civil Code (PACS); **Switzerland**: Art. 43(1), Swiss Code of Private International Law (marriage) and Art. 65a, in conjunction with Art. 43(1), Swiss Code of Private International Law (registered partnership). The reference in Art. 65a excludes the application of Art. 43(2), Swiss Code of Private International Law to registered partnerships.

<sup>53</sup> The *lex loci registrationis* principle adopted in relation to non-marital registered relationships is aimed at promoting the recognition of such relationships. A reference to the personal law of the parties would result in many couples being unable to register their relationship. For more information on this issue see I. SUMNER, “Private international law aspects of registered partnerships: Great Britain and The Netherlands compared”, in: A. BONOMI and B. COTTIER (eds.), *Aspects de droit international privé des partenariats enregistrés en Europe*, Zurich: Schulthess, 2004, Volume No. 49, p. 29-59.

residency requirements, this was not the case prior to 2001, when more stringent requirements were imposed on partnership registration than on marriage. Once again, a fear of “registration tourism” played an enormous role in the eventual adoption of such a solution.<sup>54</sup>

Although not strictly related to the eligibility conditions required of registered partners, the issue of formal validity also deserves attention here. No single jurisdiction has provided an identical registration system for marriage and non-marital registered relationships. Despite this diversity, in the majority of jurisdictions the authority competent to register such relationships is also competent to celebrate marriages.<sup>55</sup> In the **United Kingdom**, where religious marriages are legally enforceable, an exception has been made restricting registration of civil partnerships to non-religious premises.<sup>56</sup> In contrast, although religious marriages are prohibited in **The Netherlands** prior to the celebration of a civil marriage, no such prohibition exists for the celebration of religious registered partnerships. Nonetheless, a religious registered partnership has no legal effect.<sup>57</sup> The contractual nature of the **French** PACS and the political compromises made during the parliamentary discussions have resulted in a quasi-contractual formality procedure with regards the registration thereof. Although the original PACS proposal conferred competency on the *maire*, this was eventually amended and competency is now conferred on the district court clerk. **France** therefore breaks from the approach of the other six jurisdictions by conferring registration competency on a different authority than that competent to celebrate marriages.

It is also striking that despite the various differences in result, all seven jurisdictions have departed from the law on marriage in one important aspect. In all jurisdictions a marriage is celebrated upon the parties’ exchange of vows. In contrast, a non-marital registered relationship is validly concluded upon the registration of the parties’ intent.<sup>58</sup> This difference in form has important consequences not just symbolically and linguistically,<sup>59</sup> but also legally. The registration of marriages, although necessary to verify the existence of a marriage, is not determinative in assessing the moment at which the marriage is concluded. This is perhaps the most indicative example of the discernible trend away from status and towards contract in the field of familial relationships.<sup>60</sup>

<sup>54</sup> *Dutch Second Chamber*, 1993-1994, 23761, No. 3, p. 4 and 5.

<sup>55</sup> **Belgium**: Art. 1476(1), Belgian Civil Code (before the Registrar of the municipality of the common domicile of the parties); **The Netherlands**: Art. 1:80a(4), Dutch Civil Code (before the Registrar of the municipality of one of the parties); **Switzerland**: Art. 5(1), Swiss Registered Partnership Act (Registrar of the domicile of one of the parties); **England & Wales**: Sec. 8(1), Civil Partnerships Act 2004 (registration authority); **Scotland**: Sec. 88(1), Civil Partnerships Act 2004 (District Registrar); **Northern Ireland**: Sec. 139(1), Civil Partnerships Act 2004 (Registrar).

<sup>56</sup> **England & Wales**: Sec. 6(b), Civil Partnerships Act 2004; **Scotland**: Sec. 93(2), Civil Partnerships Act 2004; **Northern Ireland**: Sec. 137(5), Civil Partnerships Act 2004.

<sup>57</sup> Art. 1:68, Dutch Civil Code is not applicable to registered partnerships. See further H. LOONSTEIN, “Geregistreerd partnerschap en het kerkelijk huwelijk”, *FJR*, 2005, p. 126-128.

<sup>58</sup> This is not, however, the case in **Denmark**, **Norway**, **Sweden** and **Iceland** where the exchange of vows is also sufficient for the registration of a partnership: M. JÄNTERÄ-JAREBORG and C. SÖRGJERD, “The experiences with registered partnership in Scandinavia”, *FamPra.ch*, 2004, p. 577-597 at 585-587.

<sup>59</sup> One ‘celebrates’ (*célébre/voltrekken*) a marriage whereas one ‘registers’ (*enregistre/registeren*) a non-marital relationship. In **French** an entirely new verb has been created to cater for the entry into the national form of non-marital registered, namely *pacser*. It could perhaps be submitted that this distinction has an important socio-linguistic impact on the manner in which persons view non-marital relationship registration; if the legislature has seen a need to use different terminology then there must necessarily be a difference in function. This difference was also noted in the Parliamentary debates in the **United Kingdom**: *House of Commons*, 2004-2005, Vol. 425, Col. 184 (12<sup>th</sup> October 2004): “The difference is made clear in the drafting of the Bill. Registration is given effect by the signing of the register rather than by the verbal affirmation”.

<sup>60</sup> See, for example, J. VRANKEN, *Mr. C. Asser’s handleiding tot de beoefening van het Nederlandse burgerlijk recht. Algemeen Deel. Een vervolg*, p. 96.

## 2.4. OVERALL COMPARISON AND EVALUATION

It is submitted that despite the superficial diversity of domestic forms of non-marital registered relationships, a common core is evident. A fundamentally similar approach has been adopted in all seven countries. Generally speaking, in four of the six eligibility criteria surveyed, jurisdictions have achieved internal consistency between those wishing to marry and those wishing to register their non-marital relationship. As has been shown, this is true of those requirements other than the parties' sex and their residency. Before each of these areas is addressed, a number of other points stemming from the four general, internally consistent eligibility criteria deserve special attention.

Firstly, the approach adopted in **Belgium** and **France** in relation to age requirements is disappointing and serves only to reveal the inconsistent manner with which these Governments have addressed the issue of relationship registration. The paternalistic manner with which both Governments have dealt with the issue has simply replaced one form of discrimination with another. There is, in this author's opinion, no defensible explanation for the continued inconsistency between the law on non-marital registered relationships and the law on marriage in this respect. The imposition of an age requirement indicates the Governments' intention that this form of relationship is to be undertaken seriously and with commitment by adults. Yet the absence of the exceptions offered in the case of marriage contradicts the stated willingness to respect non-marital relationships and reduce the incidence of homophobia.<sup>61</sup>

The absence of a uniform, sex-neutral minimum marital age serves to highlight the dominant and persistent sex discrimination and stereotypical attitudes pervasive in the field of **French** family law. The lack of convincing arguments to treat marriage and non-marital registered relationships differently is the best argument to treat them equally. The time is now ripe for the **French** legislature to closely examine the discrimination in this field and achieve a solution equal to all.<sup>62</sup> It is indefensible to maintain a discriminatory age at which one can marry based on one's sex. The removal of such discrimination must then be coupled with a review of the age restrictions imposed on those wishing to register a PACS.

Similar questions can also be asked of the **Belgian** legislature. If the **Belgian** legislature believes there to be instances where a minor may marry, why is the same option denied to those wishing to register their relationship? If it is the belief of both the **Belgian** and **French** Governments that marriages may be celebrated between couples under the age of eighteen, there is absolutely no reason to deny the same option to those couples opting to register a non-marital relationship under similar circumstances.<sup>63</sup>

Secondly, although the **Belgian** legislature apparently identified similarities between couples consisting of relatives and couples in intimate relationships,<sup>64</sup> it is submitted that such a result is to be avoided.<sup>65</sup> The close ties between forms of non-marital registered relationship and marriage negate the possibility for such "familial relationships" to be dealt with in this same manner. The societal repugnance associated with incestuous relationships is, in this author's opinion, a sufficient reason to restrict entry into such

<sup>61</sup> *E.g. Belgian Chamber*, 1995-1996, No. 170/8, p. 3.

<sup>62</sup> Such an approach has also been favoured by the COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, *Report of the Committee on the Elimination of Discrimination against Women, Twenty-Eighth Session (13<sup>th</sup>-31<sup>st</sup> January 2003) and Twenty-Ninth Session (30<sup>th</sup> June – 18<sup>th</sup> July 2003)*, New York: United Nations, 2003, Report A/58/38, p. 120-121, §267-268. As the law currently stands, **French** law contravenes both Art. 1, United Nations Convention on the Rights of the Child (CRC) and Art. 16(2), United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

<sup>63</sup> In **Belgium** the majority of cases concern teenagers under the age of eighteen with a pregnant girl: P. SENAËVE, *Compendium van het Personen- en Familierecht. Deel 3*, Leuven: Acco, 2003, 6<sup>th</sup> Edition, p. 33, §1517.

<sup>64</sup> The phrase "intimate relationships" refers here to both marriages and non-marital registered relationships.

<sup>65</sup> See, for example, *Belgian Chamber*, 1995-1996, No. 170/8, p. 18 (MEULDERS).

relationship-based institutions to those outside the relevant prohibited degrees of relationship.<sup>66</sup> Although the problems faced by such groups may be very similar, institutional relationship frameworks should be restricted to those outside of domestically determined exogamous groups.

Thirdly, if countries are sincere about respecting the rights of same-sex couples, removing the discrimination faced by such couples and attempting to reduce the incidence of homophobia, such laudable aims should be followed through in the field of annulment. Instead of basing the annulment laws on the principles of contractual obligations, one should respect the equivalent principle of *favor matrimonii*, namely *favor registrationis*, and base such laws on the equivalent marital rules. If these laws are considered old-fashioned, inappropriate or unexploited,<sup>67</sup> then these rules should be amended instead of creating a two-tier system, which further institutionalises discrimination. It could be counter-argued that the non-marital registered relationships schemes established in **Belgium** and **France** are indeed aimed at creating a contractual relationship between the parties.<sup>68</sup> Nevertheless, the relationship itself cannot be forgotten; the emotional union between the parties to such a contract justifies the imposition of the *sui generis* contractual status afforded to marriage, and thus correspondingly the respective annulment laws applicable to marriage. After all, the very function of the contract relates to the protection of the relationship itself, thus forming an integral component of the contract, rather than fulfilling a mere incidental or ancillary role.

Finally, one must address the fundamental distinctions in the two areas (residency and sex) where neither external, nor a common core of internal, consistency was found. As has already been explained, the residency requirements imposed on aspirant registered partners and spouses cannot be analysed in isolation. One must take into account that more stringent residency requirements are a reactionary response to a private international law rule referring to the *lex loci registrationis* in matters of relationship validity.<sup>69</sup> The avoidance of registration tourism has been used in four countries to justify the imposition of more stringent residency requirements.<sup>70</sup> This argument was not, however, used in the **United Kingdom**. In order to explain this peculiarity, one must address a number of issues. The **United Kingdom** was relatively late, by Western European standards, to introduce a form of non-marital registered relationship. The argument that couples might travel to the **United Kingdom** in order to register their relationship was therefore no longer credible. Furthermore, unlike the other countries studied in this research, **Scotland** and **Northern Ireland** impose absolutely no residency requirements on those wishing to marry.<sup>71</sup> Even in **England & Wales** where seven days residency is required,<sup>72</sup> this amounts to a mere formality. Accordingly, even with respect to marriage, the **United Kingdom** adopts a much more liberal attitude with respect to residency than that embraced by the other four jurisdictions.

<sup>66</sup> See, for example, the ample wealth of anthropological studies on this topic, including: L. DEMAUSE, "The universality of incest", (1991) *Journal of Psychohistory*, Vol. 19.2, p. 1. J.L. PEACOCK and A.T. KIRSCH, *The human direction: An evolutionary approach to social and cultural anthropology*, 1970, New York: Appleton-Century-Crofts, p. 100.

<sup>67</sup> In **England & Wales**, for example, only 197 decrees of nullity were granted in 2002 compared to 147,538 divorces in the same year (equivalent to approximately 0.1% of all judicial marriage dissolutions).

<sup>68</sup> *E.g. Belgian Chamber*, 1995-1996, No. 170/8, p. 1 (MOUREAUX).

<sup>69</sup> Despite the absence of such a rule in **French** law, it would appear that such a rule has been applied in practice. G. KESSLER, *Les partenariats enregistrés en droit international privé*, Paris: LDGJ, 2004, p. 112-113. According to REVILLARD, PACSs have been concluded by as many as 22 different nationalities (i.e. Dutch, Russian, Belgian, American, German, Italian, English, Swiss, Ukrainian, Moroccan, Cuban, Australian, Tunisian, Burkinan (from Burkina-Faso), Thai, Luxembourgian, Belarusian, French, Canadian, Swedish, Romanian and Algerian): M. REVILLARD, "Les unions hors mariage. Regards sur la pratique de droit international privé", in: *Des concubinages. Études offertes à J. Rubellin-Devichi*, Paris: Litec, 2002, p. 588.

<sup>70</sup> **Belgium, France, The Netherlands and Switzerland**.

<sup>71</sup> SCOTTISH EXECUTIVE, *Civil partnership registration: a legal status for committed same-sex couples in Scotland*, Edinburgh: Scottish Executive, 2003, p. 22, §6.13 and NORTHERN IRELAND LAW REFORM OFFICE, *Civil partnership: A legal status for committed same-sex couples in Northern Ireland*, Belfast: Northern Ireland Department of Finance and Personnel, p. 41, §9.1.

<sup>72</sup> Sec. 8(1)(b), Civil Partnerships Act 2004.

For these reasons, it was believed better to parallel the rules on marriage than to impose stricter residency rules on registered partners.

In moving to the restrictions imposed on the parties' sex, it is suggested that all of the non-marital registered relationship schemes studied in this article perform a similar function in providing two persons an institutional framework in which to register their intimate, personal, exclusive relationship, resulting in the attribution of a number of rights, duties, obligations and responsibilities. The fact that this framework has, in some countries also been extended to different-sex couples who do not wish to marry,<sup>73</sup> whilst in others restricted to same-sex couples, does not detract from this commonality in function. Provided that the variety of institutions studied fulfil a common purpose and their function is comparable, such institutions should be clustered under the same heading. Such an approach is not novel in the field of family law, having already been employed in the field of adoption.<sup>74</sup>

Although forms of adoption, namely *adrogatio*<sup>75</sup> and *adoptio*,<sup>76</sup> were available in Roman law,<sup>77</sup> adoption was unavailable under the common law and in many civil law systems until rather recently.<sup>78</sup> The scarcity of adoption has, however, been upturned, with adoption now an almost universally acknowledged concept.<sup>79</sup> However, universality in concept does not translate into universality in procedural form or effects.<sup>80</sup> Although access to adoption was restricted to married couples in many jurisdictions,<sup>81</sup> many countries have recently opened adoption procedures to different-sex cohabiting couples and individuals,<sup>82</sup> as well as, although to a lesser extent, same-sex couples.<sup>83</sup> The question therefore arises whether these alterations to the restrictions on who is allowed to adopt have fundamentally changed the functions which adoption seeks to perform. The answer is that they have

<sup>73</sup> As well as in the case of **Belgium** to couples who cannot marry: No equivalent in the statutory cohabitant legislation to Art. 161, Belgian Civil Code.

<sup>74</sup> This was in fact highlighted during the Belgian parliamentary discussions: *Belgian Chamber*, 1995-1996, No. 170/1, p. 1.

<sup>75</sup> *Gai institutiones* 1.99-107 and later *Digesta Iustiniani* 1.7.2 (preamble). This was originally the adoption of a *sui iuris* male. This form of adoption thus involved the termination of a Roman family; the ending of a *pater familias*. A. BORKOWSKI, *Textbook on Roman Law*, London: Blackstone, 1994, 2<sup>nd</sup> Edition, p. 136-137 and M. KASER (translated by R. DANNENBRING), *Roman private law*, Pretoria: South Africa, 1993, 4<sup>th</sup> Edition, p. 310, §60.III.2(a).

<sup>76</sup> *Codex Iustinianus* 8.47.10, *Institutiones Iustiniani* 1.11.2 and *Digesta Iustiniani* 1.7.37 (preamble). See further, A. BORKOWSKI, *Textbook on Roman Law*, London: Blackstone, 1994, 2<sup>nd</sup> Edition, p. 135-138 and M. KASER (translated by R. DANNENBRING), *Roman private law*, Pretoria: South Africa, 1993, 4<sup>th</sup> Edition, p. 311-312, §60.III.3.

