THE ROAD TO RECOGNITION AND APPLICATION OF THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO MARRY OF SEXUAL MINORITIES IN THE UNITED STATES, THE NETHERLANDS, AND HUNGARY: A COMPARATIVE LEGAL STUDY

Marilyn Sanchez-Osorio

I. INTRODUCTION .......................................................... 131
II. GENERAL HISTORY OF SEXUAL MINORITIES' STRUGGLE ............................................................ 132
III. SAME-SEX MARRIAGE RIGHTS .................................... 133
    A. The United States of America ................................ 134
    B. The Netherlands ................................................ 137
    C. Hungary .......................................................... 140
IV. SIMILARITIES AND DIFFERENCES OF LEGAL TREATMENT AMONG SELECTED COUNTRIES ..................... 141
V. REASONS BEHIND LEGAL TREATMENT OF ISSUE ............ 143
VI. FUTURE TREND—ROLE OF INTERNATIONAL LAW .......... 147
VII. CONCLUSION .......................................................... 149

I. INTRODUCTION

The scope of this work is to shed some light on the vigorously debated and delicate subject of same-sex marriages, as well as to review how some countries have reached the point of recognition and application of the legal rights that homosexual individuals have within this global society. Starting with a general overview of the homosexual struggle to gain social rights and acceptance in particular societies within the Western Hemisphere, this article will focus on the specific domestic laws of the United States of America, the Netherlands, and Hungary that deal with the issue of same-sex marriage. In selecting these particular countries this article will show a traditionally open-minded society (the Netherlands); a society that purports to be modern, open-minded, and progressive as the world leaders (the United States) but, instead, it is one that is still moderate and conservative; and finally, a society that is just coming out of years of

* Marilyn Sanchez-Osorio, J.D., B.A.
repression and closure to the rest of the world and its advances (Hungary). Additionally, this article will show how each country’s societies and institutions have dealt, and deal today, with the subject of same-sex marriage. After analyzing specific laws and cases from these countries, this article will compare and contrast how each treat the subject in a similar or different fashion. This article will explore, based on the latest case rulings and legislations passed in these countries, how the future is being shaped and what the trend is in this area of legal concern for sexual minorities. This is a comparative legal study and analysis among the selected countries and their treatment of the issue of same-sex marriage based in their particular cultures, societies, religious influences and history. To conclude, this article will speculate as to how much international law can be used to ameliorate the legal situation of gays, lesbians, and bisexuals who have decided to live together in a same-sex union.

II. GENERAL HISTORY OF SEXUAL MINORITIES’ STRUGGLE

“Sexual minorities include all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity.”

Homosexuality appears in virtually all social contexts—within different community settings, socioeconomic levels, and ethnic and religious groups. In ancient Greece, homosexual relations were acceptable and, in some cases, expected activity in certain segments of society. It can be assumed that the ancient gay prototypes of antiquity were not a minority, were not stigmatized, were not perceived as different or deviant, and above all were not defined by their sexual orientations or attractions. The attitude towards homosexuality changed in the Western world largely by the prevailing Judeo-Christian moral codes, which treat homosexuality as immoral and sinful. An alliance of the Roman Empire and the equally imperial Church of Rome established the two rules on homosexuality that have marginalized same-sex love for many centuries. Both sexual activity and a legal marriage required people of opposite sexes.


4. ENCYCLOPEDIA, supra note 2.

Although the criminal rule of same-sex activity was essentially abolished in great parts of Europe by Napoleon's civil codifications, it was later brought back by other empires (British, German, Austrian). The marriage rule has taken much longer to disappear, or be abolished, from Europe or other areas of Western civilization.\(^6\)

The first half of the twentieth century marked a period of great hostility and overwhelming negative feelings towards homosexuality.\(^7\) In the United States, homosexual activity, even among consenting adults, was made a criminal offense in most of the country by the passing of the so-called "sodomy" statutes.\(^8\) Homosexuals were subject to stereotypes and prejudice. Gay men were viewed as effeminate, and lesbians were portrayed as mannish, both obsessed with sex, with little self-control or morality.\(^9\) In the 1930s and during World War II, homosexuals were targets of persecution in Nazi Germany.\(^10\) Only recently have these prejudices against homosexuals in Western societies begun to change. As the result of much scientific discussion and study, in 1973 the American Psychiatric Association eliminated homosexuality from its list of mental disorders and, in 1980, it dropped it from its Diagnostic and Statistical Manual.\(^11\)

