LGBT Rights and Economic Migration: Will the Liberalization of the Movement of Persons in Economic Integration Agreements Increase the Need for Common Regional Standards Regarding Civil Status Rights?

Andreas R. Ziegler[*]

Abstract

More and more jurisdictions allow same-sex couples access to marriage, or at least a similar scheme. At the same time, adoption or access to artificial methods of procreation by same-sex couples is a reality in a growing number of States. At the same time, the fact that individuals enjoying a particular status; i.e., marriage, civil partnership, or parenthood, are able to move between States, can lead to questions when the recognition of this civil status differs amongst States. When States elect to favour the exchange of persons through a liberalization of the access to their labour markets, or even the *free* movement of their citizens, the necessity to harmonize respective standards increases, and/or a greater need arises to provide and implement specific rules on mutual recognition. Specific rules on mutual recognition may lead to reverse discrimination and increased movement to obtain a specific civil status in another country. Such problems are relatively well-known in the European Union and other groups of countries governed by the free movement of persons, or within federal States where these questions are not completely harmonized at the federal level, such as the United States. To a lesser extent, such questions govern rights granted to individuals in the context of economic integration agreements. Economic integration agreements tend to fall short of free movement of persons in that they only favour the movement of persons in the context of the provision of services, to facilitate trade, or to promote investment, such as is the case in many modern BITs and FTAs.

* * *

1. Introduction

More and more States allow same-sex couples access to marriage, or at least a similar scheme. At the same time, adoption or access to artificial methods of procreation

[*] I would like to thank Natasha Skupsky (BA, JD, LLM in International and European Economic and Commercial Law, University of Lausanne) for her very valuable assistance in the writing of this contribution.

by same-sex couples is a reality in a growing number of States. This leads to the question of whether this development could create regional standards that would serve to influence the legal system of other States – at least in a specific region.

LGBT rights continue to differ tremendously amongst nations worldwide. Those States providing access to marriage (or at least civil union) and adoption for same-sex couples are still a very small minority of all States globally.

There are only very few international and regional instruments that address the treatment of LGBT persons in general, and deal directly with same-sex couples in particular The Yogyakarta Principles of 2006 are an example of the latter. Even less of these instruments include concrete obligations (e.g. prohibition on discriminate on the basis of to sexual orientation) or oblige States to legislate in a specific way (e.g. provide legal protection for same-sex relationships). A world-wide harmonization in this area seems impossible and politically unwanted at this time[1].

Each State may recognize and categorize the civil status of persons in different manners, and these differing perspectives lead to debates amongst governments on the acceptance of varying standards when it comes to the issue of the migration of persons. With regard to the legal recognition of same-sex relationships, and adoption by homosexuals and/or gay couples, this absence of an international consensus has been a reality for decades. Normally, domestic immigration laws will only agree to consider the legality of same-sex relationships, and adoptions by the latter, once the domestic family laws allow for them. As there are very few accepted international obligations with regard to immigration, this leaves a lot of room for strong variation. This may even be the case within large federal systems in which divergences prevail[2]. The question of refugees and immigration caused by political or economic hardship is closely related, but will not be treated in this context, as it is normally kept entirely separate from economic integration considerations in international agreements[3].

[1] For an overview and the development over time, see: Eric Heinze, *Sexual Orientation: A Human Right*, (Martinus Nijhoff Publishers 1994); Douglas Sanders, 'Human Rights and sexual orientation in international law' [2002] 25:1 International Journal of Public Administration 13-44; Ignacio Saiz, 'Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the UN' [2004] 7:2 Sexuality, Human Rights, and Health 48-80; Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles' [2008] 8:2 Human Rights Law Review 207-248; Aeyal M. Gross, 'Review Essay, Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law' [2008] 21 Leiden Journal of International Law 235-253; Joke Swiebel, 'Lesbian, gay, bisexual and transgender human rights: the search for an international strategy' [2009] 15:1 Contemporary Politics 19-35; Kelly Kollman and Matthew Waites, 'The Global politics of lesbian, gay, bisexual and transgender human rights: An introduction', [2009] 15:1 Contemporary Politics 1-17.

[2] For an interesting account regarding the situation in the United States see Human Rights Watch (ed.), *Family Unvalued - Discrimination, Denial, and the Fate of Binational Same-Sex Couples under US Law* (HRW 2006).

[3] See, for example, the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (UNHCR, Geneva, 21 November 2008).

Migration is an important reality in today's world, and more and more regional agreements provide for specific rights for the citizens of their Member States to migrate between the territories of these States. Often, such rights are originally justified for economic reasons in order to attract skilled labourers, or to overcome any shortage that may arise in a domestic labour market. Immigration may also be important for investment flows and technology transfer, and the remittances sent home by immigrants can be a welcome factor in fostering economic development in their home country. Normally, such immigration rights will also have a political component to create greater regional coherence, and overcome nationalist rivalries.

The differences with regard to the recognition of the civil status of persons between one State and another (e.g. same-sex couples and their adopted children) becomes particularly relevant when these differences impede on persons wishing to immigrate into a country with their family, in particular if individuals in a family-by-marriage/adoption have no independent right to migrate because they are third country nationals. While taking human rights into consideration, specifically the right to a family life, may influence the respective legal assessment, most modern economic integration agreements will also allow for family reunification with regard to the movement of workers and self-employed individuals. Therefore, the most important remaining question in this regard revolves around the determination of "family member" for the purposes of immigration. While this issue was, for a long time, mostly discussed within the framework of the "ever closer union" among what today are most European States, it becomes of increasing relevance as more and more regional economic integration agreements are negotiated.