<sup>77</sup> Under JUSTINIAN'S rule, the procedure in *adoptio* was simplified. Instead of the old *mancipatio* form, he required a declaration, entered on the records of the competent official. He also restricted the full effects of *adoptio* to adoption of a descendant, *adoptio plena* (full adoption). In all other cases, *adoptio minus plena* (less than full adoption), the effects were considerably weaker. *Codex Iustinianus* 8.47.10.1a-g. See further A. BORKOWSKI, *Textbook on Roman Law*, London: Blackstone, 1994, 2<sup>nd</sup> Edition, p. 138, M. KASER (translated by R. DANNENBRING), *Roman private law*, Pretoria: South Africa, 1993, 4<sup>th</sup> Edition, p. 312, §60.III.3(b). See further **Section 4.3**.

<sup>78</sup> H. D. KRAUSE, *Creation of relationships of kinship, Volume III.6: International Encyclopaedia of Comparative Law*, Mouton: The Hague, 1976, p. 12. The **Scandinavian** nations and **Russia** on the other hand, appear to have received this Roman tradition with open arms: PERMANENT BUREAU OF THE HAGUE CONFERENCE, *Proceedings of the Seventeenth Session of The Hague Conference. Volume II*, The Hague, 1994, p. 27, §31.

<sup>79</sup> Note however the exception of Islamic countries who do not currently allow for adoption: PERMANENT BUREAU OF THE HAGUE CONFERENCE, *Proceedings of the Seventeenth Session of The Hague Conference. Volume II*, The Hague, 1994, p. 25-26.

<sup>80</sup> The analogy to the diverse legal effects created as a result of adoption see **Section 4.3**.

<sup>81</sup> See, for example, **Belgium**: Art. 343(1), Belgian Civil Code prior to the Act of 24<sup>th</sup> April 2003; **France**: Art. 343, French Civil Code prior to Act of 22<sup>nd</sup> December 1976, No. 76-1179; **Netherlands**: Art. 227(1), Dutch Civil Code prior to Act of 24<sup>th</sup> December 1997, *Staatsblad* 1997, No. 772; **Switzerland**: Art. 264a, Swiss Civil Code prior to Act of 30<sup>th</sup> June 1972; **England & Wales and Northern Ireland**: Law prior to the Adoption Act 1976; **Scotland**: Law prior to the Adoption (Scotland) Act 1978.

<sup>82</sup> PERMANENT BUREAU OF THE HAGUE CONFERENCE, *Proceedings of the Seventeenth Session of The Hague Conference. Volume II*, The Hague, 1994, p. 59, §99.

<sup>83</sup> Only **England & Wales** and **The Netherlands** allow for joint same-sex adoption.

not. One must distinguish between the purposes of adoption and the inherent restrictions imposed upon aspirant adopters.

In deliberating the function of adoption, one unearths perceptible differences in approach. Today, although adoption has come to be viewed as a device to place parentless children with parents and vice versa,<sup>84</sup> this has been achieved in remarkably varied ways. In some jurisdictions adoption is viewed as a contract between the parties,<sup>85</sup> whilst in other States adoption is regarded as a purely governmental act.<sup>86</sup> Although at first sight this conspicuous disparity appears crucial, these differences are less decisive than they first appear. As KRAUSE indicates, the practical difference is simply one of emphasis.<sup>87</sup> He notes that in those systems that regard adoption as a governmental act, such systems cannot avoid the fact that in order for an adoption to occur, the consent of all the parties is needed. In those systems, on the other hand, where adoption is treated as a contract, a court is usually involved in a supervisory capacity.<sup>88</sup> In a broad, non-legal sense adoption may thus be defined as,

The institutionalised social practice through which a person, belonging by birth to one family or kinship group, acquires new family or kinship ties that are socially defined as equivalent to biological ties and which supersede the old ones, either wholly or in part.<sup>89</sup>

If an institution as varied as adoption can thus find common legislative answers in the form of international treaties based on assumed common functional bases,<sup>90</sup> can the same be accomplished in relation to non-marital registered relationships? Can a common function be attributed to or found to be evident in the various forms of non-marital registered relationship schemes studied? Although it is clear that two distinct approaches have been taken, the principle aim is similar. Variance in the precise ambit of this purpose necessarily dictates variety in the restrictions on who may register with whom. However, variance does not necessarily come at the cost of incompatibility.

In attempting to determine the existence of a common function, one must also address the differences between the motives behind opening relationship registration to couples of a different sex in **Belgium**, **France** and **The Netherlands**. In comparing these jurisdictions, ANTOKOLSKAIA argues that the aims of these jurisdictions should not be confused.<sup>91</sup> In **France** and **Belgium** the reasons for opening relationship registration to different-sex couples were very different than those postulated in **The Netherlands**. The **Dutch** Government wished to avoid the discrimination that would be created if registered partnership were restricted to same-sex couples. It was believed that if registered partnerships were so restricted it would in effect create a second-class marriage.<sup>92</sup> By opening registration to different-sex couples, the Government would ensure that such arguments could be avoided. In **France** and **Belgium**, on the other

<sup>84</sup> S. CRETNEY *et al.*, *Principles of family law*, London: Butterworths, 2003, p. 792, §23-001.

<sup>85</sup> PERMANENT BUREAU OF THE HAGUE CONFERENCE, *Proceedings of the Seventeenth Session of The Hague Conference. Volume II*, 1994, p. 57, §92. H. D. KRAUSE, *Creation of relationships of kinship, Volume III.6: International Encyclopaedia of Comparative Law*, Mouton: The Hague, 1976, p. 75, §155.

<sup>86</sup> Regardless of whether this be an administrative or judicial act. H. D. KRAUSE, *Creation of relationships of kinship, Volume III.6: International Encyclopaedia of Comparative Law*, Mouton: The Hague, 1976, p. 73, §148.

<sup>87</sup> H. D. KRAUSE, *Creation of relationships of kinship, Volume III.6: International Encyclopaedia of Comparative Law*, Mouton: The Hague, 1976, p. 73, §149.

<sup>88</sup> H. D. KRAUSE, *Creation of relationships of kinship, Volume III.6: International Encyclopaedia of Comparative Law*, Mouton: The Hague, 1976, p. 73, §149.

<sup>89</sup> PERMANENT BUREAU OF THE HAGUE CONFERENCE, *Proceedings of the Seventeenth Session of the Hague Conference. Volume II*, The Hague, 1994, p. 23.

<sup>90</sup> *E.g.* the 1993 Hague Adoption Convention.

<sup>91</sup> M. ANTOKOLSKAIA, *Harmonisation of family law in Europe – An historical perspective*, Antwerp: Intersentia, 2006, Chapter 4.4 (to be published).

<sup>92</sup> *Dutch Second Chamber*, 1995-1996, 23761, No. 7, p. 10.

hand, the main reasons for opening registration to different-sex couples stemmed from the political impasse that would have been created if the Governments were perceived to be promoting same-sex relationships. As a result, a political compromise was struck and registration was open to both groups of couples. ANTOKOLSKAIA argues that these two approaches cannot be assimilated;<sup>93</sup> the function of relationship registration in these three countries for different-sex couples is based on different ideals.

It is, however, submitted that although the reasons given are perhaps different, the essential aim of all three legislatures was the same. In **France**, **Belgium** and **The Netherlands** the Governments recognised two issues that needed resolution: the legal invisibility of same-sex couples and the problem of those different-sex couples who chose not to marry. In all three jurisdictions it was decided that these two aims could best be dealt with in the same piece of legislation. The political reasons for making this decision are indeed to some extent different. In **The Netherlands** the position adopted was reached from the principle of neutrality, whereas in **France** and **Belgium** the position was realised as the result of a political compromise. Yet in all three jurisdictions, although these reasons are different, the intentions were the same. It was the aim of reaching a political compromise and thus ensuring that same-sex couple registration was enacted, that eventually resulted in the opening up of registration to different-sex couples. The political compromise reached in **France** and **Belgium** has, of course, had serious implications on the rights and duties attributed to the institution; however, this does not detract from the underlying fundamental principle that all three jurisdictions saw the need to reach a compromise or chance the peril of the legislation being defeated in its entirety.

Returning to the question of functional comparability, one is supported in proposing the existence of a *tertium comparationis* if one examines the substantive law disparity in the field of marriage. One can hardly speak of an institution exemplified by an inherent and cohesive worldwide definition. The rules relating to marriage differ markedly between jurisdictions and yet a wide variety of marital notions are accepted as falling under a single umbrella term due to the existence of a common functional basis. Why should that be any different for non-marital registered relationships? Has the opening up of marriage to same-sex couples in **The Netherlands**, for example, caused a fundamental paradigm shift in the function, aims and nature of marriage under **Dutch** law? Of course not.

A number of issues must be clearly identified and dealt with independently. The topics of function and eligibility should remain clearly distinct from one another, as should the issues of comparability and compatibility with domestic, substantive law. Comparability deals with assessment and evaluation of whether domestic national institutions may be compared, whilst compatibility involves an in-depth investigation into the questions surrounding the recognition of non-marital relationships registered abroad. This latter question is evidently intricately associated with the notion of public policy at private international law and therefore falls outside the bounds of an article of this scope.<sup>94</sup>

As already stated above, in attempting to answer the issues raised by comparability, one must espouse a functional analysis.<sup>95</sup> In doing so one must ask a series of separate yet interrelated questions. Firstly, do same-sex non-marital relationships registered in different countries fulfil a similar function? The answer

<sup>93</sup> M. ANTOKOLSKAIA, *Harmonisation of family law in Europe – An historical perspective*, Antwerp: Intersentia, 2006, Chapter 4.4 (to be published).

<sup>94</sup> These issues have, however, been dealt with in I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that end's registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005 (published in November), p. 441-442.

<sup>95</sup> I. SCHWENZER, "Methodological aspects of harmonization of family law", in: K. BOELE-WOELKI (ed.), *EFL Series: Volume 4. Perspectives for the unification and harmonisation of family law in Europe*, Antwerp: Intersentia, 2003, p. 146-148.

to this question is obviously yes. The registration schemes in all seven jurisdictions attempt to provide same-sex couples with protection of their intimate personal relationships. The apparent existence of a *tertium comparationis* is undeniable.

Secondly, turning one's attention to the three jurisdictions where different-sex couples are permitted to register their relationships, is a distinction drawn between the function of the registration for different-sex couples and the function of the registration for same-sex couples? The answer to this question must be answered negatively. No distinction is drawn in **Belgium, France** or **The Netherlands** in terms of the function of the registration scheme dependent upon the sex of the parties registering. The reasons for the action taken may well be different, but the function of the registration is the same: to afford protection to intimate, personal relationships. If one takes these two basic tenets, *i.e.* that various national forms of same-sex non-marital registered relationships perform similar functions and that no distinction is drawn in those systems that have opened such registration schemes to different-sex couples, it is therefore logical to draw the conclusion that these registration schemes all perform a similar function. The common functional framework upon which one can analyse such laws is thus, it is submitted, broadly speaking: "Non-marital registered relationships aim at providing legal protection to the intimate, personal, exclusive relationship between two persons and result in the State attribution of a collection of rights, duties, obligations and responsibilities."

It is submitted that a putative *tertium comparationis* in this field has indeed been found to be present. Nonetheless, regardless of the existence of a *tertium comparationis*, the issue of sex cannot be ignored altogether. It is undeniable that the sex of the parties has played an important role in the eligibility criteria adopted in such legislation. Hence, and in bearing in mind the aforementioned distinction between eligibility criteria and functionality, it is possible to distinguish between two different approaches to the issues raised. At this stage it is also perhaps important to note that one must dissociate the rights and duties incumbent upon the parties to the relationship from the purpose of the registration scheme itself. Although these two are inherently and intrinsically connected, it is not true that they must necessarily be compared concurrently.<sup>96</sup>

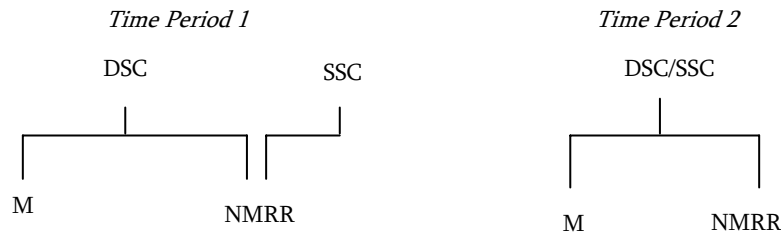
As a result of all the aforementioned comparisons, two models can be distinguished. On the one hand, there is the PLURALISTIC MODEL, whereby couples irrespective of their gender are offered two possibilities, namely marriage or non-marital registered relationship. On the other hand, some countries have preferred the DUALISTIC MODEL, where couples are only provided with one institutionalised relationship form dependent on their sex: different-sex couples are able to marry, whilst same-sex couples are entitled to register their non-marital relationship. It must furthermore be noted that countries adhering to the PLURALISTIC MODEL tend to attain the end phase of this model by virtue of a two-stage process, thereby necessitating the division of the PLURALISTIC MODEL into two time-periods. The first time-period involves opening non-marital registration to both different and same-sex couples, whilst leaving marriage legislation entirely intact and unaltered. Once this has been achieved, the arguments for opening civil marriage to same-sex couples are strengthened,<sup>97</sup> since the discrimination originally faced by same-sex couples, in not being able to marry, is simply replaced with a new form of discrimination; although different-sex couples are offered a choice of relationship forms, same-sex

<sup>96</sup> See, for example, the distinction drawn by H. D. KRAUSE, *Creation of relationships of kinship, Volume III.6: International Encyclopaedia of Comparative Law*, Mouton: The Hague, 1976, p. 89, §184 with respect to adoption and the effects of adoption.

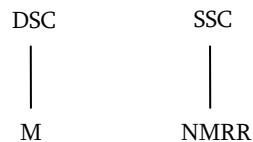
<sup>97</sup> See, for example, I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that end's registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005 (published in November), Chapters III.3.5 (p. 46-47) and V.3.3 (p. 126-127).

couples are not.<sup>98</sup> It is irrefutable that the option for different-sex couples to register their relationship along identical lines to same-sex couples in **The Netherlands** and **Belgium** played an important role in the pressure placed on these Governments to amend the laws prohibiting same-sex civil marriage.<sup>99</sup> Both these models can be represented diagrammatically.

### THE PLURALISTIC MODEL



### THE DUALISTIC MODEL



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

In attempting to create a valued pluralistic system of family law<sup>100</sup> whereby couples are afforded choices dependent upon their needs rather than on the basis of their sex, one should support the eventual result achieved by the PLURALISTIC MODEL. By *time period 2* of this model, couples are offered two choices of institutionalised relationship forms regardless of their sex. The DUALISTIC MODEL, on the other hand, retains discrimination as its fundamental premise:<sup>101</sup> same-sex couples are entitled to register, whilst different-sex couples are entitled to marry. Although the legal effects incumbent upon the registration of a non-marital relationship and the celebration of a marriage may be negligible, one is reminded of the famous adage, “all animals are equal but some are more equal than others”.<sup>102</sup> The symbolic significance of a distinction between two different institutions does, and always will, support a continued belief that the needs of same-sex and different-sex couples are fundamentally different and thus require different

<sup>98</sup> See, for example, *Dutch Second Chamber*, 1995-1996, 23761, No. 7, p. 10.

<sup>99</sup> It is, therefore, argued that over the course of time, **France** will gradually come to debate the issue of opening civil marriage to same-sex couples. This issue has in fact already been raised in the courts (The mayor of Bégles, a small town just outside Bordeaux, was in fact suspended for one month from the 15<sup>th</sup> June 2004 for performing a wedding ceremony for a couple of the same-sex. The marriage was, however, subsequently annulled, TGI Bordeaux, 27<sup>th</sup> July 2004) as well as politically (See, for example, MINISTRE DE LA JUSTICE, *Le pacte civil de solidarité. Réflexions et propositions de réforme. Rapport remis à Monsieur Dominique Perben*, Paris: Ministry of Justice, 2004, p. 6).

<sup>100</sup> During the twentieth century the term “valued pluralism” had almost become the buzz word in family law publications: see, for example, A. BAINHAM, “Family law in a pluralistic society: a view from England and Wales”, *CLJ*, 1998, p. 42-45; K. O’DONOVAN, “Unmarried partners ‘traditional marriage’, in English law”, in: J. RUBELLIN-DEVICHI and L. BALESTRA (eds.), *Des concubinages, droit interne, droit international et droit compare. Études offertes à J. Rubellin-Devichi*, Paris: Litec, p. 455-471; A. LAQUER ESTIN, “Human rights, pluralism and family law”, in: P. LØDRUP and E. MODVAR (eds.), *Family life and human rights*, Oslo: Gyldendal, 2004, p. 210-228; W. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en duitse recht*, Deventer: Kluwer, 2004, p. 572; J. SINCLAIR, “Embracing new family forms, entrenching outmoded stereotypes: building the rainbow nation”, in: P. LØDRUP and E. MODVAR (eds.), *Family life and human rights*, Oslo: Gyldendal, 2004, p. 801-838.

<sup>101</sup> Even if the differences are only to be found in the name given to the available institution.