The institution of marriage has been altered fundamentally in Western societies because of social changes brought about by the Reformation, the Industrial Revolution, and a growing ideology of individualism.\(^12\) Because the family unit provides the framework for most human social activity, it is the foundation on which social organization is based. In most cultures, marriage is closely tied to economics, religion, and law.\(^13\)

III. SAME-SEX MARRIAGE RIGHTS

The question seems a simple one: when does the law recognize that same-sex partners have the right to marry each other? The answer does not seem so obvious to a great majority of the Western societies. However, in Europe and in other areas of the world, particularly, in specific countries like the United States of America, the Netherlands, and

---

7. ENCARTA ENCYCLOPEDIA, supra note 2.
8. Id.
9. Id.
10. MILLER, supra note 3, at 215.
11. ENCARTA ENCYCLOPEDIA, supra note 2.
13. Id.
even in Hungary, modern civilization is finally beginning to legally recognize the right that same-sex partners have to marry each other.

A. The United States of America

On December 20, 1999, the Supreme Court of Vermont reversed the trial court's judgment in *Baker v. State* and retained jurisdiction pending legislative action because Defendant State was constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Chief Justice Jeffrey L. Amestoy based his decision on the Common Benefits Clause of the Vermont Constitution (Chapter I, Article 7), which says that government is for the common benefit of the community rather than for the advantage of individuals: "[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . "

In the Constitutional claim section of his opinion, C.J. Amestoy emphasizes the differences between the Common Benefits Clause of the Vermont Constitution and that of its counterpart, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Chief Justice points out that Vermont's constitutional commitment to equal rights was the product of the successful effort to create an independent republic, in 1777, preceding the adoption of the Fourteenth Amendment by nearly a century. In his clarification of the reasons why this court based its decision on Vermont's Common Benefits Clause, Justice Amestoy further explains that while the federal amendment may supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters and the Court is free to provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter.

---


18. Id.
The historical origins of the Vermont Constitution thus reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African-Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferment and advantages.19

C. J. Amestoy reasoned that denial of the Plaintiff's request for a marriage license was found in the legislative intent of the marriage statute that denied the homosexual couples in question the right to such license.20 "The legislative understanding is also reflected in the enabling statute governing the issuance of marriage licenses, which provides, in part, that the license 'shall be issued by the clerk of the town where either the bride or groom resides.' 'Bride and groom' are gender-specific terms."21 Therefore, Chief Justice J. L. Amestoy told Vermont's legislature in this opinion to either provide for licenses or set up some sort of domestic partner system where all or most of the same rights and obligations provided by law to married partners will be extended to same-sex couples.

In what has been called a "historical and ground breaking" event, on March 16, 2000, the Vermont House approved legislation that would create the closest thing to gay marriage that America has ever seen.22 In a vote of 79-69, a bill giving same-sex couples the benefits of marriage through "civil unions" was passed.23 Representative William Lippert, the only openly gay member of the House, gave a speech where he points out the many decades of mistreatment, discrimination, and prejudice that has existed against gay men and lesbians.24 Gay couples who form civil unions would be entitled to about three-hundred state benefits of privileges available to married couples: filing of joint tax returns, inheritance, property transfers, medical decisions, and insurance are among the most important areas.25 On April 26, 2000, Howard Dean, the Governor of Vermont, signed a "first-in-the-nation" same-sex "civil unions" bill into

19. Id. at 33.
23. Id.
25. Sneyd, supra note 22 at 2A.
The law will allow gay couples to form civil unions beginning July 1. While other states will most likely not recognize Vermont's civil unions, through their "Defense of Marriage Acts," this is an enormous positive step in the fight for same-sex marriage rights in the United States.

On December 9, 1999, the Supreme Court of Hawaii decided *Baehr v. Miike*, ending an eight-year fight to make this island archipelago the first United States state to legalize same-sex marriage. The trial court had entered a judgment in favor of the plaintiffs, ruling that the sex-based classification in Haw. Rev. Stat. § 572-1 (1950) was unconstitutional by virtue of being in violation of the equal protection clause of Hawaii's Constitution Article I, section 5. The Department of Health was therefore enjoined from denying an application for a marriage license because applicants were of the same sex. However, the state legislature amended the state constitution, investing in the legislature the power to reserve marriage to opposite sex couples. On appeal, the court held that the marriage amendment validated § 572-1 by "taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite sex couples." The Court ordered that the judgment of the circuit court in favor of the plaintiffs be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs. The marriage amendment rendered the plaintiffs' complaint moot.

The importance of the *Baker* decision is that its consequences will not be limited to the State of Vermont. States in the United States must determine whether they will extend the Full Faith and Credit provision of the United States Constitution to any other state that does adopt legislation granting marriage licenses to same-sex couples. This may apply as well to any state that adopts a domestic partner system where homosexual couples enjoy the same benefits and rights that heterosexual married couples enjoy. Article IV, § 1 of the United States Constitution provides:

---

27. *Id.*
30. *Id.* at 1.
31. *Id.*
32. *Id.*
33. *Id.*
34. Wilets & Woods, *supra* note 1, at 213.
“Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State . . .” Public Acts is the most relevant of the above-mentioned elements of the Full Faith and Credit Clause of the Constitution to cover marriage, however

some legal commentators have suggested that it is ‘comity’ (legal principle whereby courts of one state or jurisdiction will give effect to laws or judicial decisions of another state or jurisdiction as a matter of deference and mutual respect) rather than ‘full faith and credit’ that is the relevant legal principle to apply to the question of a state’s recognition of a same-sex marriage performed in another state. 35

Even when this provision means that marriages in one state must be recognized in another, some states may claim a public policy exception to the provision. 36 A major bar to the challenge under the “Full Faith and Credit” clause has been the passage of the Defense of Marriage Act. This federal law exempts those states that have enacted statutes that call for a refusal to recognize the legality of another state’s same-sex marriage. 37

As of February, 2000, “of the 541 pieces of state legislation dealing with issues concerning gay, lesbian, bisexual, and transgendered people and their loved ones, 309 were ‘favorable’ and 232 were ‘unfavorable’.” 38 Bills allowing same-sex marriage failed in Massachusetts and Rhode Island while in Oregon, an anti-marriage initiative was kept off the ballot. 39 Only Louisiana passed a bill prohibiting the recognition or validity of any marriage between persons of the same sex lawfully entered into in another jurisdiction. 40

B. The Netherlands

Under Chapter 1, (Fundamental Rights), article 1 (Equality), of the Kingdom of the Netherlands’s Constitution, there is a clause that reads:

35. Interview with James D. Wilets, Assistant Professor of Law, Nova Southeastern University in Fort Lauderdale, Florida. (Apr. 28, 2000) (on file with author).
36. Wilets & Woods, supra note 1, at 213.
39. Id. at 4.
“Discrimination on the grounds of religion, political opinion, race, sex, or on any other grounds whatsoever shall not be permitted.”

Same-sex, as well as opposite sex, unmarried couples and their children in the Netherlands, have had available to them a “Registered Partnership” legislation since January 1, 1998. The bill was introduced in the Dutch Parliament through bill number 2376, in June 1994, and it grants almost all legal consequences of marriage to unmarried couples that do not wish to marry, but who live together. It does not grant the actual marital status nor any form of parental rights and duties to the couple.

On April 16, 1996, the Lower Chamber of the Dutch Parliament, through Parliamentary Paper 1995/96, nr. 22700/18, proposed and adopted the following:

The Chamber, having heard the debate,

noting that often in our society two people of different sexes and of the same sex want to enter into a lasting and committed relationship;

noting furthermore that according to the Civil Code the concluding of a civil marriage is permitted to two people of different sexes;

being of the opinion that in line with the General Equal Treatment Act there is no objective justification for the marriage prohibition for same-sex couples;

resolves, that legal marriage prohibition for two people of the same sex be lifted.

With the inception of a new coalition government in the Netherlands, on August 3, 1998, its members agreed to further the interests of homosexual couples by introducing a bill to open civil marriages and adoptions to persons of the same sex.

41. NETH CONST. art. 1.
43. Id. at 3.
44. Id.
45. Id. at 4.
On June 25, 1999, by an amendment to Book 1 of the Civil Code—Parliamentary Papers: *Kamerstukken II 1998/99, 26672, nrs. 1-3*, the Dutch Cabinet approved the introduction of bills to open up marriage and adoption to same-sex partners. Normally, it would take both chambers of Parliament at least until the end of the year 2000 to debate and approve these bills. Therefore, the first same-sex marriages and adoptions would not take place before 2001. The Marriage Bill will not do away with registered partnerships and these two will co-exist for at least the next five years. In addition, registered partners will get the opportunity to convert their partnerships into full marriages.