<sup>102</sup> GEORGE ORWELL, *Animal Farm*, Chapter X.

legislation. This proposition is already based on prejudicial fallacies. Legislatures should focus on the degree of commitment involved in the relationship, the function which institutionalised relationship legislation seeks to perform, as well as the presence of any children. On these bases, a functional pluralistic family law for the 21<sup>st</sup> century will gradually become a reality. Such a reality is in fact achieved by *time period 2* of the PLURALISTIC MODEL. The intrinsic discrimination faced by same-sex couples in the DUALISTIC MODEL is removed, and at the same time couples are offered a range of choices as to how to regulate their intimate, personal relationship. Discrimination could also be removed in the DUALISTIC MODEL by amalgamating the two institutions into one. This would lead to the creation of a third approach, the MONISTIC MODEL, whereby couples are offered one institutionalised relationship form (*i.e.* marriage) regardless of sex.<sup>103</sup> Although perhaps less favourable than the PLURALISTIC MODEL, in that couples are only provided with an all-or-nothing choice of institutionalised relationship form,<sup>104</sup> it would remove the integral discriminatory basis upon which the DUALISTIC MODEL is based.<sup>105</sup>

### THE MONISTIC MODEL

DSC/SSC



M

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

The MONISTIC MODEL is also foreseeable in a country embracing the PLURALISTIC MODEL, if the options proffered are based on perceived choice rather than actual choice. In such a scenario, non-marital registered relationship would be abolished and couples would be left with only one choice of institutionalised relationship form (*i.e.* marriage). Although **The Netherlands** adheres to the PLURALISTIC MODEL, the choice offered to couples wishing to formally regulate, and thereby institutionalise, their relationship is in fact not a choice between different possibilities, but the same possibility with two different names.<sup>106</sup> Valued pluralism relates to the furnishing of genuine choices, not artificial alternatives. In this respect the distinction drawn in **Belgium** between a relatively weak form of non-marital registered relationship coupled with marriage open to both different-sex and same-sex couples, should be commended in its approach. Nonetheless, this does not detract from the numerous inadequacies inherent in the manner in which the **Belgian** legislation has been drafted. It is therefore

<sup>103</sup> Outright adoption of the MONISTIC MODEL has, for example, been achieved in some common law States such as **Massachusetts, USA** and certain provinces in **Canada**.

<sup>104</sup> Although in some jurisdictions this will not be an all-or-nothing choice, but instead an “all-or-not-quite-as-much” choice.

<sup>105</sup> Such a shift from the dualistic model to the monistic model has already been signalled in **Sweden**, where calls for the abolition of registered partnership and the opening of marriage to same-sex couples have been heard: SWEDISH GOVERNMENTAL PRESS RELEASE, “Äktenskap eller partnerskap för homosexuella?”, 27<sup>th</sup> January 2005, available at: <http://www.regeringen.se/sb/d/5069/a/37931>. See also C. SÖRGJERD, “Neutrality: the death or revival of the traditional family? Regulating informal partnerships in Sweden”, in: K. BOELE-WOELKI (ed.), *EFL Series: Volume 10. Common core or better law in European family law*, Antwerp: Intersentia, 2005, p.335-352 at 348. Such a shift has also been signalled in **Denmark**, I. LUND-ANDERSEN, “The Danish Registered Partnership Act”, in: K. BOELE-WOELKI and A. FUCHS (eds.), *EFL Series: Volume 1. Legal recognition of same-sex couples in Europe*, Antwerp: Intersentia p. 13-23 at 23. For information on **Norway, Iceland and Finland** see M. JÄNTERÄ-JAREBORG and C. SÖRGJERD, “The experiences with registered partnership in Scandinavia”, *FamPra.ch*, 2004, p. 587. As a result of the federal same-sex marriage legislation enacted in **Canada**, this result has been achieved in **Alberta, North Western Territories and Nunavut**. This is also true in 6 of the 17 regions in **Spain** and **Massachusetts, United States of America**.

<sup>106</sup> This has already been called for by W. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Deventer: Kluwer, 2004, p. 566. See also **Section 3.3**.

clear that although all the seeds for a truly pluralistic, non-discriminatory model have been sown, there is, as yet, no single representative country able to claim to have reaped the full harvest of benefits.

### 3. DISSOLUTION

Obviously when creating new forms of registered relationships, the respective legislatures have also had to deal with issues relating to their possible dissolution. It is possible to draw two conclusions from the diversity of solutions currently proffered. Firstly, it is questionable, but perhaps nonetheless arguable, that superficial external consistency exists in the dissolution procedures currently in operation (**Section 3.1**). Secondly, two distinct dissolution models should be distinguished. On the one hand, there are those countries where, as far as possible, dissolution procedures available to registered partners mirror those available to spouses wishing to terminate their marriage. Although slightly modified, the general grounds and procedural provisions for dissolution are the same for both categories of couples: *internal consistency* is thus achieved. Such an approach has been adopted in **Switzerland** and the **United Kingdom** (**Section 3.2**).

On the other hand, there are those countries where, in light of registration being open to couples of a different sex, a distinction has been drawn between marriage and non-marital registered relationships: *internal inconsistency* is thus the result. A salient feature of such dissolution procedures lies in their relative informality, either in the form of an administrative or unilateral procedure. This approach is evident in **Belgium**, **France** and **The Netherlands** (**Section 3.3**).

#### 3.1. EXTERNAL CONSISTENCY

Since the death of either or both partners automatically brings a non-marital registered relationship or marriage to an end in all seven jurisdictions, internal and external consistency has been achieved in this domain.<sup>107</sup> This is, however, not a particularly surprising result. Any alternative is almost impossible to imagine and would have broken with a time immemorial principle that death ends a relationship. Although such external consistency evaporates when one turns one's attention to the law on presumed death, internal consistency has nevertheless been achieved in all jurisdictions with respect to these rules.<sup>108</sup>

In searching for general overarching principles common to all jurisdictions in the field of relationship dissolution, it is important to note the recent publication by the CEFL presenting the first Principles of European Family Law.<sup>109</sup> Ten general principles have been formulated in the field of divorce based on a

<sup>107</sup> **Belgium**: Art. 1476(2)(1), Belgian Civil Code; **France**: Art. 515-7(4), French Civil Code; **The Netherlands**: Art. 1:80c(a) and (b), in conjunction with 1:412-425, Dutch Civil Code; **Switzerland**: Art. 31(3), Swiss Registered Partnership Act; **United Kingdom**: General principle, see N. LOWE and G. DOUGLAS, *Bromley's family law*, London: Butterworths, 1998, 9<sup>th</sup> Edition, p. 867; E. CLIVE, *The law of husband and wife in Scotland*, Edinburgh: W. Green, 1997, 3<sup>rd</sup> Edition, p. 602-603, K. O'HALLORAN, *Family law in Northern Ireland*, Dublin: Gill & MacMillan, p. 44.

<sup>108</sup> **Belgium**: According to Belgian law, the absence of a spouse or statutory cohabitant never leads to the termination of the marriage or statutory cohabitation. See P. SENAËVE, *Compendium van het personen- en familierecht. Deel 3*, Leuven: Acco, 2003, p. 44, §62; **France**: Art. 122, French Civil Code; **The Netherlands**: Art. 1:80c(a) and (b), in conjunction with 1:426-430, Dutch Civil Code; **Switzerland**: No principle of presumption of death is present in Swiss law; **England & Wales**: Sec. 55(1), Civil Partnerships Act 2004; **Scotland**: Sec. 1(3), Presumption of Death (Scotland) Act 1977, as amended by §44, Schedule 28, Civil Partnerships Act 2004; **Northern Ireland**: Sec. 178(1), Civil Partnerships Act 2004.

<sup>109</sup> K. BOELE-WOELKI *et al.*, *EFL Series: Volume 7. Principles of European family law regarding divorce and maintenance between former spouses*, Antwerp: Intersentia, 2004. The CEFL has also formulated Principles in the field of maintenance between former spouses.

comparative survey of twenty-two European jurisdictions.<sup>110</sup> The first three principles provide a general framework. It is submitted that all three could, to a certain extent, be applied to the dissolution of non-marital registered relationships as well.

Principle 1:1 states that the law should permit divorce and that no duration of the marriage should be required.<sup>111</sup> In transposing these principles to the field at hand, one is clearly able to identify support for such statements. All countries provide for a method to terminate non-marital registered relationships.<sup>112</sup> This is sometimes judicial, sometimes administrative, sometimes based on mutual consent and other times not. Regardless, all systems that have enacted forms of non-marital registered relationships have also provided methods for their possible dissolution. This is, however, hardly a surprising result. The secular nature of non-marital registered relationships has inevitably avoided the religious pitfalls that have been a source of demise for many attempts to enact divorce legislation.

Unanimity of result is, however, absent in relation to any independent requirement that the relationship has lasted for a particular length of time. **England & Wales** and **Northern Ireland** both impose independent time-bars on the application for such a dissolution order.<sup>113</sup> Furthermore, all three jurisdictions in the **United Kingdom** also impose a minimum period of separation if the dissolution is based on mutual consent.<sup>114</sup> However, the CEFL exposed a similar state of affairs with respect to divorce. Although only two of the twenty-two jurisdictions surveyed for the CEFL Principles imposed an independent time-bar on divorce proceedings,<sup>115</sup> more than two-thirds of jurisdictions imposed a minimum separation period on divorce proceedings by mutual consent.<sup>116</sup> The absence of a common core has not, however, prevented the CEFL in reaching the conclusion laid down in Principle 1:1(2). The *dédramatisation* of the divorce procedure is highlighted as the foremost reason for removing all hindrances to obtaining a divorce.<sup>117</sup> It could be argued that such an aim should also be followed through in the field of non-marital registered relationship dissolution.

Turning one's attention to Principle 1:2, namely the divorce procedure and competent authority, one is also able to discern a veritably similar approach.<sup>118</sup> Although the dissolution of a non-marital registered relationship is regulated by law in all those countries surveyed, in only three countries is a legal

<sup>110</sup> K. BOELE-WOELKI, B. BRAAT and I. SUMNER (eds.), *EFL Series: Volume 2. European family law in Action. Volume I: Grounds for divorce*, Antwerp: Intersentia, 2003.

<sup>111</sup> K. BOELE-WOELKI *et al.*, *EFL Series: Volume 7. Principles of European family law regarding divorce and maintenance between former spouses*, Antwerp: Intersentia, 2004, p. 17.

<sup>112</sup> **Belgium**: Art. 1476(2), Belgian Civil Code; **France**: Art. 515-7, French Civil Code; **The Netherlands**: Art. 1:80c and 80d, Dutch Civil Code; **Switzerland**: Arts. 29 and 30, Swiss Registered Partnership Act; **England & Wales**: Chapter 2, Part 2, Civil Partnerships Act 2004; **Scotland**: Chapter 5, Part 3, Civil Partnerships Act 2004; **Northern Ireland**: Chapter 2, Part 4, Civil Partnerships Act 2004.

<sup>113</sup> **England & Wales**: Sec. 41(1), Civil Partnerships Act 2004 (one year); **Northern Ireland**: Sec. 165(1), Civil Partnerships Act 2004 (two years).

<sup>114</sup> Namely two years: **England & Wales**: Sec. 44(5)(b), Civil Partnerships Act 2004; **Scotland**: Sec. 117(3)(c), Civil Partnerships Act 2004; **Northern Ireland**: Sec. 168(5)(d), Civil Partnerships Act 2004.

<sup>115</sup> **England & Wales** (N. LOWE, in: K. BOELE-WOELKI, B. BRAAT and I. SUMNER (eds.), *EFL Series: Volume 2. European family law in Action. Volume I: Grounds for divorce*, Antwerp: Intersentia, 2003, p. 197-198) and **Ireland** (G. SHANNON, in: K. BOELE-WOELKI, B. BRAAT and I. SUMNER (eds.), *EFL Series: Volume 2. European family law in Action. Volume I: Grounds for divorce*, Antwerp: Intersentia, 2003, p. 198-199).

<sup>116</sup> Only **Finland**, **The Netherlands**, **Poland**, **Portugal**, **Russia**, **Sweden** and **Switzerland** do not impose any time periods in the case of divorce by mutual consent: see K. BOELE-WOELKI *et al.*, *EFL Series: Volume 7. Principles of European family law regarding divorce and maintenance between former spouses*, Antwerp: Intersentia, 2004, p. 18.

<sup>117</sup> K. BOELE-WOELKI *et al.*, *EFL Series: Volume 7. Principles of European family law regarding divorce and maintenance between former spouses*, Antwerp: Intersentia, 2004, p. 19.

<sup>118</sup> K. BOELE-WOELKI *et al.*, *EFL Series: Volume 7. Principles of European family law regarding divorce and maintenance between former spouses*, Antwerp: Intersentia, 2004, p. 20.

procedure the only means available.<sup>119</sup> Special mention must be made of the situation in **Belgium** and **France** where the celebration of a marriage also acts to dissolve any existing non-marital registered relationship.<sup>120</sup> In **France**, a legal procedure must, however, be followed before the marriage takes place. The party wishing to marry is obliged to send notice of his or her decision to the other by means of a bailiff's summons, a true copy of which must also be sent to the clerk of the district court who received the original PACS document.<sup>121</sup> The PACS is then deemed to have come to an immediate end by operation of law on the date on which the marriage was celebrated.<sup>122</sup> Nevertheless, failure to satisfy the legal procedure prior to celebrating the marriage does not effect the termination of the PACS. Such a legal procedure is, however, not necessary in **Belgium** and the celebration of a marriage is enough to bring a statutory cohabitation to an immediate and automatic end.<sup>123</sup>

It would therefore appear that in both these countries, it is not only a legal procedure that can terminate a non-marital registered relationship but also a legal act. Nevertheless, the wording of Principle 1:2(1) is such that this distinction can be accommodated.<sup>124</sup> Since Principle 1:2(1) emphasises the secular nature of the divorce procedure, which is indeed mirrored in procedures available to registered partners,<sup>125</sup> it is submitted that whether the dissolution occurs by means of a legal procedure or legal act is irrelevant.

In two jurisdictions, namely the **United Kingdom** and **Switzerland**, only judicial authorities are competent to proceed with dissolution procedures. Although in **France** the declaration to terminate one's relationship must be registered with a judicial authority, the procedure itself is administrative in nature (*i.e.* lacking judicial scrutiny). In **Belgium** competency rests with an administrative authority, although there may indeed be no authority as such involved in the termination procedure (*i.e.* if the non-marital registered relationship is terminated by means of a subsequent marriage). In contrast, in **The Netherlands** the authority competent to terminate the relationship depends on the legal procedure used.<sup>126</sup> If the dissolution is jointly requested, the parties are obliged to terminate their registered partnership administratively (either by means of an administrative dissolution or conversion into a marriage), whilst judicial dissolution is only permitted via a unilateral dissolution request.

It is hence possible to conclude that from the comparative overview concerning the dissolution of non-marital registered relationships, the *ratione materiae* of Principle 1:2 could be extended to include non-marital registered relationships. Although the rationale exemplified by Principle 1:2(2) is reflected in the dissolution procedures available for these new institutional relationship forms, the phraseology is not entirely consistent with the manner in which non-marital registered relationships may be terminated.

<sup>119</sup> **The Netherlands**: Arts. 1:80c-80g, Dutch Civil Code; **Switzerland**: Arts. 29 and 30, Swiss Registered Partnership Act; **England & Wales**: Chapter 2, Part 2, Civil Partnerships Act 2004; **Scotland**: Chapter 5, Part 3, Civil Partnerships Act 2004; **Northern Ireland**: Chapter 2, Part 4, Civil Partnerships Act 2004.

<sup>120</sup> **Belgium**: Art. 1476(2)(1), Belgian Civil Code; **France**: Art. 515-7(3), French Civil Code.

<sup>121</sup> Art. 515-7(3), French Civil Code

<sup>122</sup> Art. 515-7(7)(3), French Civil Code

<sup>123</sup> Art. 1476(2)(1), Belgian Civil Code

<sup>124</sup> Principle 1:2(1) is worded so as to cover both legal procedures and legal acts: "divorce procedure should be determined by law".

<sup>125</sup> K. BOELE-WOELKI *et al.*, *EFL Series: Volume 7. Principles of European family law regarding divorce and maintenance between former spouses*, Antwerp: Intersentia, 2004, p. 23.

<sup>126</sup> Art. 1:80d, Dutch Civil Code provides that dissolution petitions on the basis of mutual consent are dealt with administratively, whilst Art. 1:80e, Dutch Civil Code provides that unilateral dissolutions are dealt with judicially.

With respect to Principle 1:3 one is also able to identify a perceptible common core of opinion.<sup>127</sup> All seven jurisdictions permit the dissolution of a non-marital registered relationship either on the basis of mutual consent or without the consent of one of the parties. The internal differences as to how this result is achieved necessitate at this juncture a departure from the structure of the Principles and a return to the structure espoused in **Section 2**, namely between those countries having sought internal consistency and those that have not.

### 3.2. EXTERNAL INCONSISTENCY BUT INTERNAL CONSISTENCY

In both **Switzerland** and the **United Kingdom**, the legislature has decided to preserve the judicial mechanisms for dissolving non-marital registered relationships. Accordingly, no administrative form of dissolution is provided for in either country.<sup>128</sup> In retaining the judicial monopoly on relationship dissolution, both countries have, as far possible, attempted to create a corresponding procedure for non-marital registered relationship breakdown to that already applicable in cases of marital breakdown. Although a number of minor differences are apparent, this is often attributable to an attempt to achieve internal legislative consistency within the non-marital registered relationship legislation. For example, although adultery is not an explicit ground for the dissolution of a civil partnership in any of the three jurisdictions of the **United Kingdom**, as is the case for marriage, couples wishing to use adultery as a ground to dissolve their relationship will be able to file for dissolution of the relationship based on unreasonable behaviour. The reason for the absence of such a ground can be traced to the Government's unwillingness to alter the common law definition of adultery, a position adopted throughout the CPA 2004.<sup>129</sup>

In **Switzerland**, despite the absence of a two-track joint dissolution petition procedure for registered partners,<sup>130</sup> the Sw. RPA does provide for both termination by mutual consent, as well as termination without the consent of one of the parties.<sup>131</sup> In justifying the absence of an equivalent distinction for registered partners as that made in Arts. 111 and 112, Sw. CC, the **Swiss** Ministry of Justice pointed to the simplification of the dissolution system due to the absence of children. Despite the characteristic of a two-track joint petition procedure for spouses, the absence of such a choice for registered partners is not of fundamental importance. The difference between the divorce procedures in Art. 111 and Art. 112, Sw. CC is restricted to procedural law. However, the absence of a reflection period for the termination of a registered partnership, as is provided for in Art. 111, Sw. CC indicates the haphazard manner in which the **Swiss** legislature has fused these two procedures into one.

All the same, the **Swiss** legislature has provided for a two-track system for relationship dissolution. On the one hand, a joint petition procedure is available if the parties are in agreement as to the need to

<sup>127</sup> Principle 1:3 states that "the law should permit both divorce by mutual consent and divorce without the consent of one of the spouses": K. BOELE-WOELKI *et al.*, *EFL Series: Volume 7. Principles of European family law regarding divorce and maintenance between former spouses*, Antwerp: Intersentia, 2004, p. 24.

<sup>128</sup> See I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, Chapters VI.6.4 (p. 204), VI.6.5 (p. 204), VII.6.4 (p. 254) and VII.6.5 (p. 254).

<sup>129</sup> WOMEN AND EQUALITY UNIT, "Responses to civil partnership. A framework for the legal recognition of same-sex couples", London: Department of Trade and Industry, 2003, p. 36.

<sup>130</sup> Unlike marriage were two possible grounds exist: Art. 111, Swiss Civil Code (agreement as to all consequences) and Art. 112, Swiss Civil Code (only partial agreement or lack of agreement as to consequences).

<sup>131</sup> **Marriage**: Arts. 111-113, Swiss Civil Code (joint petition) and Arts. 114-115, Swiss Civil Code (unilateral petition); **Registered Partnership**: Art. 29, Swiss Registered Partnership Act (joint petition) and Art. 30, Swiss Registered Partnership Act (unilateral petition).

terminate the relationship. On the other, a unilateral dissolution procedure is available if such a basic consensus is absent. Despite this superficial coherence, numerous minor differences are perceptible. For example, a unilateral request for divorce must be supplemented by proof that the parties have been separated for two years, whereas this separation period is fixed at one year for registered partners.<sup>132</sup> The reasons for these differences stem from the absence of constitutional protection afforded to the institution of registered partnership, the lack of children and the overriding desire to respect the will of the parties.<sup>133</sup> As a result, the dissolution procedure for registered partnership symbolises the political compromise achieved between adhering to the dissolution framework for marriage and the desire to achieve more procedural flexibility. The overall result is that of a dissolution system based entirely on that applicable to spouses with minor procedural alterations.<sup>134</sup> No new grounds for the dissolution of a non-marital registered relationship have been created and the same authorities competent to dissolve a marriage are also equally monopolistic in their competency to terminate non-marital registered relationships.

In both **Switzerland** and the **United Kingdom**, the legislature was thus very keen to ensure that parties embarked upon the registration of their relationship with commitment, sincerity and acknowledgment of the gravity of the undertaking. This was thus signalled, not only in the formalities that must be completed prior to registering a relationship, but also in relation to the procedures for terminating such relationships.

### 3.3. INTERNAL AND EXTERNAL INCONSISTENCY

This approach has not, however, been followed in **The Netherlands**, **Belgium** and **France**. In all these three countries, distinctive procedures have been created enabling couples to dissolve their non-marital registered relationships on grounds not available to spouses wishing to divorce or via authorities not competent to grant a divorce. In opening registration to couples of a different sex, the Governments in all three jurisdictions have attempted to draw a clear line between marriage, on the one hand, and the less traditional form of registration on the other, and in so doing have contrived new dissolution procedures.

In contrast to the administrative methods available for terminating non-marital registered relationships in these three jurisdictions,<sup>135</sup> marriages can only be terminated on the basis of a judicial procedure.<sup>136</sup> This statement must, however, be read with caution with respect to **The Netherlands**, where a marriage may in fact be terminated administratively by means of the two step lightning divorce procedure.<sup>137</sup> Nevertheless, this procedure is extremely controversial and forms one of the focal points of two proposals currently before the Second Chamber of the **Dutch** Parliament. Both proposals aim to remove the possibility offered to married couples to convert their marriage into a registered partnership.<sup>138</sup> Furthermore, the LUCHTENVELD proposal aims to introduce a form of administrative divorce, whilst the DONNER proposal aspires to maintain the judicial monopoly on divorce proceedings. If the LUCHTENVELD

<sup>132</sup> Art. 30, Swiss Registered Partnership Act.

<sup>133</sup> FF 2003, p. 1192 at 1227-1228.

<sup>134</sup> FF 2003, p. 1192 at 1228.

<sup>135</sup> **Belgium**: Art. 1476(2), Belgian Civil Code; **France**: Art. 515-7, French Civil Code; **The Netherlands**: Art. 1:80c(c) and 80d, Dutch Civil Code.

<sup>136</sup> **Belgium**: Art. 227, Belgium Civil Code; **France**: amended by Act of 26<sup>th</sup> May 2004, No. 2004-439; **The Netherlands**: Art. 1:149, Dutch Civil Code.

<sup>137</sup> Art. 1:77a, in combination with 1:80c(c) and 1:80d, Dutch Civil Code and further I. SUMNER, "Transformers: marriages in disguise", *IFL*, 2003, p. 15-23 and I. SUMNER, "Dissolution of partnerships: An excursion in Conversion!", *IFL*, 2004, p. 231-237.

<sup>138</sup> *Dutch Second Chamber*, 2004-2005, 29676, No. 2, Art. I.B, p. 2 (LUCHTENVELD) and *Dutch Second Chamber*, 2004-2005, 30145, No. 2, Art. I.B, p. 1 (DONNER).

proposal is indeed accepted, this would in effect remove any real distinction between the dissolution procedure open to spouses and registered partners.<sup>139</sup> This will, once again, no doubt raise questions as to the necessity and utility of maintaining the institution of registered partnership.<sup>140</sup>

Nonetheless, regardless of the current proposals in **The Netherlands**, registered partners wishing to terminate their registered partnership are provided with a judicial alternative. If the parties are unable to agree upon the need to terminate their partnership, **Dutch** law adopts a protective stance in providing resort to a judicial mechanism. Even if the parties opt for an administrative procedure, the weaker party is afforded protection by ensuring that the declaration to terminate their relationship is signed by one or more lawyers or notaries.<sup>141</sup> The involvement of a legal professional attempts at ensuring the fairness of any agreements reached by the parties, whilst guaranteeing that respect is bestowed on the principle of party autonomy.

In **France** and **Belgium**, on the other hand, less protective measures have been adopted. The dissolution procedures available to couples involved in a non-marital registered relationship are totally devoid of judicial involvement. Instead the dissolution of a relationship takes place administratively, by means of a joint or unilateral declaration. If the parties disagree as to the need to terminate their relationship, either party may unilaterally and administratively terminate their relationship. In securing observance of the principle of party autonomy, both these jurisdictions have done so at the cost of the protection offered to the weaker party. This last method has been heavily criticised since it affords the weaker party absolutely no protection; formerly the traditional argument supporting the State's involvement in the divorce procedure. Hence, although **Belgium**, **France** and **The Netherlands** have all opted for a solution very different to that currently offered to married couples, these jurisdictions have not all approached such options in the same manner. Two different approaches must therefore be distinguished: protective dissolution (**The Netherlands**) and non-protective dissolution (**Belgium** and **France**).

The reason for this rudimentary distinction can be traced to the origins of the legislation. In enacting legislation creating a form of registered partnership, the **Dutch** Government initially believed that those different-sex couples opting for registered partnership would be childless, since the only differences between the legal effects of a registered partnership and marriage were in the field of child law.<sup>142</sup> The Government therefore argued that in the absence of any dependent children, a registered partnership should be able to be terminated at the will of the parties, as long as a number of specific points had been addressed and agreed upon.<sup>143</sup> In **France** and **Belgium**, on the other hand, the procedural differences were rooted in the contractual basis upon which the political compromises enacting the PACS and statutory cohabitation legislation were founded. In adhering to general principles of contractual freedom and party autonomy, the parties to these registered relationship forms were provided with the opportunity to terminate their relationship at will.

<sup>139</sup> As a result internal consistency will have been achieved, although this will have been realised by amending the law on divorce.

<sup>140</sup> See, for example, W. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en Het Duitse Recht*, Deventer: Kluwer, 2004, p. 566.

<sup>141</sup> I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, Chapter V.6.4.2 (p. 158-159).

<sup>142</sup> *Dutch Second Chamber*, 1995-1996, 23761, No. 7, p. 10. Y. SCHERF, *Registered partnership in The Netherlands*, The Hague: Ministry of Justice, 1999, p. 20 where it is shown that this conjecture has perhaps not evolved in practice. In SCHERF'S study 30% of the 151 interviewees were reported to have children whether from the relationship itself or a previous relationship.

<sup>143</sup> These points are summarised in Art. 1:80d(1), Dutch Civil Code.

### 3.4. OVERALL COMPARISON AND EVALUATION

At first glance these results may appear surprising, yet it is submitted that the existence of two different approaches to dissolution is a logical consequence of the abovementioned differences concerning the establishment of non-marital registered relationships.<sup>144</sup> In both **Switzerland** and the **United Kingdom**, in creating a form of non-marital registered relationship restricted to same-sex couples, reference was made as far as possible to the institution of marriage, and thus accordingly the divorce procedure. The general position was that the rules should be the same, unless a reason existed for these rules to be different. With marriage as the foundation stone upon which to begin building, there appears to have been few reasons to depart from the existing divorce framework in creating a dissolution procedure for non-marital registered relationships. Whenever a difference is apparent between the two dissolution forms it appears to have been based either on principles of simplicity or inapplicability. Despite the almost contemporaneous review of divorce law in **Switzerland**, a dissolution procedure identical to divorce was not created. The Government's aim was to simplify the procedure based on the presumed absence of children. In the **United Kingdom**, the differences can be explained due to the heterosexual nature of some of the grounds for relationship dissolution.

It is, however, submitted that both of these reasons, although seemingly logical, are fundamentally flawed. Although this author is not in favour of adultery as a ground for the termination of a marriage, it is argued that if this ground is retained as a ground for divorce, then an equivalent ground should be created for the dissolution of a civil partnership. The absence of such a ground conveys an erroneous message to the general population. Sexual activity outside of the marital bond is not permitted, whereas such behaviour is ostensibly acceptable in a civil partnership. If the **British** Government believes that such behaviour can be subsumed under the ground "unreasonable behaviour" why has this not been done with respect to marriage? The singling out of adultery as a specific ground for divorce indicates the **British** Government's moral stance with respect to extra-marital sexual activity; a stance obviously not evident with respect to civil partnerships. It is submitted that the **British** Government should eradicate this discrepancy by removing adultery as a ground for divorce, thereby extending the ambit of the ground of unreasonable behaviour. Although perhaps technical in nature, the bearing on social norms and values is important.

In **Belgium**, **France** and **The Netherlands**, on the other hand, where these new forms of relationship recognition were opened to different-sex couples, the legislature attempted to draw a distinction between marriage and the new form of non-marital registered relationship. The inherent choice that this political compromise offered to different-sex couples had important and far-reaching effects vis-à-vis the dissolution of such a relationship. The legislature was confronted with a conundrum: if the legislation creates an identical dissolution procedure to divorce, the question will be readily posed: why open civil partnership to different-sex couples? The ultimate solutions to this thorny problem are as diverse as the justifications used to defend the differences.

In **The Netherlands**, the Government alleged that different-sex couples opting for registered partnership would typically be childless.<sup>145</sup> Furthermore, it was believed that the prohibition on same-sex adoption coupled with the impossibility of establishing parentage with both parties in a same-sex couple meant the children in such relationships would not constitute an element of dispute in any potential dissolution proceedings. The perceived absence of children in the case of registered partnership allowed the **Dutch** Government to provide for a simple, non-judicial procedure to terminate the relationship. Although this

<sup>144</sup> See **Section 2.4**.

<sup>145</sup> *Dutch Second Chamber*, 1995-1996, No. 7, p. 10.

argument could possibly have been supported in 1998, this is certainly no longer the case in 2005.<sup>146</sup> Despite the absence of children, the **Dutch** Government still saw the need to protect the parties' respective interests and thus created a two-track dissolution procedure; a judicial track for unilateral requests and an administrative track for consensual requests. In this way, the **Dutch** Government has struck a good balance between respecting the principle of party autonomy and bestowing adequate protection on the weaker party.

In **France** and **Belgium** different arguments were used to justify the introduction of new procedures. It was argued in both jurisdictions that this new form of relationship was not to bring about a new stage in the parties' lives.<sup>147</sup> Moreover, in balancing the principles of party autonomy and protection afforded to the weaker party, the Governments aimed to sustain the contractual nature of these forms of relationship. In so doing, and by removing the requirement of judicial scrutiny, the scales were balanced against the protection of the weaker party and in favour of broadening observance of the principle of party autonomy. Despite the obvious consistency in argumentation proffered by the **French** and **Belgian** legislatures, the waters are somewhat muddier than they first appear.

In allowing parties to marry whilst still involved in a non-marital registered relationship and providing a unilateral termination procedure, the **French** and **Belgian** legislatures have not entirely adhered to general principles of contract law with respect to indefinite contracts. According to **French** and **Belgian** law, contracts for an indefinite period may be terminated unilaterally only after a period of reasonable notice.<sup>148</sup> Non-adherence to a reasonable period of notice can lead to a *rupture brusque* and constitutes an *abus de droit*.<sup>149</sup> This approach is moreover supported with reference to Art. 6:109, Principles of European Contract Law, where a contract for an indefinite period of time may only be terminated by one of the parties by giving notice of reasonable length.<sup>150</sup> It is thus clear that the ability of either party to the non-marital registered relationship to unilaterally terminate the relationship without notice of a reasonable length by celebrating a marriage, especially if this marriage is celebrated with a third person, not only provides for a non-protective dissolution procedure but also contravenes the basic tenets of contract law.<sup>151</sup> Although the unilateral dissolution procedure in both countries is subject to a delay,<sup>152</sup> no reference is made to the concept of reasonableness. If one assumes that a non-marital registered relationship should be seen as a purely contractual matter then one must adhere to the normal rules applicable to contracts. This is not the case. Besides, is it reasonable that a non-marital registered

<sup>146</sup> K. BOELE-WOELKI, "Registered partnership and same-sex marriage in The Netherlands", in: K. BOELE-WOELKI and A. FUCHS (eds.), *EFL Series: Volume 1, Legal recognition of same-sex couples in Europe*, Antwerp: Intersentia, 2003, p. 46.

<sup>147</sup> This was indicated in both jurisdictions by the refusal for such a relationship to affect the parties' civil status.

<sup>148</sup> **France**: A. BÉNABENT, *Droit de la famille*, Paris: Litec, 2001, 10<sup>th</sup> Edition, p. 212-214, §312-314; **Belgium**: W. VAN GERVEN and S. COVEMAKER, *Verbintenissenrecht*, Leuven: Acco, 2001, p. 160-161 and L. CORNELIS, *Algemene theorie van de verbintenis*, Antwerp: Intersentia, 2000, p. 814-816, §629-631.