On April 1, 2001, four laws came into effect in the Netherlands by means of the Royal Decree, *Staatsblad*, nr. 145. One of these laws is the law of December 13, 2000 (*Staatsblad* 2001, nr. 11), dealing with various matters including the further equality between marriage and partnership registration. Some parts of this law took effect before April 2001. Then, there is the law of December 21, 2000 (*Staatsblad* 2001, nr. 9), which deals with the opening up of marriage for same-sex partners. The third law that took full effect was the law of December 21, 2000 (*Staatsblad* 2001, nr. 10), dealing with adoption by same-sex partners. The fourth law that took effect was the law of March 8, 2001 (*Staatsblad* 2001, nr. 128), which adjusted various other laws to the opening up of marriage and adoption. Until a bill, now in Parliament, that provides for automatic parental custody for children born in same-sex marriages for lesbians or heterosexual registered partnerships becomes law, the differences between registered partnership and marriage, and between same-sex marriage and different-sex marriage, will be insignificant. With the exception of the differences imposed by biology and foreign laws, which are beyond the reach and sovereignty of the Netherlands' lawmakers, same-sex and different-sex foreign partners hold now the same position with respect to marriage, partnership registration, and immigration. At midnight, on April 01, 2001, four same-sex Dutch couples took their legally recognized wedding vows after years of struggle for equality.

The Netherlands, thus, becomes the first country in the Western world to adopt a marriage law that grants same-sex couples all the rights, including the license, which heterosexual couples have in marriage.

---
46. Waaldijk, *supra* note 6, at 17.
47. *Id.* at 1.
48. *Id.*
49. *Id.*
50. Waaldijk, *supra* note 42.
51. *Id.*
C. Hungary

The Republic of Hungary decriminalized homosexuality in 1961, when it was still under the Soviet Union’s Communist regime. The age of consent for homosexual practices was 20 years until 1978, when it was changed by Section 199 of Hungary’s Penal Code to 18 years, subject to 3 years of imprisonment for a violation.

“The Hungarian Constitutional Court ruled on March 8, 1995, that it is unconstitutional for Hungarian law to recognize heterosexual common law marriages but not lesbian or gay ones.”

Since Hungary recognizes marital unions under the common law marriage doctrine, the Hungarian court found no legal grounds on which to sustain such disparate treatment and sent the law on common law marriages, called Ptk 578/G, back to the legislature, ordering it to take action on the matter by March 1996. Nevertheless, the Court also ruled that civil marriages were still off-limits to homosexual couples by stating that the “Constitution protected the institution of civil marriage as a union between a man and a woman.”

On May 21, 1996, by passing Act XLII of 1996, an amendment to Act IV of the 1959 Civil Code of the Republic of Hungary, Parliament revised their “cohabitation” law to read: Section 1: “During their cohabitation, common law spouses shall acquire common property in proportion to their participation in the acquisition.”

Section 2: “Common law spouses are two persons living together without marriage in common household, in emotional and economic community.”

It is also important to note that the Hungarian Constitution contains a provision, under Article 70A (No Discrimination), whereby “The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender . . . political or other opinion, or on any other grounds whatsoever.” Based on this Constitutional right not to discriminate on “any grounds whatsoever” and its finding that law Ptk 578/G was arbitrary and contrary

53. Id.
54. Wilets & Woods, supra note 1, at 231.
55. ILGA, supra note 52.
56. Wilets & Woods, supra note 1, at 231.
57. ILGA, supra note 52.
58. PTK/G (1996) (Hun.)
59. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] art. 70A.
60. Id.
to human dignity, the Hungarian Constitutional Court had the legal tools necessary to demand Parliament to amend the law on cohabitation and, thus, extend to homosexual couples the same rights that heterosexual couples enjoyed. Today, in Hungary, same-sex couples living together can claim all the marital rights of traditional common-law marriages, except the right to adopt children.