<sup>149</sup> **France**: Cass., Com. Ch., 5<sup>th</sup> December 1984, *Bull. civ.* IV, No. 33; **Belgium**: Rb Antwerp, 13<sup>th</sup> April 1979, *RW* 1979-1980, p. 722, L. CORNELIS, *Algemene theorie van de verbintenis*, Antwerp: Intersentia, 2000, p. 815, §630.

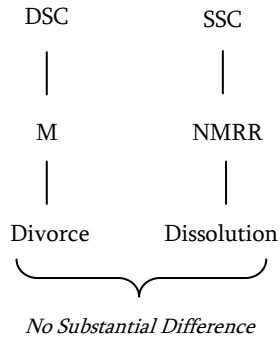
<sup>150</sup> According to 1:302, PECL reasonableness is to be "judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account." Comment C mentions factors such as the length of the contract, the efforts and investments that the other party has undertaken in the performance of the contract, the time it may take the other party to obtain another contract with another party and what is customary in the debtor's branch of business. See further O. LANDO and H. BEALE (eds.), *Principles of European contract law Parts I and II (combined and revised)*, the Hague: Kluwer, 2000, p. 316-317; H. SCHELHAAS *et al.*, *The principles of European contract law and Dutch law*, Nijmegen: Ars Aequi Libri, 2002, p. 279.

<sup>151</sup> Furthermore, there is as far as this author is aware no other form of contract that is automatically terminated by the simple fact of a subsequent marriage celebration.

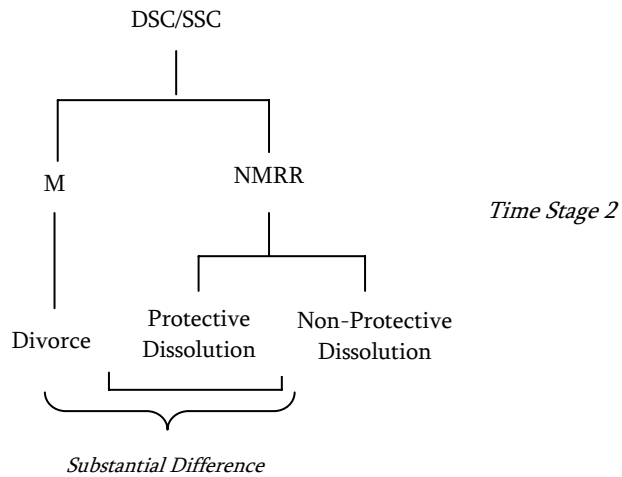
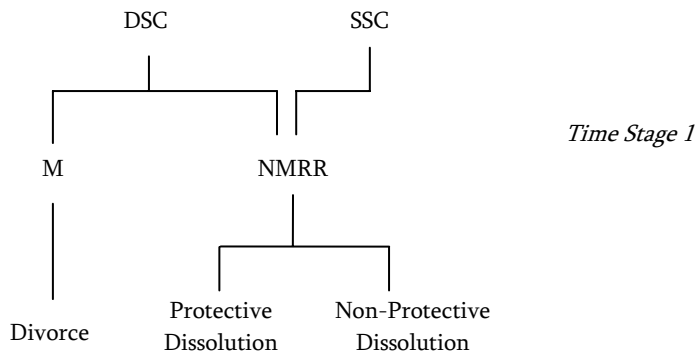
<sup>152</sup> 8 days in **Belgium** and 3 months in **France**. Art. 515(7)(5), French Civil Code also provides that the notice of intent to marry must be sent at least two weeks prior to the marriage celebration.

relationship that has lasted one year should be subject to the same notice period as a relationship that has lasted twenty years? As a result of the aforementioned comparisons, it is possible to expand upon the PLURALISTIC and DUALISTIC MODELS developed in **Section 2.4**, to include the issue of relationship dissolution outlined in this section.

**THE DUALISTIC MODEL**



**THE PLURALISTIC MODEL**



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

In evaluating these two models, it is clear that the same arguments could be forwarded here as those advanced with respect to the establishment of a non-marital registered relationship. In the PLURALISTIC MODEL, parties are offered a choice, at least theoretically, that is absent in the DUALISTIC MODEL. There are, however, serious problems associated with the enactment of non-protective dissolution procedures. The possibility to unilaterally dissolve a non-marital registered relationship without the provision of reasonable notice seriously undermines the protection that should be offered to the weaker party. Although one should not lose sight of the principle of party autonomy, this should not come at the cost of protection. For countries adopting a PLURALISTIC MODEL and striving for diversity in the dissolution procedures between marriage and non-marital registered relationships, the two-track system available in **The Netherlands** is, therefore, to be preferred, whereby the courts deal with contentious dissolutions and an administrative authority deals with non-contentious dissolutions.<sup>153</sup>

A fundamental difference must however be kept in mind when appraising the different types of dissolution procedures available. Unlike with respect to the establishment of the relationship, where the aspiration to create a valued pluralistic system triggers the desire to provide more options to couples wishing to institutionalise their relationship, the same is not true of dissolution procedures. If the parties disagree as to the need to terminate their relationship, the State is, and should be, involved in the termination procedure. In so doing, the State can ensure that both parties are protected and that the result is reasonable given the circumstances. Allowing this process to occur outside of court, without legal advice, denies the parties the protection they should be afforded. This State involvement should therefore transpire regardless of the relationship form. The necessity to protect not only the weaker party, but also any children involved should weigh heavier in the balance than the inclination to provide diversity.

It is therefore submitted that the approach adopted in the DUALISTIC MODEL is thus better suited to this aim. Couples, regardless of the form of their relationship, should be presented with equivalent options for terminating their relationship. Two procedures should be available, distinguishable on the basis of the consent of the parties.<sup>154</sup> On this basis, it would therefore seem that although the PLURALISTIC MODEL provides for the ideal solution in terms of the establishment of the relationship, the DUALISTIC MODEL provides for the preferred solution when one confines oneself to the dissolution of the relationship.

## 4. LEGAL EFFECTS

The rights and duties extended to registered partners vary immensely from jurisdiction to jurisdiction. This section does not attempt to embark upon the immense task of comparing each and every individual legal right and duty conferred on registered partners. Instead, this section attempts to distinguish between general classifications of countries on the basis of the substantive law information provided, not only with respect to the purview of attributed legal effects (**Section 4.1**), but also with respect to the method adopted in conferring these benefits (**Section 4.2**).

### 4.1. EXTENT OF LEGAL EFFECTS

It is clear from the comparative overview that with respect to the legal effects attributed to the various forms of non-marital registered relationships, two distinct models can be discerned in relation to the

<sup>153</sup> It must, however, be noted that even in **The Netherlands**, the solutions are far from ideal, where the possibility to submit a joint petition to court is unavailable: Art. 1:80c(d), Dutch Civil Code.

<sup>154</sup> Whether these procedures should be administrative or judicial is ultimately a question for the State concerned and therefore falls outside the ambit of this research question.

jurisdictions studied: strong registration resulting in internal consistency (**Section 4.1.1**) and weak registration resulting in internal inconsistency (**Section 4.1.2**). Although these approaches are easy to distinguish, determining the dividing line between these two categories causes immeasurable difficulty. What are the criteria for determining whether a system has adopted a policy of strong or weak registration? Are certain legal effects essential for a jurisdiction to be deemed to have created “similar” rights to marriage? Is there a minimum benchmark that countries must attain in order to be eligible for acknowledgment as a non-marital registered relationship? These questions will, *inter alia*, be dealt with in the overall comparison and evaluation to this section (**Section 4.3**).

#### 4.1.1. *Strong registration: Internal consistency*

In the **United Kingdom**, **Switzerland** and **The Netherlands**, the vast majority of legal effects associated with marriage have been extended to partners involved in a non-marital registered relationship. Although these laws are externally inconsistent, internal consistency has been achieved in almost all fields. This section will attempt to highlight the similarities and differences in the various legal effects studied, as well as provide explanations for any differences uncovered.

All three jurisdictions concur that the registration of a non-marital relationship is to affect the parties’ civil status in an identical fashion to marriage.<sup>155</sup> Although the notion of civil status *per se* is absent in the **United Kingdom**, it is intended that the registration of a civil partnership is to have the same impact on the parties’ personal status as a marriage. Furthermore, in the **United Kingdom** and **The Netherlands**, internal equality has also been achieved with respect to registered partners and spouses in the fields of nationality and name law.<sup>156</sup> In **Switzerland**, although internal consistency has been achieved with respect to **Swiss** nationality,<sup>157</sup> this has not been followed through with respect to cantonal and communal nationality, or in the field of name law. The absence of consistency in relation to these issues stems from the existing sex discrimination in this field. The superior position afforded to the husband could not be translated into the registered partnership legislation without making a distinction between male registered partnerships and female registered partnerships. As a result, although internal consistency has not been achieved, alternative solutions have been tendered, such as the possibility of using each other’s *nom d’alliance*.<sup>158</sup>

In the field of fiscal law, total internal consistency has also been achieved in all three jurisdictions with the exception,<sup>159</sup> once again, of those areas in existing **Swiss** legislation where due to persistent gender

<sup>155</sup> **The Netherlands**: Art. 1:80b, Dutch Civil Code; **Switzerland**: Art. 2(3), Swiss Registered Partnership Act and FF 2003 p. 1192 at 1232; **United Kingdom**: The situation is slightly more complicated in the UK in that a comparable institution to civil status is not present. However the Government has indicated that the effect of registering a civil partnership is to be produce the same legal effect to one’s “personal status” as celebrating a marriage: see further, I. CURRY-SUMNER, *EFL Series: Volume 11. All’s well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, p. 228-229.

<sup>156</sup> *In terms of nationality*: **The Netherlands**: Kingdom of The Netherlands Nationality Act applies both to spouses and registered partners; **United Kingdom**: British Nationality Act 1981 applies equally to spouses and civil partners. *In terms of name law*: **The Netherlands**: Art. 1:9 *et seq* applies equally to spouses and registered partners; **United Kingdom**: The absence of any name law as such, allows civil partners to take each other’s surnames.

<sup>157</sup> **Marriage**: Art. 27, Federal Act on the Acquisition and Loss of Swiss Nationality; **Registered Partnership**: Art. 15, Federal Act on the Acquisition and Loss of Swiss Nationality.

<sup>158</sup> FF 2003, p. 1192 at 1217.

<sup>159</sup> **The Netherlands**: Art. 2(5), General Revenue Act; Art. 2(4), Revenue Collection Act 1990; Arts. 2(2), 17(2), 45(1), 46, 55(5), Income Tax Act 1964; Art. 11 and 22, Salary Tax Act 1964; Art. 2(2) and 26(1), Property Tax Act 1964; Arts. 4(b) and 5(b), Company Tax Act 1969; Art. 15(1)(b), Legal Transaction Taxes Act; Arts. 13a(4) and 32(6), Inheritance Tax Act; **Switzerland**: Federal Act on Direct Tax, Federal Act on the Harmonisation of Direct Cantonal and Communal Tax, Federal Act on Elderly

discrimination a distinction is drawn on the basis of sex.<sup>160</sup> Finally, the field of inheritance law has also been equalised, with registered partners being placed in an identical position to a spouse with regards both testate and intestate succession.<sup>161</sup>

When one turns to the fields of property law and the personal obligations partners owe one another, one is confronted with an assortment of solutions. In **The Netherlands**, total consistency of result has been achieved. All the rights and duties applicable to spouses and relevant provisions on matrimonial property law have been declared *mutatis mutandis* applicable to registered partners.<sup>162</sup> In **Switzerland** and the **United Kingdom** the situation is more complicated. The rights and duties imposed on spouses in the **United Kingdom** are predominantly non-statutory, relying heavily on case law and precedent.<sup>163</sup> Consequently, one will have to wait and see whether judges will apply the common law rules on spousal rights to civil partners analogously or will adopt innovative solutions specific to this situation. It is, however, expected that a *mutatis mutandis* approach will be taken, especially since it is Parliament's obvious intent that marriage and civil partnership are to be regarded as equivalent institutions. The same is also expected to be the case with respect to the equivalent common law principles in the field of property law.<sup>164</sup>

In **Switzerland**, this field of law also reveals important differences in the rationale behind the institution of registered partnership. Instead of imposing the regime of *participation aux acquêts* as the default statutory property regime for registered partners, the **Swiss** legislature opted for a regime of *séparation des biens*. However, in doing so, they preserved the right for registered partners to opt-into the regime of *participation aux acquêts*. As a result, although the default situation differs for spouses and registered partners, the same choices are available to both groups. The same cannot, however, be said of the personal obligations that the parties owe to each other, in which **Switzerland's** legislation falters due to lack of clarity. This incertitude stems from the **Swiss** legislature's belief that registration of a partnership should not have any effect on children. As a result, any reference to the term *famille* or *logement de la famille* has been replaced by *communauté* and *logement commun* respectively. This replacement of terminology does, however, inevitably lead to speculation as to the precise ambit of such rights and duties. Nevertheless, it is submitted that despite these etymological difficulties, the personal obligations that registered partners owe to each other are the same as those incumbent upon spouses. It is only where these obligations are extended to the spouses' children where the parallel ceases to apply. This is perhaps no clearer than in the case of the duty to provide support and assistance.<sup>165</sup>

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Pension and Survivorship Insurance, Federal Act on Invalidity Insurance, Federal Act on Sickness Insurance, Federal Act on Accident Insurance, Federal Act on Military Insurance, Federal Act on Insurance for Agricultural Families and the Federal Act on Unemployment Insurance; **United Kingdom**: Sec. 103, Finance Act 2005, as well as Schedule 24, Civil Partnerships Act 2004.

<sup>160</sup> FF 2003, p. 1192 at 1222.

<sup>161</sup> I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, Chapters V.5.8 (p. 143-144), VI.5.8 (p. 194-195) and VII.5.8 (p. 240-243).

<sup>162</sup> This is an example of the so-called exclusion method, see **Section 4.2**.

<sup>163</sup> I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, p. 232-238.

<sup>164</sup> I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, p. 238-240.

<sup>165</sup> **Marriage**: Art. 159(3), Swiss Civil Code; **Registered Partnership**: Art. 12, Swiss Registered Partnership Act.

Although it is therefore true to say that the registration of a non-marital relationship has, wherever possible, been assimilated to a marital relationship in the vast majority of legal fields, this is far from universally true. Perhaps the most decisive area deals with issues relating to children: parentage, parental responsibilities, adoption and artificial insemination. Despite the variety in the solutions tendered, all three jurisdictions are in agreement in relation to one aspect. Although all three jurisdictions adhere to the maxim *mater certa semper est*, no country applies the maxim *pater is est quem nuptiae demonstrant* analogously to unmarried fathers or the female partner of the legal mother.<sup>166</sup> Different-sex non-marital registered partners in **The Netherlands** are, nevertheless, offered the same options as their spousal counterparts in attempting to establish parentage.<sup>167</sup> In **The Netherlands**, **Switzerland** and the **United Kingdom** same-sex couples<sup>168</sup> are excluded from all options open to different-sex couples wishing to establish parentage.<sup>169</sup> In **The Netherlands** and **England & Wales**, same-sex couples are, nonetheless, provided with the option to either adopt jointly or adopt their partner's child(ren).<sup>170</sup> In contrast, the inability for same-sex couples to adopt in **Scotland**, **Northern Ireland** and **Switzerland** thwarts any possibility for same-sex couples to obtain joint parentage rights over the same child in these jurisdictions.<sup>171</sup>

In turning one's attention to parental responsibilities, one is also unable to discern a uniform approach. This is in part due to the restricted manner in which same-sex couples are able to establish legal parentage.<sup>172</sup> Although in **The Netherlands** legislation dealing with registered partners and married couples is dealt with in different provisions of the **Dutch** Civil Code, the eventual result is the same regardless; if a child is born during a marriage or registered partnership both parties are vested with joint parental authority<sup>173</sup> unless a third party has already established legal parentage over that child.<sup>174</sup> In the **United Kingdom**, civil partners can obtain parental responsibility, or parental rights and responsibilities (as it is known in **Scotland**) either by obtaining a parental responsibility order or a residence order.<sup>175</sup> Due to the fact that only legal parents in **Switzerland** are granted the possibility to be vested with parental responsibility, same-sex couples are denied the possibility to exercise joint parental

<sup>166</sup> **The Netherlands**: Art. 198 and 199, Dutch Civil Code (Art. 199, Dutch Civil Code not applied to same-sex couples); **Switzerland**: Art. 252, Swiss Civil Code (Art. 252(2) and (3), Swiss Civil Code not applied to same-sex couples); **United Kingdom**: *The Amphill Peerage Case* [1977] AC 547 at 577 (maternity) and *Re B (Parentage)* [1996] 2 FLR 15 at 21 (paternity). All of the provisions of the Human Fertilisation and Embryology Act 1990 are not gender neutral and therefore do not apply to same-sex couples.

<sup>167</sup> Namely the possibility of recognition, in accordance with Art. 199(c), Dutch Civil Code.

<sup>168</sup> Thus regardless of whether they are involved in a non-marital registered relationship, a marriage (in **The Netherlands**) or in a non-institutionalised relationship.

<sup>169</sup> Recognition in **The Netherlands** (Art. 199(c), Dutch Civil Code) and **Switzerland** (Art. 260, Swiss Civil Code) birth certificate registration in **England & Wales** (Sec. 34(2), Births and Deaths Registration Act 1953); **Northern Ireland** (Art. 14(3), Births and Deaths Registration (Northern Ireland) Order 1976) and acknowledgement in **Scotland** (Sec. 5(1)(b), Law Reform (Parent and Child)(Scotland) Act 1986) is all restricted to couples of opposite-sex.

<sup>170</sup> **The Netherlands**: Art. 227(1), Dutch Civil Code; **England & Wales**: Sec. 50(1), Adoption and Children Act 2002, in conjunction with Sec. 144(4), Adoption and Children Act 2002, as amended by Sec. 79(12), Civil Partnerships Act 2004.

<sup>171</sup> **Switzerland**: Art. 28, Swiss Registered Partnership Act; **Scotland**: Sec. 15, Adoption (Scotland) Act 1978; **Northern Ireland**: Art. 15, Adoption (Northern Ireland) Order 1987, as amended by Sec. 203(4), Civil Partnerships Act 2004.

<sup>172</sup> In the case of **Switzerland**, it is better to talk of a total prohibition.

<sup>173</sup> Arts. 1:252 (marriage), 1:253aa (registered partnership two legal parents), 1:253sa (registered partnership legal parent with non-legal parent), Dutch Civil Code

<sup>174</sup> The combination of the *mater semper certa est* rule and the prerequisite to the vesting of joint parental authority that there is no other legal parent means that a male couple can seldom rely on the provisions of Arts. 1:253aa and 1:253sa, Dutch Civil Code directly. See, for example, *Dutch Second Chamber*, 1999-2000, 27047, No. 3, p. 3.

<sup>175</sup> **England & Wales**: Sec. 4(1)(b), Children Act 1989 (parents) and Sec. 4<sup>A</sup>(1)(b), Children Act 1989, as amended by ACA 2002 (stepparents); **Scotland**: Sec. 11(2)(b), Children (Scotland) Act 1995 (parents and stepparents); **Northern Ireland**: Art. 7(1)(b), Children (Northern Ireland) Order 1995 (parents) and Sec. 7(1<sup>A</sup>), Children (Northern Ireland) Order 1995 (stepparents). In **England & Wales** civil partners are also entitled to make a parental responsibility agreement with the mother: Sec. 4<sup>A</sup>(1)(a), Children Act 1989, as amended by Adoption and Children Act 2002.

responsibility.<sup>176</sup> Finally, only **Switzerland** restricts access to artificial insemination to different-sex couples.<sup>177</sup> Although theoretically possible in **The Netherlands** and the **United Kingdom**, practical access to artificial reproductive techniques is often restricted by hospital or clinic policy.<sup>178</sup>

#### 4.1.2. *Weak registration: Internal inconsistency*

Unlike the approach adopted in the **United Kingdom**, **Switzerland** and **The Netherlands**, the legislatures in **France** and **Belgium** have opted for a different tack. In both countries the “legal distance” between marriage and non-marital registered relationship has been maintained by ensuring that the package of legal effects attributed to the domestic form of non-marital registered relationship are dissimilar to those offered to spouses. In this respect a different starting point is taken than that espoused in **The Netherlands**, **Switzerland** and the **United Kingdom**. In **France** and **Belgium**, one begins with the assumption that the registration of a non-marital relationship should have no effects unless expressly agreed upon by the parties. In these jurisdictions, the Government was thus not constricted by the preconception that the rights and duties attendant on marriage must be extended to non-marital registered relationships. Instead, these Governments departed from the premise that the registration should be contractual in nature, with the principle of party autonomy playing a central role.<sup>179</sup>

With these principles underpinning the entire legislative framework for non-marital registered relationships, the **French** and **Belgian** legislatures have not seen the need to amend the law in the fields of civil status, nationality law, name law child law, or inheritance law, due to the passage of the PACS or statutory cohabitation legislation.<sup>180</sup> The benefits attributed to couples in these areas were believed to be inherent to the institution of marriage, and thus immune from extension to registered partners. Instead, the effects of both of these pieces of legislation are restricted to the fields of fiscal and tax law, property law and the rights and duties the parties owe to each other.

Although in both jurisdictions registered partners and spouses are treated identically with respect to tax law,<sup>181</sup> under **French** law this only occurs once the parties have been registered for three years.<sup>182</sup> This equality is, however, currently restricted to the field of tax law, with the registration of a non-marital relationship having no effect on the parties’ social security benefits or pensions.<sup>183</sup> With respect to the

<sup>176</sup> See further I. CURRY-SUMNER, *EFL Series: Volume 11. All’s well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, Chapter VI.5.9.2.

<sup>177</sup> Art. 3(2), Federal Act of 18<sup>th</sup> December on medically assisted reproduction, Art. 119(2)(c), Swiss Federal Constitution and Art. 28, Swiss Registered Partnership Act.

<sup>178</sup> See, for example, [www.freya.nl](http://www.freya.nl).

<sup>179</sup> See for example the discussions surrounding the extension of Art. 221, Belgian Civil Code to statutory cohabitants by means of Art. 1477(3), Belgian Civil Code and Art. 214, French Civil Code by virtue of Art. 515(4)(1), French Civil Code.

<sup>180</sup> For information on these issues, see I. CURRY-SUMNER, *EFL Series: Volume 11. All’s well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, Chapters III.5.2, IV.5.2, III.5.3, IV.5.3, III.5.4, IV.5.4, III.5.8, IV.5.8, III.5.9 and IV.5.9.

<sup>181</sup> **Belgium**: Since 2005 statutory cohabitants are treated identically to spouses in the field of taxation: Art. 2(2), Act of 10<sup>th</sup> August 2001, which amends Art. 1, Belgian Income Tax Code; **France**: Art. 6(1)(2), French General Tax Code. However, parties to a PACS are only treated as a joint fiscal unit for the purposes of income tax once three years have elapsed since the date of registration of the relationship.

<sup>182</sup> Art. 6(1)(3), French General Tax Code inserted by virtue of Art. 4, Act of 15<sup>th</sup> November 1999, No. 99-944. Under current proposals this time period would be abolished: MINISTRE DE LA JUSTICE, *Le pacte civil de solidarité. Réflexions et propositions de réforme. Rapport remis à Monsieur Dominique Perben*, Paris: Ministry of Justice, 2004, p. 17.

<sup>183</sup> Under current proposals in **France** this would be difference in treatment would be abolished and registered partners would be treated in an identical manner to their spousal counterparts: MINISTRE DE LA JUSTICE, *Le pacte civil de solidarité. Réflexions et propositions de réforme. Rapport remis à Monsieur Dominique Perben*, Paris: Ministry of Justice, 2004, p. 18-22.

rights and duties that the partners owe each other, although at times somewhat vague<sup>184</sup> it would appear that in both jurisdictions the parties are subject to the duty to cohabit,<sup>185</sup> although not subject to a duty of fidelity or support and assistance.<sup>186</sup> It would also appear that the parties are treated identically to spouses with respect to the duty to contribute to the repayment of debts,<sup>187</sup> the duty to contribute to household expenses<sup>188</sup> and afforded similar protection with respect to the common home.<sup>189</sup> Although with respect to these fields it is perhaps possible to talk of a similar approach having been taken by these two jurisdictions, any such similarities dissipate when one broaches the topic of property law.

In principle, although spouses in **Belgium** are subject to a statutory community of property, statutory cohabitants are subject to the customary separation of property.<sup>190</sup> In **France**, on the other hand, along lines similar to the matrimonial community of property,<sup>191</sup> parties to a PACS are subject to a *régime de l'indivision*.<sup>192</sup> Although a distinction is drawn between *meubles meublants* and other goods, this distinction is in practice relatively insignificant. This difference would, however, be removed should the proposals made by the **French** Ministry of justice be accepted.<sup>193</sup> The group advising the **French** Ministry of Justice believed that the current application of Art. 515-5, French Civil Code is extremely rigid and complex, noting that this complexity has been virtually unanimously denounced.<sup>194</sup> It is not, however, entirely clear why the group did not examine the possibility of extending the matrimonial community of property regime to those involved in a PACS.

It is clear that the package of rights and duties to which registered partners benefit according to **French** and **Belgian** law is much more restricted than that which registered partners in **The Netherlands**, **Switzerland** and the **United Kingdom** enjoy. Nonetheless, the registration of a non-marital registered relationship in **Belgium** and **France** is not without consequence. Legal implications ensue not only as between the parties themselves but also with respect to the State. It is, nonetheless, important to note that the effects are restricted to the fields of fiscal and property law, as well as the personal obligations that the parties owe to one another.

#### 4.2. METHOD OF EXTENDING LEGAL EFFECTS

As has been shown some countries have chosen to assimilate the domestic institution of non-marital registered relationship to marriage whilst others have not. Those countries to have opted for a weak form

<sup>184</sup> This incertitude will hopefully be clarified with respect to **France** with the implementation of the proposals made by the Ministry of Justice: MINISTRE DE LA JUSTICE, *Le pacte civil de solidarité. Réflexions et propositions de réforme. Rapport remis à Monsieur Dominique Perben*, Paris: Ministry of Justice, 2004, p. 14-15.

<sup>185</sup> **Belgium**: Although Art. 213, Belgian Civil Code is not applied to statutory cohabitants, Art. 1476, Belgian Civil Code implicitly imposes such a condition; **France**: Although Art. 215, French Civil Code is not applicable to those involved in a PACS, Art. 515-4(1), French Civil Code implicitly imposes such a requirement.

<sup>186</sup> **Belgium**: Art. 213, Belgian Civil Code not applicable to statutory cohabitants; **France**: Art. 212, French Civil Code not applicable to those involved in a PACS.

<sup>187</sup> **Belgium**: Art. 1477(3), Belgian Civil Code; **France**: Art. 515-4(1), French Civil Code.

<sup>188</sup> **Belgium**: Art. 1477(4), Belgian Civil Code; **France**: Art. 515-4(2), French Civil Code.

<sup>189</sup> **Belgium**: Analogous application of Arts. 215, 220(1), 224(1)(1), Belgian Civil Code to statutory cohabitants; **France**: Arts. 14 and 15 of Act No. 89-402 of 6<sup>th</sup> July 1989 as amended by Act No. 99-944 of 15<sup>th</sup> November 1999.

<sup>190</sup> Art. 1478(1), Belgian Civil Code.

<sup>191</sup> Art. 515-5(1), French Civil Code (movable furnishings) and Art. 515-5(2), French Civil Code (other goods).

<sup>192</sup> See further, H. FULCHIRON, "Les présomptions d'indivision et de communauté dans le couple", *Rép. Not.*, 2001, No. 17, p. 949-969

<sup>193</sup> MINISTRE DE LA JUSTICE, *Le pacte civil de solidarité. Réflexions et propositions de réforme. Rapport remis à Monsieur Dominique Perben*, Paris: Ministry of Justice, 2004, p. 15-16.

<sup>194</sup> MINISTRE DE LA JUSTICE, *Le pacte civil de solidarité. Réflexions et propositions de réforme. Rapport remis à Monsieur Dominique Perben*, Paris: Ministry of Justice, 2004, p. 15.

of non-marital registered relationship, *i.e.* **France** and **Belgium**, have thus explicitly enumerated all the rights and benefits that the couple enjoy. In those countries to have opted for strong registration, two distinct methods should be distinguished.<sup>195</sup> From the outset it should be emphasised that these methods are used interchangeably, dependent upon the field of law in question.

Some countries have chosen to catalogue all the legal effects that a registered couple enjoy. This approach results in masses of legislation and countless amendments to existing legislation. Wherever the words “spouse”, “wife”, “husband” and “marriage” occurs, the words “registered partner”, “partner” and “registered partnership” have been inserted. This is referred to as the *enumeration method*. The end result is a complex array of legislative amendments often running into hundreds of pages.<sup>196</sup> This approach, although capturing the precise range of the legislature’s intent, can lead to oversights and mistakes.<sup>197</sup> This approach has been employed in **Switzerland** and the **United Kingdom**, as well as the majority of fields of law in **The Netherlands**.<sup>198</sup> Nevertheless, some areas of law have been spared such monumental amendment and one simple provision has sufficed.<sup>199</sup> In this latter method, a general provision is enacted which stipulates that the registration of a partnership is to have the same legal effects as the celebration of a marriage, subject to any exceptions listed.<sup>200</sup> This second method is referred to as the *exclusion method*.<sup>201</sup>

Although these methods have no direct overall impact on the extent of the rights and benefits extended to registered partners, this difference in approach is important to realise, due to the antipodean point of departure in these two methods. In those countries to have adhered to the *exclusion method*, spouses and registered partners are treated identically, unless otherwise stated. In those countries to have adhered to the *enumeration method*, the legal position of registered partners is unaltered, unless otherwise stated. Although the practical result will often be indistinguishable, the method will have obvious implications in more obscure areas of law that the legislature may have overlooked.

### 4.3 OVERALL COMPARISON AND EVALUATION

There exists an obvious enormous diversity vis-à-vis the legal effects attributed to non-marital registered relationships. In some countries, the legal effects attributed are similar, if not almost identical, to those attached to the institution of marriage. In other jurisdictions only minimal protection is offered to the parties. A distinction can nonetheless be made between “strong registration” and “weak registration”.

<sup>195</sup> These methods have also been identified by WINTEMUTE. However, he divides all non-marital registered relationship forms into two categories (enumeration and subtraction). It is however submitted that only those countries opting for strong registration will realistically make use of the subtraction method. See further R. WINTEMUTE, “Conclusions”, in: R. WINTEMUTE and M. ANDENÆS (eds.), *Legal recognition of same-sex partnerships*, Oxford: Hart, 2001, p. 766.

<sup>196</sup> In the **United Kingdom**, the Civil Partnerships Act 2004 is approximately 400 pages long with over 200 Articles and 30 Schedules. In **The Netherlands**, the Registered Partnership Amendment Act explicitly detailed amendments to more than 300 individual statutes.

<sup>197</sup> R. WINTEMUTE, “Conclusions”, in: R. WINTEMUTE and M. ANDENÆS (eds.), *Legal recognition of same-sex partnerships*, Oxford: Hart, 2001, p. 766.

<sup>198</sup> See, for example, Titles 1-4, Book 1, Dutch Civil Code. Although outside the ambit of this research, this approach has also been adopted in **Luxembourg**, regions in **Spain** and **Germany**.

<sup>199</sup> See, for example, Art 1:80b and Art. 4:8, Dutch Civil Code

<sup>200</sup> R. WINTEMUTE, “Conclusions”, in: R. WINTEMUTE and M. ANDENÆS (eds.), *Legal recognition of same-sex partnerships*, Oxford: Hart, 2001, p. 766. WINTEMUTE calls this method the “subtraction method”. The term “exclusion” has been used instead to more precisely convey the idea that everything is extended except those excluded rights. The word subtraction does not necessarily convey the idea that the package with which one begins is identical to the package of legal effects stemming from marriage.

<sup>201</sup> Although outside the ambit of this research, this approach has been adopted in the **Nordic** countries, for example, §3(1), Danish Registered Partnership Act.

Strong registration involves the near assimilation of the legal effects attributed to registered partners and spouses. Although countries opting for this system often refrain, at least in the beginning, from amending the law relating to children (*i.e.* adoption, parentage and parental responsibility), all the legal effects affecting the partners themselves are generally equalised. In contrast, weak registration entails the enactment of only minimal protective measures. These forms of registration often have no impact on the parties' personal law, *e.g.* name law, nationality and civil status, or family and inheritance law, but are instead restricted to fiscal and property law issues, as well as the personal obligations that the parties have towards each other.

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

- Property law and personal obligations;
- Fiscal law (tax, social security and pensions);
- Family and inheritance law; and
- Rights in relation to children.

It would appear that those countries adopting a system of weak registration confine the effects of such a registration to the first two categories. Hence, the effect of registering a statutory cohabitation or PACS is restricted to fiscal and property law. It is also clear from the comparison that it is not true to say that countries are gradually progressing along a spectrum towards granting the full package of marital rights to registered partners.<sup>202</sup> Although it is true to say that the legislatures in both **France** and **Belgium** have already or are in the process of granting more rights to registered partners, it is not true to talk of a steady progression towards total equality in the legal effects of marriage and non-marital registered relationships. Although similarity in function may well be discernible, it is clear that those countries that have limited themselves to the legal effects in the first two categories have done so with a different philosophy in mind than those countries that have broadened the range of rights to include effects in the latter two categories. Nevertheless, it is also clear that as one progresses from one category to the next, the relative level of associated political controversy increases accordingly.