IV. SIMILARITIES AND DIFFERENCES OF LEGAL TREATMENT AMONG SELECTED COUNTRIES

The United States, the Netherlands, and Hungary treat the issue of same-sex marriage in similar and different ways. Among the similarities, what stands out is: i) how recent it is that these countries have taken seriously the passage of laws to legalize same-sex unions, ii) the process by which these countries have had to first, recognize that there is discrimination in the area of sexual orientation; then, progressively, decriminalize homosexual activity, and then move to allow homosexuals their civil rights, including the final acceptance of same-sex marriage, whether based on common law marriage principles (Hungary), civil unions (USA- State of Vermont), or an actual marriage license (Netherlands). Another similarity is how internal conservative movements have continuously tried to obstruct legislation granting gays any type of right, much less the right to marry.

These countries, however, have dealt with this issue also in different ways. The Dutch Parliament, has proven time and again how the intense social conscience that prevails in the Netherlands on the subject of minority rights, non-discriminatory legislation in the area of sexual orientation, equal rights for same-sex partners, and general human rights laws, will find fertile ground in a legal system that works to fully reflect the society it represents and not only the personal and conservative views of a few of its members. The Dutch groundbreaking approach to real legislative representation has made the Netherlands a pioneer in granting same-sex couples a myriad of legal rights, whereas in countries like the United States, the legal system (including the legislative and judiciary branches of government) and those who represent it, have yet to reach this point in spite of being the country that created the civil rights movement.

The United States' legislative system, starting from Congress, going to each state's legislatures, and ending up at the court level, has proven that, although the awareness is there, the United States still has a long road to go before it fully reflects in its legislation its social reality in the area of

61. The International Lesbian and Gay Association, supra note 52.
human and civil rights for gays, lesbians, bisexuals and transgendered individuals. So far, the only positive legislation passed in the United States that provides similar rights of heterosexual married couples to same-sex partners, has been the Vermont civil unions law. In a country with almost three hundred million inhabitants and as the world economic leader, the United States has a terrible record as far as the creation and implementation of domestic anti-discrimination laws that protect the rights of sexual minorities or homosexuals.

The power that some extremely conservative religious groups assert over many members of Congress, through their lobbying and political action groups, is partly responsible for the striking down of legislation that would have given homosexuals the right to enter into full legal marriages, at least from the time that the State of Hawaii made its first claims on the subject. Other reasons are simply based on pure personal ignorance and fear of the unknown from people in power who, most likely, have never even met a homosexual couple in their lives. Respected judges in high courts of the United States have written opinions where they base most of the "logic" behind the denial of rights to a homosexual person, i.e. the right of privacy to engage in sexual conduct with a member of one's same sex, upon the judge's own values and standards of morality. As long as the problem is not attacked from its roots, education, and included as part of the regular general courses that children take in school, (i.e. subjects on tolerance of those different from us, civil rights and duties, and human rights) homosexuals, like any other minority in the United States, will continue to suffer the legal consequences of the blindness and deafness of the people that are supposed to represent their rights.

The good news is that a country like Hungary, with a much more controversial past than that of the United States, both socially and historically, is starting to take some serious steps in the direction of legislative awareness on the subject of sexual orientation issues and anti-}


63. Justice White, who wrote the majority opinion in Bowers v. Hardwick, explained: [i]f[he law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed . . . [R]espondent insists that the majority sentiment about the morality of homosexuality should be declared inadequate. We do not agree . . . [n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other, has been demonstrated by either the Court of Appeals or by respondent [Hardwick]. Moreover, any claim that precedent cases presented to support Hardwick's position stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally isolated from state proscription is unsupportable.

discriminatory legislation. Even if Hungary’s only reason to accept homosexual couples living together is to offer an image of social and civil rights consciousness in order to eventually enter the European Union, this creates the legislative awareness needed as basis to move forward into an eventual full incorporation of same-sex marriage legislation.

V. REASONS BEHIND LEGAL TREATMENT OF ISSUE

History, religion, culture, economics and society all play an important role in understanding the reasons why the United States, the Netherlands, and Hungary treat the issue of same-sex marriage in a variety of ways and why each behaves legally in a particular way.

The advent of industrial capitalism led the way for the breakdown of old family structures in the Western world. Individuals started making their own livings and breaking away from the interdependent family unit. Urban societies became the center for people who wanted to find others like themselves. In the West, the evolution of liberal and democratic societies provided legal recourses for homosexuals to acquire, defend, and expand personal rights that were not available in rural societies or within the “traditional” heterosexual family structures. In addition, in the United States and Western Europe, education and economic possibilities were opening up for women, which translated into less pressure to marry and have children. With the addition of social mobility, the twentieth century marked the first time in Western history that the lesbian was able to emerge as a distinct social identity.

In the United States, the late nineteenth century marked a period of major change in the lives of many women. Romantic friendships flourished in a society were women were still not perceived as sexual beings. Then came the age of Freud, where women began to be viewed as “sexual,” birth control became more accessible, and heterosexual sex did not have to end in babies. All of these factors threatened male dominance and women found themselves under pressure to abandon these romantic friendships and devote themselves to their marriages. The entry of the United States into World War II, in December 1941, helped

64. See generally MILLER, supra note 3 (analyzing gay and lesbian history).
65. See generally id.
66. See generally id.
67. Id. at XXIV.
68. Id.
69. MILLER, supra note 3.
70. Id. at 63.
strengthen a weak gay and lesbian identity. 71 Thousands of men and women were taken into sex-segregated environments and away from the structures that family, church, and their hometowns provided. It was the first time that the United States military asked recruits whether or not they were homosexuals.72

A very important event took place on the night of June 27, 1969 in New York City. The Police Department raided, as it customarily did, a gay bar known as “Stonewall Inn.” 73 This raid led to a series of days of riots by gays against the police officer’s abuses and discriminations against that particular section of society. The homosexual revolution had started with thousands of gays taking the streets, weeks and months after the Stonewall raid, shouting “Gay Power” and “We Shall Overcome.” 74

American society slowly evolved into a liberal one within its conservative democratic political ideology. This liberal society allowed homosexuals to have some legal recourse to acquire, defend, and expand personal rights. 75 In the post-1960s period, something known as “identity politics” came into fashion where the birth of the “gay and lesbian community” became viewed as just another minority or constituent group. 76 It is important to point out that “the whole idea of anti-discrimination legislation (covering first race, religion, and sex) is primarily an American invention, starting with the Civil Rights Act of 1964.” 77 This means that the American legal system of the sixties was already setting the grounds for case and statutory laws that would support the plight of sexual minorities within American society, although it has been a long and frustrating struggle.

Religion and morality are often used as reasons why society should not recognize same-sex marriages. Nevertheless, in the United States, several Protestant denominations—notably the Unitarian Universalist Church and many Quaker congregations—recognize same-sex unions. 78 In addition, arguably the United States Constitution’s First Amendment’s Freedom of Religion is violated any time a state prohibits same-sex marriages. The excuse most often alluded to has been that same-sex

71. MILLER, supra note 3, at 231.
72. Id.
73. WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 63 (1997).
74. MILLER, supra note 3, at 368.
75. Id. at xxv.
76. Id.
77. Waaldijk, supra note 6, at 11.
78. RUBENSTEIN, supra note 73, at 749-50.
Sanchez-Osorio

marriages do not lead to procreation, and this is a fundamental purpose of marriage. Nevertheless, no state actually requires heterosexual couples to procreate as a condition precedent to receiving a marriage license. Since sex cannot occur outside of wedlock and the fundamental purpose of marriage is to procreate, why are contraceptives not outlawed?

Economics can also play an important role in determining why a state may want to pursue the recognition of same-sex rights legislation. In a very perceptive analysis, a California law professor indicated in 1995 that it would bring economic benefits to any state to be the first to recognize same-sex laws: increased tourism and its revenue being the main economic incentive. She also indicated that the states most likely to be the ones to legalize same-sex marriage in the United States were Hawaii, New Mexico, or Vermont. She was right.

The Netherlands has a reputation for being one of the most open-minded and liberal countries within the European Union and the world. With laws that allow the public use of certain soft drugs, e.g., marijuana, the legalization of prostitution, the recent passage of a law permitting euthanasia, and for being the first country in Europe to have full legal homosexual marriages, their reputation is well deserved. The reasons for this tolerant atmosphere and uncommon open mentality are mixed. The Dutch inhabitants are mainly descendants from Franks, Frisians, and Saxons of Germanic and Nordic origins.

As Figure One indicates, Roman Catholics constitute about thirty-five percent of the population. Twenty-four percent are Protestants, mostly belonging to the Dutch Reformed Church, and about forty-one percent of the people do not belong to a religious body. This translates to sixty-five percent of the population of the Netherlands who do not hold any of the strict Judeo-Christian views on homosexuality.