The rights and duties associated with the first category are generally of a low politically sensitive nature. It is assumed that parties involved in an intimate relationship wish to commit to each other, and by imposing duties such as a duty to cohabit or contribute to the costs of the household, the State is merely indicating its moral stance at little financial burden to the State. Although opinions as to the best or proper matrimonial property regime differ markedly and have resulted in protracted political debates in many countries, the question of whether to enact rules determining the property law effects of registering a non-marital relationship is by and large uncontroversial. Moreover, in the majority of legal systems, parties are in any case able to draw up a contract regulating such issues themselves.<sup>203</sup> The State simply provides for a default system to operate in the absence of such an expression of the parties' will.<sup>204</sup> In addition, it appears that in any debate concerning the protection that should be offered to cohabitants,

<sup>202</sup> This is, for example, proposed by M. ANTOKOLSKAIA, *Harmonisation of family law – An historical perspective*, Antwerp: Intersentia, 2006, Chapter 4.4 (to be published), with reference to same-sex non-marital registered relationship schemes.

<sup>203</sup> K. BOELE-WOELKI (ed.), *Huwelijksvermogensrecht in rechtsvergelijkend perspectief*, Deventer: Kluwer, 2000, p. 248. The absence of such a system in the **United Kingdom** can be explained by fear on the part of the common law system that spouses could be bound by a contract which they made many years before. The principle of reasonableness therefore outweighs the principle of legal certainty in this system.

<sup>204</sup> This, of course, does not detract from any disparity in the property regime applicable to spouses and registered partners.

discussion centres on this field of law.<sup>205</sup> It is, therefore, not surprising that this field of law is one of the first to be legislated upon for non-marital registered relationships.

However, different approaches are often rooted in the inherent differences in the legal systems. The common law ancestry of the **British** legal system and the reluctance of the **British** legislature to intervene in the field of matrimonial law, has given rise to the absence of clear-cut rights and duties of civil partners to each other. The peculiar Anglo-Saxon approach to the issues of matrimonial property has also been followed through with respect to civil partners, in that the registration of a civil partnership is devoid of effects on the property of the parties to the relationship.<sup>206</sup> In contrast, the abundant clarity of the approach adopted by the **Dutch** legislature denotes the legislature's intention that the registration of a partnership and the celebration of a marriage are to be viewed as equal institutions.<sup>207</sup>

Although rights and duties in the second category are generally of a less sensitive political nature than those in the third or fourth categories, the extension of fiscal benefits in the form of tax breaks, social security benefits and access to pension schemes, obviously comes at great financial cost to the Government. The political will to remove fiscal discrimination is therefore often pitted against the available funds in the financial coffers.<sup>208</sup>

As one moves towards the third category of legal effects, one senses a shift in emphasis. If one accepts the extension of rights in this field it becomes difficult to make distinctions. Upon extending one right or duty, one must justify the almost unjustifiable in denying the extension of other rights in this category.<sup>209</sup> Rights and duties in this category also have a long-standing association with the law on marriage in many countries. On the continent the celebration of a marriage has an important impact on those personal law rights associated with one's civil status, name and nationality. This is to some extent also true of common law countries, where according to old authorities the celebration of a marriage for many purposes fuses the legal personalities of husband and wife into one.<sup>210</sup> As a result, the extension of such rights to those outside of the marital bond is a much more sensitive matter than the rights in the first two categories.

The final category, untouched in **France, Belgium, Switzerland, Northern Ireland** and **Scotland**, is possibly the most sensitive of all. This sensitivity stems from a multiplicity of dynamic factors: biology, tradition, third party rights and moral values. The law on parentage was originally based on the

<sup>205</sup> See, for example, P. SENAËVE, "Rechtswaardering van het concubinaat", in: P. SENAËVE (ed.), *Concubinaat. De buitenhuwelijkse tweerelatie*, Leuven: Acco, 1992, p. 19-71; A. BARLOW, *Cohabitants and the law*, London: Butterworths, 2001, 3rd Edition; W. PINTENS, B. VAN DER MEERSCH and K. VANWINCKELEN, *Inleiding tot het familiaal vermogensrecht*, Leuven: UPL, 2002 and W. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer, 2004.

<sup>206</sup> See I. CURRY-SUMNER, *EFL Series: Volume 11. All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe. A comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, Antwerp: Intersentia, 2005, Chapter VII.5.7.

<sup>207</sup> Art. 1:80b, Dutch Civil Code.

<sup>208</sup> See, for example, the Annexes to the **English** proposal WOMEN AND EQUALITY UNIT, "Civil partnership: A framework for the legal recognition of same-sex couples", London: Department of Trade and Industry, 2003, p. 75 (Tables 3 and 4, Annex A). In Table 3 it was estimated that introduction of the civil partnership schemes would cost the **British** Government £23-230 million per year by 2050 (for state pensions and bereavement benefits and public service pensions). In Table 4 it was estimated that the cost to private pension benefit schemes would be between £2.5-20 million. See also P. LOCHER, *Rapport de la commission d'experts chargée d'examiner le système suisse d'imposition de la famille (Commission Imposition de la Famille)*, Bern: Federal Department of Finances, 1998.

<sup>209</sup> The only justification which has been offered (in **Switzerland**) is that the rules in the field of marriage are discriminatory.

<sup>210</sup> BLACKSTONE, *Commentaries*, i. 442.

presumption of biology.<sup>211</sup> It was and still is simply presumed that the husband of a pregnant woman was the child's father, *pater is est quem nuptiae demonstrant*. The idea of extending such presumptions to same-sex couples involves an enormous excursion from reality. Even if the husband of the legal mother is not the father of the child, there is a biological possibility that he could be, whereas such a biological possibility is completely absent in same-sex couples.<sup>212</sup> The controversy surrounding children raised in same-sex families has even prevented gay rights groups from asserting the need for equality in this field.<sup>213</sup>

The necessary absence of parentage rights for same-sex couples does not explain a total lack of attention to this field. However, one must also note the State's interest in the raising of children. The State imposes its moral values on the opportunity for same-sex couples to adopt or raise children. In the majority of European countries to have introduced forms of non-marital registered relationship schemes, it has almost universally been accepted that children need to be raised by a mother and a father and that it is therefore undesirable for children to be raised by same-sex couples.<sup>214</sup> If one joins this with the often prevailing presumption that the marital home is the best place for the child to be raised, then it is not surprising that the rights in this category are the last to be extended to registered partners. It is, in addition, generally noted that a fundamental difference between same-sex and different-sex couples lies in the necessity for third party involvement in the case of same-sex relationships, either by means of sperm, egg or embryo donation or surrogacy. The traditional view that a child should remain in contact, if not be raised by his or her biological parents, is therefore fundamentally besieged should one accept the proposition that same-sex couples are able to raise children. In avoiding the political quagmire associated with the venturing of an opinion in relation to these views, it is submitted that these reasons provide the explanation to the current absence of legislation with respect to children born or raised in non-marital registered relationships.

Although this division into rough categories of rights is merely illustrative and does not profess to be used for any higher purpose, it is perhaps effective in helping to identify the crucial difference between those countries adhering to a system of strong registration and those adopting a system of weak registration. Of course, any global classification on this superficial basis will be subject to exception and it is admitted that this model is merely an aid in any attempt to discern general uniform trends in this field. In **Switzerland**, for example, despite having adopted a relatively strong registration form, the continued unequal treatment of men and women in the field of family law has led to unequal treatment

<sup>211</sup> **The Netherlands:** *Second Chamber*, 1999-2000, 27047, No. 5, p. 1-2 and M. VONK, "One, two or three parents? Lesbian co-mothers and a known donor with "family life" under Dutch law", *IJLPF*, 2004, p. 103; **Switzerland:** MINISTRY OF JUSTICE, *La situation juridique des couples homosexuels en droit suisse*, Bern: Ministry of Justice, 1999, p. 26 and FF 2003, p. 1192 at 1223; **United Kingdom:** In the **UK** there was in fact no discussion on this point. This is due to the possibility for same-sex couples to adopt and the basic assumption that legal parentage is based on biology. See further, N. LOWE and G. DOUGLAS, *Bromley's family law*, London: Butterworths, 1998, p. 261-262, A. BAINHAM, *Children: The modern law*, Bristol: Jordans, 2005, p. 88. Despite the medical advancements made in recent decades, as yet a child's conception still necessitates the involvement of male sperm and female eggs (N. LOWE and G. DOUGLAS, *Bromley's family law*, London: Butterworths, 1998, p. 262). This is also generally accepted, see, for example, A. HENSTRA, *Van afstamming naar ouderschapsrecht*, Amsterdam: Boom Juridische Uitgevers, 2002, p. 83, who in turn cites M.J.A. VAN MOURIK and A.J.M. NUYTINCK, *Personen- en familierecht, huwelijksvermogensrecht*, Deventer: Kluwer, 1998, p. 141-142 "Hoe men het ook wendt of keert en ongeacht alle moderne voorplantingstechnieken, zoals bijvoorbeeld in-vitrofertilisatie, eiceldonatie en embryotransplantatie, een kind stamt altijd af van een man en een vrouw".

<sup>212</sup> KORTMANN COMMISSIE, *Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht*, The Hague: Ministry of Justice, 1997, p. 5, §2.1.

<sup>213</sup> See, for example, the petition entitled "Same rights for same-sex couples", *Swiss Council of States*, BO 1997, No. 96-2011, p. 701.

<sup>214</sup> See, for example, the **Swiss** legislature's discussion regarding adoption and artificial reproductive techniques: FF 2003, p. 1192 at 1223.

of spouses and registered partners. In the **United Kingdom**, the common law bases of property law have led to uncertainty as to the extent of such case law to civil partners.

At this stage it is perhaps constructive to return to the analogy of adoption, where one is also able to see clear differences in the legal effects attributed to adoption in different jurisdictions. As far back as Roman times, distinctions have been made between different types of adoption.<sup>215</sup> These forms of adoption remained even after JUSTINIAN'S reforms in AD 529. However, JUSTINIAN did fundamentally change the law of *adoptio*, drawing a distinction between *adoptio plena* (full or strong adoption) and *adoptio minus plena* (less than full or weak adoption).<sup>216</sup> *Adoptio plena* was subsequently limited to the case of adoption by a natural ascendant. For all other cases, he created the *adoptio minus plena*, which did not impair the rights of the natural family. As a result of JUSTINIAN'S alterations three different types of adoption could be brought under the umbrella term *adoptio*. Although the legal effects of each of these forms of adoption were different, the institutions were so similar in function and structure that they could be regarded as being different variants of the same classification.

These different forms of adoption are still perceptible in modern-day legal systems. In some jurisdictions weak adoption is the preferred form, whereas in others strong adoption is given the upper hand, whilst both forms exist side-by-side in others.<sup>217</sup> According to modern comparative studies, full adoption (*adoptio plena, volle adoptie, l'adoption plénière*) aims at integrating the child completely into the adoptive family; all systems providing for this type of adoption bestow the status of legitimate child of the adopters on the child. The current dominant view is that full integration of the adoptee irrevocably terminates all ties with the biological family. In contrast, weak adoption (*adoptio minus plena, zwakke adoptie, l'adoption simple*) generally aims at providing the child with some form of social assistance, and for that purpose it is often neither necessary to fully integrate the child into the adoptive family, nor desirable to cut off those ties with the biological family, which do not interfere with this purpose.<sup>218</sup>

Such a distinction could also be drawn with respect to the various forms of non-marital registered relationship schemes currently available. There are some countries that have provided for a system of strong registration, ensuring that the couples are able to benefit from the provisions of family and inheritance law. In viewing non-marital registered relationships as an equivalent to marriage, the legal effects associated with the registration are strong and far-reaching. In contrast, there are other countries that have preferred to limit their legislation to the field of fiscal and property law. In viewing non-marital registered relationships as a contractual arrangement between the parties, the legal effects associated with the registration are relatively weak. It is submitted that this distinction in legal effects does not, however, necessarily correspond to either of the models outlines in **Sections 2.4** and **3.4**.

With the exception of **The Netherlands**, those countries adhering to the PLURALISTIC MODEL have opted for a form of weak registration, whereas those countries adhering to the DUALISTIC MODEL have opted for strong registration. This is of course a natural consequence of the underlying principles behind the

<sup>215</sup> Under Roman law the adopter acquired *potestas* over the adopted person by way of both forms of adoption, *i.e. adrogatio* and *adoptio*. Furthermore, the adopted person changed families, *i.e.* became for all legal purposes a member of the family of the adopter, and ceased to be a member of his previous family. Although both forms of adoption were regulated in a similar manner, and fulfilled a similar function, different legal effects were attributed to the ultimate legal act. In *adoptio*, for example, only the adopted person passed into the *potestas* of the adopter, and not his entire family, as was the case with *adrogatio*. See also **Section 2.4**.

<sup>216</sup> A. BORKOWSKI, *Textbook on Roman law*, London: Blackstone, 1994, p. 138.

<sup>217</sup> PERMANENT BUREAU OF THE HAGUE CONFERENCE, *Proceedings of the Seventeenth Session of The Hague Conference. Volume II*, The Hague, 1994, p. 27-29, §31-33.

<sup>218</sup> PERMANENT BUREAU OF THE HAGUE CONFERENCE, *Proceedings of the Seventeenth Session of The Hague Conference. Volume II*, The Hague, 1994, p. 61, §103.

PLURALISTIC and DUALISTIC MODELS. Why did **The Netherlands** abide by the PLURALISTIC MODEL and yet elect for strong registration effects? Is it conceivable that a country pursuing registration based on the DUALISTIC MODEL would opt for a weak registration scheme?

The answer to the first question lies in the **Dutch** parliamentary discussions in 1995-1996. The initial aim of the legislation was to provide an alternative to marriage for those who could not marry (same-sex couples and those within the prohibited degrees of marriage).<sup>219</sup> However, as a result of an influential memorandum in 1995, the government decided that to do so would lead to calls of discrimination and therefore decided to open registration to different-sex couples.<sup>220</sup> Nonetheless, in opening up registration to different-sex couples, the Government did not intend to lessen the effects of the registration, but instead merely offer different-sex couples an alternative to marriage. In so doing, the **Dutch** Government therefore combined the PLURALISTIC MODEL with strong registration. In answer to the second question, it is conceivable that a country would opt for the DUALISTIC MODEL, yet only provide for weak registration. Up until now, those European countries to have legislated in this field have done so as a result of national initiatives. However, as the number of countries in the European Union to have enacted legislation increases, the political and social pressure on the others to do so will equally increase. As soon as pressure begins to be exercised from outside the national order, it is conceivable that conservative Governments will attempt to provide for a rock bottom solution. The Government will do what it must to silence those calling for the Government to act, yet will do no more than an absolute bare minimum.<sup>221</sup>

With all this in mind it is perhaps difficult to combine the extent of legal effects into the division made between PLURALISTIC and DUALISTIC MODELS. The combination of the model of registration with the legal effects depends on a multitude of factors, including the influence of the church in State politics, the constitutional protection afforded to marriage and the general impact which marriage has upon the personal law of aspirant spouses. It is therefore possible to envisage four different scenarios, three of which are represented by countries studied in this book.

- PLURALISTIC MODEL with weak registration, *e.g.* **France, Belgium**
- PLURALISTIC MODEL with strong registration, *e.g.* **The Netherlands**
- DUALISTIC MODEL with weak registration, *e.g.* **Slovenia**
- DUALISTIC MODEL with strong registration, *e.g.* **UK, Switzerland**

## 5. OVERALL EVALUATION

### 5.1. EXISTING CLASSIFICATIONS

In attempting to analyse and categorise the various forms of non-marital registered relationships throughout Europe and the rest of the world, a number of prominent legal authors have suggested various models, techniques and distinctions. FORDER, for example, distinguishes between six different types of protection offered to different and same-sex cohabitantes: (1) cohabitation protection,<sup>222</sup> (2)

<sup>219</sup> *Dutch Second Chamber*, 1993-1994, 23761, No. 1, p. 2 (Proposed Art. 1:80a); No. 3, p. 5.

<sup>220</sup> It was felt that in not opening registration to opposite-sex couples, registered partnership would come to be seen as a "second class marriage": *Dutch Second Chamber*, 1994-1995, 22700, No. 5 (*Leefvormen*) and *Dutch Second Chamber*, 1995-1996, 23761, No. 7, p. 5.

<sup>221</sup> On the 20<sup>th</sup> July 2005, the **Slovenian** Registered Partnership Act came into force. This form of non-marital registered relationship provides only weak legal effects and is restricted to same-sex couples, thus supporting the claims advanced here.