79. Id.
80. Id.
82. Id.
84. Id.
The Netherlands has no official religion, however the Reformed Church has had a close association with the Dutch state since the founding of the Republic. Finally, starting from the sixteenth century, when the Netherlands was the foremost commercial and maritime power of Europe, until today, the Dutch people have enjoyed a high level of basic education and high literacy rates.

Hungary, where about ninety percent of its people are Magyars, descendants of the Finno-Ugric and Turkish tribes who mingled with Slavic tribes in the ninth century, possesses a great variety of ethnic minorities. Gypsies, Germans, Slovaks, Croats, Serbs, and Romanians are among the largest. It is predominantly a Roman Catholic country with a large Protestant minority, in spite of the fact that, during the Communist period, the government dissolved all religions. Approximately ninety-nine percent of the adult population is literate and education is mandatory for children between the ages of six to sixteen. Before the Communists took power in 1948, Hungary's economy was primarily agricultural. The new Communist government drastically changed it. It emphasized unrealistic industrialization goals for many years until new economic

---

85. *Id.*
86. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
reforms brought prosperity. The change from Communism to a free-market economy (1990) has taken its toll on the Eastern European economies and its people, bringing high inflation and low wages. Along with this economic breakdown comes social problems like a high incidence of alcoholism. There are also claims of discrimination and persecution that several Hungarian minorities have suffered. In spite of all this, Hungary is known for its constitutional guarantees of civil liberties and human rights. The main reason behind this type of legislation quickly passing in these former Communist countries of East Europe is that countries wished to meet the human rights criteria that were set for membership in the Council of Europe. Ultimately, Hungary wants to become a member of the European Union.

VI. FUTURE TREND—ROLE OF INTERNATIONAL LAW

With the legal leadership and precedent already set by the Netherlands; the legal and social consciousness that are now very present in the United States, after such states like Hawaii, which paved the way, and later the state of Vermont, which took the first real step towards equality for same-sex American couples; and, finally, with the acceptance of homosexual couple’s rights in a country like Hungary, the rest of the Western world is likely follow these examples. With the increasing trend toward globalization, all societies will eventually start incorporating into their legal systems legislation that will recognize same-sex marriages, partnerships, and the rights and responsibilities that come along with that.

Until World War II, customary international law stated or implied that each country could do as it pleased with its people within its borders, based on the doctrine of sovereignty. After the Holocaust, the International Human Rights Movement became part of international law

91. See Jeffrey A. Frieden & David A. Lake, International Political Economy 475 (1995) (discussing former Soviet states; the observations are equally applicable to Hungary).

92. Id. at 478.

93. Encarta Encyclopedia supra note 32.

94. Waaldijk, supra note 6, at 8.

95. International custom is evidence of a general practice accepted as law, with no requirement of universal acceptance. See art. 38 of the statute. See also The Paquete Habana; The Lola, 175 U.S. 677 (1900).

96. The doctrine of sovereignty—the claim to be the ultimate political authority, subject to no higher power regarding the making and enforcing of political decisions—developed as part of the transformation of the modern medieval system in Europe in the modern state system, a process that culminated in the treaty of Westphalia in 1648. It is the basis of the international society. Ian McLean, The Concise Oxford Dictionary of Politics, 464 (Oxford University Press) (1996).
and the United Nations Charter. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948), is the main Human Rights document binding all member states of the United Nations to uphold its provisions within their territories. Article 1 states that "all human beings are born free and equal in dignity and rights." Article 2 sets out the non-discrimination provisions regarding the rights and benefits provided by the Declaration: "everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, sex, language, religion, political or other opinion, national origin or other status." Article 7 brings into play the importance of equal protection guarantees: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

When the European Union was founded, it was not perceived that there was a fundamental rights aspect to the primarily economic objectives of the Community. The original member states had established the separate structure of the Council of Europe and the European Convention on the Protection of Fundamental Rights and Freedoms (1950), and the European Court of Human Rights guaranteed the protection of human rights. Initially, fundamental human rights gained recognition through the judgments of the European Court of Justice, basing its decisions primarily on general principles of law. However, recent growing concerns within the European Union that measures taken to improve and implement internal markets could not be achieved without first addressing disparities in the protection against any form of discrimination. In May 1995, the European Parliament adopted a resolution whereby the Intergovernmental Conference of 1996 would adopt a treaty that provided more rights for EU citizens and improved protection of the fundamental rights of all EU residents. This led to the adoption of the Treaty of Amsterdam at the European Council Meeting on June 1997.

The importance of this treaty, for purposes of how international law can assist the rights that same-sex partners may have in marriage, is that it marks the first time that any international treaty introduces a clause based

97. Anthony Chase, Professor of Law, Lecture on Public International Law, Nova Southeastern University, Fort Lauderdale, Florida (Feb. 25, 2000) (on file with author).
99. Id.
100. Id.
102. Id. at 11.
on discrimination. For example, Article 13 makes specific mention of sexual orientation. A significant aspect of this Article is that it recognizes that discrimination on the grounds of sexual orientation exists, and implies that such types of discriminations calls for action on the part of the European Union members. Up to now, most legislation that has been passed that protects against discrimination, whether in Europe or in the United States, makes reference to sex, religion, race, ethnicity and nationality, but no specific mention of sexual orientation was ever made.

In the United States, treaties are considered the "supreme law of the land." Nevertheless, some treaties, e.g., those non-self-executing, require domestic legislation to make a treaty enforceable. The reality is that sovereignty and the consent of states defines international law. In other words, countries may sign treaties that protect human rights but they, ultimately, are the ones who must enforce them within their territories. Although there are established means of enforcement for violations to international treaties (such as economic sanctions), only in the last decade of the 1900s, a movement started towards using military sanctions (NATO air bombing of Belgrade) against countries in gross violations of human rights (e.g., genocide).

The importance of these events is that awareness that human rights, including the rights of same-sex partners, must occupy a more significant place in world politics and international law is already present.

VII. CONCLUSION

The Western world is seeing homosexual communities becoming more visible. Large numbers of homosexuals are openly declaring their identities and demanding their rights to equal and respectful treatment. What must be realized is that the homosexual community occupies a de facto place in society and their rights must be recognized de jure just as all other members of society rightfully do. In the last century, same-sex marriage went from being some unthinkable proposition to a reality. As

103 Id. at 16.

104. Gay Employee Can't Sue Under Title VII For Sex Harassment, Law. WEEKLY USA, Apr. 16, 2001, at 5. (Referring to a recent Ninth Circuit Court of Appeals decision rejecting the claims of a plaintiff who sued based on sexual harassment under Title VII. This Court determined that Title VII protects against discrimination based only on the basis of race, color, religion, sex or national origin. Rene v. MGM Grand Hotel, Inc., Docket No. 98-16924 (9th Cir. 2001).

105. U.S. CONST. art. VI, § 2.

106 International custom is evidence of a general practice accepted as law, with no requirement of universal acceptance. See art. 38 of the statute. See also The Paquete Habana; The Lola, 175 U.S. 677 (1900).
long as societies around the world provide all legal consequences of civil marriage to same-sex couples, whether they choose the Netherlands’s full marriage recognition or registered partnerships, or Vermont’s bill allowing for same-sex civil unions, or Hungary’s common law recognition of legal cohabitation, eventually there will be no political or moral arguments to support that same-sex unions are not as legal and real as any other “marriage.” It remains to be seen what legal implications will the Netherlands’ passing of same-sex full marriage law will have within the European Union. Should the European Court of Justice decide to ignore same-sex marriages validly contracted in the Netherlands and restrict the meaning of the word “spouse” to its traditional heterosexual notion, that would translate to an invasion on the part of the Court to the Netherlands’ domain in the area of family law, over which individual member states still have preemption.

Despite changing attitudes toward same-sex relationships, homosexual conduct remains a criminal offense in some jurisdictions of the United States and many other countries around the world. To effect a global change in attitude towards homosexual issues, precedent suggests that countries and their societies need to pass through stages. First, there must be a conscious acceptance that homosexuals exist and have the same rights to equal protection of the laws as any other member of society. Second, countries need the realization that these sexual minorities are targets of continuous discrimination in practically all areas of life: employment, marriage, healthcare, housing, adoption, and even education. Third, countries need the progressive passage of anti-discrimination laws that include sexual orientation as part of the statutory language; fourth, the eradication of the idea that homosexual activity is criminal, immoral, or deviant. Finally, same-sex partnership legislation that lead to full legal marriages. As history has shown, it may be a difficult road. However, it is not an impossible goal.