<sup>222</sup> The main purpose of this type of provision is thus to offer financial protection. This protection occurs automatically based on the length of time the parties have lived together, the quality of the relationship (*i.e.* its resemblance to marriage) or the

optional cohabitation schemes,<sup>223</sup> (3) enrolled contract,<sup>224</sup> (4) registered partnership,<sup>225</sup> (5) marriage and (6) relationships not resembling marriage.<sup>226</sup> This is supported, although somewhat adapted, by ANTOKOLSKAIA who distinguishes between six different categories of legislative progression.<sup>227</sup>

COESTER identifies four different legislative responses to the problems faced by same-sex couples: (1) piecemeal regulation, (2) domestic partnership (cohabitation) legislation, (3) registered partnership and (4) same-sex marriage.<sup>228</sup> An alternative classification is sketched by WAALDIJK who distinguishes between forms of marriage, quasi-marital status and semi-marital status.<sup>229</sup> KESSLER, in his account of **French** private international law in relation to registered partnerships, distinguishes between *partenariats institutions* and *partenariats contrats*,<sup>230</sup> a distinction mirroring that already made by FULCHIRON between *partenariats statuts* and *partenariats contrats*,<sup>231</sup> and DEVERS between *partenariats statuts* and *partenariats cadres*.<sup>232</sup> These **French** authors differentiate between two sorts of partnerships on the basis of the balance struck between contract and status. In those cases where the status of the institution is more dominant, these authors classify these relationships as institutional or framework, whilst all other forms of registered relationship are deemed contractual. Finally, MCGLYNN, although not drawing a distinction based on national legislation, does suggest the existence of a hierarchy of families in Europe with heterosexual marriage at the pinnacle, followed by heterosexual cohabitation, transsexual partnerships and same-sex relationships.<sup>233</sup> On the basis of this hierarchy of family forms, jurisdictions could thus be classified according to their acceptance of different types of relationship.

Despite the palpable value of such distinctions and classifications, the majority do not address the fundamental differences in the function or structure of the non-marital registration schemes in

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presence of a common child: C. FORDER, "European models of domestic partnership laws: the field of choice", *CJFL*, 2000, p. 371-454 at 375-383.

<sup>223</sup> This category consists of the limited protection offered to cohabitants wishing to opt-into a registration scheme e.g. **Belgium** and regions of **Spain**: C. FORDER, "Opening marriage to same sex partners and providing for adoption by same sex couples, managing information on sperm donors and lots of private international law", in: A. BAINHAM (ed.), *International survey of family law. 2000 Edition*, Bristol: Jordans, 2000, p. 383-385.

<sup>224</sup> FORDER thus presents the **French** PACS legislation with a separate category, distinguishing it from the **Belgian** statutory cohabitation legislation on the basis of the public law effects attached thereto: C. FORDER, "European models of domestic partnership laws: the field of choice", *CJFL*, 2000, p. 371-454 at p. 386-389.

<sup>225</sup> **Denmark, Norway, Sweden, Iceland, The Netherlands, Germany** all fall into this category according to F. C. FORDER, "European models of domestic partnership laws: the field of choice", *CJFL*, 2000, p. 371-454 at 390-430.

<sup>226</sup> In this category, FORDER deals with all the other forms of relationship regulation which are not based on the traditional marital model. These can, in her opinion, also be subsumed in the first two categories: C. FORDER, "European models of domestic partnership laws: the field of choice", *CJFL*, 2000, p. 371-454 at 442-446.

<sup>227</sup> Namely, (1) countries devoid of regulation, (2) countries which provided for ad hoc cohabitation regulation, (3) countries with specific legislation providing minimal *ipso facto* protection, (4) countries providing for a limited regulation between contract and status, (5) countries providing for registered cohabitation and (6) countries allowing same-sex marriage: M. ANTOKOLSKAIA, *Harmonisation of family law – An historical perspective*, Antwerp: Intersentia, 2006, Chapter 4.4, p. 6 (to be published).

<sup>228</sup> M. COESTER, "Same-sex relationships: a comparative assessment of legal developments across Europe", *FamPra.ch*, 2002, p. 752-758.

<sup>229</sup> K. WAALDIJK, "Others may follow: the introduction of marriage, quasi-marriage and semi-marriage for same-sex couples in other European countries", *New England Law Review*, 2004, p. 569-590.

<sup>230</sup> KESSLER does, however, explain his choice for different terminology: G. KESSLER, *Les partenariats enregistrés en droit international privé*, Paris: LDGJ, 2004, p. 24, §32.

<sup>231</sup> H. FULCHIRON, "Réflexions sur les unions hors mariage en droit international privé", *JDI*, 2000, p. 889 at 900.

<sup>232</sup> A. DEVERS, *Le concubinage en droit international privé*, Paris: LDGJ, 2004, p. 132, §208.

<sup>233</sup> C. MCGLYNN, "Challenging the European harmonisation of family law: perspectives on the family", in: K. Boele-Woelki (ed.), *EFL Series: Volume 4. Perspectives on the unification and harmonisation of family law in Europe*, Antwerp: Intersentia, 2003, p. 219-238 at 228-229. See also C. MCGLYNN, "The Europeanisation of family law", *CFLQ*, 2000, p. 35-49.

Europe.<sup>234</sup> They focus predominantly on one or two aspects of the registration scheme, either the registration itself or the legal effects attributed thereto. Alternatively these two facets of the registration are not adequately distinguished from each other. Furthermore, a deficiency in the classifications of both FORDER and COESTER lies in their reference to the term “registered partnership”. In attempting to form European-wide terminology, one must search for new and overarching phraseology that breaks loose from the shackles of domestic substantive law. Reference therefore to the term “registered partnership” should be avoided.<sup>235</sup>

WAALDIJK’S classification lacks clarity in defining categories on the basis of their similarity to marriage. What criteria can be used to distinguish between “quasi-marriage” and “semi-marriage”? How is one to determine when a country has attached *almost all* of the rights of marriage and when a country has attached only *some*? Are there legal rights and duties that are essential in such a classification? The lack of definitional criteria makes it almost impossible to scientifically use WAALDIJK’S classification. Although on an elementary level COESTER’S overview provides a good guide to the state of European legislation in this field, it lacks sufficient analysis of the different forms of “registered partnership” available. It is moreover confined to same-sex relationships, whilst domestic legislation is not.

## 5.2. TOWARDS A NEW CLASSIFICATION

Accordingly, in attempting to compare and classify the legal institutions that have been studied in this book, a number of crucial factors have been taken into account. Firstly, one cannot base a classification solely on the basis of the legal effects attributed to the registration of the partnership. One must analyse and dissect the underlying *raison d’être* of these forms of non-marital registered relationships. In doing so one must also bear in mind the threefold distinction made throughout this book between the establishment of, the legal effects attributed to and the dissolution of a non-marital registered relationship. Secondly, in selecting terminology to identify and classify such institutions, one must attempt to denationalise one’s choices. In using terms already utilised by nation States, one runs the risk that national attributes will be assumed to be present in other States. A registered partnership (*geregistreerd partnerschap*) in **The Netherlands** is not identical to a registered partnership (*partenariat enregistré*) in **Switzerland**, despite both being termed the same.<sup>236</sup> It is crucial to construct overarching terminology, which although avoiding reference to individual national legislation, adequately portrays the underlying similarities in the institutions covered. It is for this reason that the term non-marital registered relationships has been chosen.<sup>237</sup>

With this in mind, the jurisdictions studied in this book can be divided into two distinct models with respect to two of the three fields of study (*i.e.* establishment and dissolution): the DUALISTIC MODEL and the PLURALISTIC MODEL. Although the end result in each of these models is different, the underlying rationale and function is strikingly similar. In both models the legal invisibility of and disadvantages faced by same-sex couples provided the necessary fuel to ignite the legislative fire. Although this fuel was sufficient in the DUALISTIC MODEL to keep the fire alight, the risk of the fire being extinguished in the PLURALISTIC MODEL meant that further fuel was required. It was found in the form of the legal problems faced by different-sex cohabiting couples. Whether one is able to talk of comparable results depends on one’s level of abstraction.

<sup>234</sup> A notable exception is, however, DEVERS who addresses the nature and effects of the institutions of registered partnerships: A. DEVERS, *Le concubinage en droit international privé*, Paris: LDGJ, 2004, p. 33-41 and 51-70.

<sup>235</sup> See **Section 1.3** for more information on the choice of the term “non-marital registered relationships”.

<sup>236</sup> D. KOKKINI-IATRIDOU, *Een inleiding tot het rechtsvergelijkende onderzoek*, Deventer: Kluwer, 1988, p. 90-91.

<sup>237</sup> See earlier in **Section 1.3**.

Although both fires burned, the chemical properties of these fires are different. If one compares them at micro-level (*i.e.* comparing the models at a national level) the fires are very different; having been fuelled by different elements, the chemical composition of the final product is different. However, if one compares the fires at a macro-level (*i.e.* comparing the models at an international level), then one observes that both fires were fed by a common fuel and resulted in combustion. It is important that one therefore fully appreciate the level of abstraction at which one is attempting to compare these models.

The differences at substantive law level are, at this point in time, too great to attempt harmonisation, let alone unification.<sup>238</sup> Yet this disparity in domestic solutions does not lead one to conclude that this field is not suitable for harmonisation at private international law level. In fact, the conclusions expounded here illustrate the opposite. The similarity of result in the systems studied is plainly evident. Although the systems studied can be classified into two general models, these models serve to highlight the underlying comparable aims and rationale of these systems.

In having distinguished between these two models, the question obviously arises why a country chooses a particular model. Is there any way in which one can predict whether a given country will opt for the PLURALISTIC MODEL or the DUALISTIC MODEL? The answer to this question is naturally politically weighted. However a number of general points can be made. Firstly, if constitutional protection is afforded to the institution of marriage, then the chances are greater that a country will opt for the DUALISTIC MODEL. In **Switzerland**, for example, the protection afforded to the institution of marriage on the basis of Art. 14, Sw. FC was seen as a prohibitive factor in opening registration to couples of a different sex. Providing an alternative to marriage for different-sex couples was thought to compete with the institution of marriage.<sup>239</sup> In passing the new **Swiss** Federal Constitution in 1999, the **Swiss** Federal Council confirmed the traditional interpretation of marriage as a monogamous union between parties of a different sex.<sup>240</sup> Any constitutional amendment can take many years to be enacted, and the urgency with which the Government wishes to pass such legislation forces the Government to accept such a compromise. Outside the jurisdictions studied, the constitutional protection offered to the institution of marriage has also been one of the main arguments raised for refusing to open non-marital registration to different-sex couples.<sup>241</sup>

Secondly, if a country allows for the legal celebration of religious marriages, the chances are also greater that a country will opt for the DUALISTIC MODEL of relationship registration. The involvement of the

<sup>238</sup> The same conclusion has been reached with respect to the possibilities for harmonization/unification with respect to matrimonial property law: K. BOELE-WOELKI, "The working method of the Commission on European Family Law", in: K. BOELE-WOELKI (ed.), *EFL Series: Volume 10. Common core and better law in European Family Law*, Antwerp: Intersentia, 2005, p. 15-38 at 19.

<sup>239</sup> FF 2003, p. 1192 at 1207-1208.

<sup>240</sup> FF 1997, p. 1 at 155.

<sup>241</sup> This has also played an important role in **Germany**: See W. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer, 2004, p. 287-300. See further the decision of the **German** Constitutional Court, 17<sup>th</sup> July 2002, (2002) *NJW* 2543. In **Spain**, although men and women have the right to marry according to Art. 32, **Spanish** Constitution, marriage itself as an institution is not constitutionally protected (**Spanish** Constitutional Court Decision, No. 184/1990. See further, E. ROCA, "Same-sex relationships in Spain: family, marriage or contract", *EJLR*, 2003, p. 366). Art. 39, **Spanish** Constitution simply protects the "family": see C. GONZÁLEZ-BEILFUSS, *Parejas de hecho y matrimonios del mismo sexo en la union europea*, Madrid: Marcial Pons, p. 44; E. ROCA, "Same-sex relationships in Spain: family, marriage or contract", *EJLR*, 2003, p. 365-367. Following this trend it is expected that the current proposal in the **Republic of Ireland** (see **Appendix 1**) will not be accepted as it stands since it allows for the registration of opposite-sex couples, whilst Art. 41(3)(1), **Irish** Constitution affords the institution of marriage special protection. This has in fact already been outlined as the position adopted by the Government by MR. MCDOWELL, Minister for Justice, Equality and Law Reform: *Irish Seanad*, 2004-2005, Vol. 179, No. 8, p. 692 (16<sup>th</sup> February 2005). For further analysis of the Irish situation, see I. CURRY-SUMNER, "General patterns in registration schemes for unmarried couples and the implications for Ireland", *IJFL*, 2005, p. 187-195.

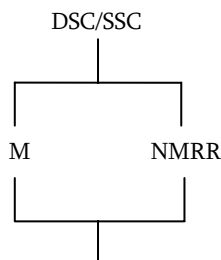
church in the celebration of marriages tends to increase reluctance on the part of the Government to introduce any form of institution that could be seen as competing with the “sacred institution of holy matrimony”. For example, in the **United Kingdom**, where religious marriages do not need to be preceded by civil marriages, the parliamentary debates clearly indicate the important influence still exercised by the church on the celebration of marriages. Outside the jurisdictions studied in this book, this was also one of the main points of debate in all of the **Nordic** countries.<sup>242</sup> It is interesting to note that since 2000, when the Church of **Sweden** was officially separated from the State, there has been increased debate on the introduction of same-sex marriage and the consequential repeal of the registered partnership legislation.

Obviously these two criteria do not engender hard and fast rules, and there may well be places where the constitutional protection afforded to the institution of marriage is not seen as forming an impediment to allowing different-sex couples to register their relationships. However, these two issues have been crucial up until now in determining whether a debate is possible on opening registration to different-sex couples.

At this stage it is also important to summarise the evaluations made. In **Section 2.4** it was noted that the **PLURALISTIC MODEL** best abides by the principles of a valued pluralistic family law, whilst in **Section 3.4** it was noted that with respect to the dissolution procedure afforded, no distinction should be drawn between the relationship form, and therefore support was put forward for the **DUALISTIC MODEL**. In light of these evaluations, coupled with the scale of legal effects outlined in **Section 4.3**, it is possible to propose a combination of these two models as the ideal solution to the issues at hand.

### THE IDEAL MODEL

#### A COMBINATION OF PLURALISTIC/DUALISTIC MODELS



Protective Dissolution Procedures

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

Due to the existence of two different models of partnership registration outlined in this chapter, the question whether the rules of private international law in this field can be harmonised or even unified is of ever-greater significance. It is submitted that the fundamental approach and aims of the legislature are comparable in all seven jurisdictions. It is thus submitted that all seven legal systems have created: A State-regulated, legal registration scheme for two persons involved in an exclusive, intimate relationship. Opting into this system by means of registration of the relationship entails the attribution of rights and

<sup>242</sup> I. LUND-ANDERSEN, “The Danish Registered Partnership Act”, in: K. BOELE-WOELKI and A. FUCHS (eds.), *EFL Series: Volume I. Legal recognition of same-sex couples in Europe*, Antwerp: Intersentia, 2003, p. 21-22 and M. JÄNTERÄ-JAREBORG and C. SÖRGJERD, “Some experiences with registered partnerships in Scandinavia”, *FamPra.ch*, 2005, p. 585-587.

duties, and the assumption of obligations and responsibilities between the parties themselves, as well with third parties and the State.

Classification of living things is known as taxonomy. Scientists have classified all living organisms into five kingdoms along lines of commonality. Each kingdom is split into smaller groups called phyla. Each phylum is split into groups called classes, each class into orders, each order into families, each family into genera, and each genus into species. The same method of classification can be transposed into family law.<sup>243</sup> If one examines the topic at hand through the eyes of a scientist, one sees that marriage and non-marital registered relationships are merely different *genera* of the same *family*: close, intimate, personal relationships. The various different forms of non-marital registered relationships, as well as various sorts of marriages,<sup>244</sup> are simply different *species* derived from the same *genus*. Different varieties of the same grouping can thus, if possessing common functional properties, be bracketed together and thus assigned to the same private international law category. The question that now arises is: according to which private international law category should the various forms of substantive law legislation be assigned? Perhaps even more crucially: if a distinction between the PLURALISTIC, DUALISTIC and MONISTIC MODELS is evident at substantive law level, is such a distinction necessary at private international law? Does the distinction between different models of non-marital registered relationship legislation at substantive law level necessitate different rules in the field private international law? These questions form the springboard for the next part of this research: the search for harmonisation or unification possibilities in the field of cross-border non-marital registered relationships in Europe.

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<sup>243</sup> See, for example, W. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer, 2004, p. 569.

<sup>244</sup> For example, polygamous marriages, child marriages, same-sex marriages, religious marriages *etc.*