2. LGBT Rights in Multilateral Instruments

2.1. Overview

Of course, some international and regional legal instruments – in particular, the ones especially dedicated to a human rights instrument[4] – have a direct impact on LGBT rights when it comes to discrimination, and the right to respect for a person's private and family life. This process can be even stronger where international courts and other treaty bodies are available[5]. Here, international standards and their interpretation by international and domestic courts have led to striking changes in recent years, when it comes to the treatment of LGBT behaviour under criminal law, and with regard to their individual treatment compared to other individuals.

[4] See Human Rights Watch, Important International Jurisprudence Concerning LGBT Rights, available at <http://www.hrw.org/en/news/2009/05/25/jurisprudence-about-lgbt-human-rights#_United_Nations>, accessed 6 April 2011.

[5] For an overview see Phillip Tahmindjis, 'Sexuality and International Human Rights Law' [2005] 48:3/4 Journal of Homosexuality 9-29, or Holning Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law' [2004] 71 University of Chicago Law Review 1689-720.

At the same time, crucial questions relating to the right to a family, in particular the right to marriage and adoption remain controversial, although the existing catalogues of rights might lend themselves to an interpretation that would provide access to these institutions for LGBT individuals.

2.2. The Yogyakarta Principles

On 26 March 2007, an informal group of human rights experts adopted the so-called Yogyakarta Principles[6]. These Principles were developed in November 2006, in the Indonesian town of the same name, and represent what is likely today's most comprehensive universal attempt to describe a standard of human rights protection relating to sexual orientation and gender identity. They can be interpreted as a concretization of existing human rights obligations to this particular vulnerable group. The principles are accompanied by specific recommendations for implementation at the national level. In view of the global situation, the main focus lies on the fight against homophobic violence and criminal prosecution of homosexuals and transsexuals. In view of the participating personalities, this document seems particularly likely to be taken into account by political bodies world-wide. Other statements, with a similar vocation to the Yogyakarta Principles, made by large groups of NGOs exist, however these statements lack the same acceptance in the political process[7].

Principles 22 and 23 address Freedom of Movement and Asylum. In particular, with respect to the free movement of persons, Principle 23 states: "Everyone lawfully within a State has the right to freedom of movement and residence within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person's entry, regress or return to or from any State, including that person's own State. States shall: a) Take all necessary legislative, administrative and other measures to ensure that the right to freedom of movement and residence is guaranteed regardless of sexual orientation or gender identity". According to the Principles 24-26 (Rights of Participation in Cultural and Family Life) – and by reference to a respective decision of the UN Human Rights Committee – States have an obligation not to discriminate between different-sex and same-sex relationships in allocating partnership benefits, such as survivors' pensions[8].

[6] See, for example, David Brown (2009), 'Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles', Michigan Journal of International Law, 31, 821-879, or Ryan Richard Thoreson (2009) 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name', Journal of Human Rights, 8: 4, 323-339.

[7] See, for example, the Declaration of Montreal, which is a set of principles adopted by an important number of scholars and activists present at the 2006 Montreal OutGames, available at: *http://www.declarationofmontreal.org* (last visited on 6 April 2011).

[8] For details consult: <http://yogyakartaprinciples.org/> or the Activist's Guide to the Yogyakarta Principles as published by several NGOs and available online at <http://www.ypinaction.org/content/activists_guide>, accessed 6 April 2011.

The content of these Principles show a relatively cautious approach with respect to the question of migration. Migration is mainly addressed under the aspect of direct discrimination against LGBT persons, and within the issue of a right to asylum. The question of the admittance of same-sex couples and (adopted) children as part of the family of a LGBT person, may possibly be derived from a combination of the right to participation in family life, and the right of non-discrimination of persons with regard to movement between States, however it is not as yet addressed as such.

2.3. United Nations

Within the United Nations, the discussion of LGBT rights remains controversial. France and the Netherlands coordinated an LGBT equality rights statement in the General Assembly in December 2008. It was delivered by a representative of Argentina. Sixty-six States sponsored the statement. The initiative prompted a counter-statement, presented by Syria, and sponsored by fifty-seven states. Sixty-nine States did not join either statement[9]. There was no vote. More recently in 2010, during the 65th Session of the UN General Assembly, a report by the Special Rapporteur on the Right to education led to a heated debate on the right to sexual education. In the Third Commission of the GA, African and Arab States managed to delete a passage relating to the protection of LGBT persons in the draft Resolution against arbitrary, summary, and extra-judicial killings in Autumn 2010. It was due to the intensive lobbying by NGOs and the intervention of the Secretary General, as well as to the United States, which allowed the deleted passage to be reinstated.

In 2002, the Human Rights Commission addressed the issue for the first time. In 2003, Brazil had tabled a resolution, within this governing body, supporting LGBT rights. The massive opposition of African and Islamic States led to Brazil's dropping of the motion in 2005. Later, on the 1st of December 2006 in the new Human Rights Council, Norway made a statement that was supported by fifty-four States. This statement asked that the United Nations be more proactive with regard to the human rights relating to sexual orientation and gender identity, and create respective organs[10]. Further statements were made in the Human Rights Council by the Czech Republic, Switzerland, and Norway, on behalf of the Nordic States in March 2007, by the Foreign Minister of the Netherlands on 3 March 2008, and by Ireland and Slovenia on behalf of the European Union on 5 March 2008[11]. The last such state-

[9] See Douglas Sanders, The Role of the Yogyakarta Principles, available online at: <http://www.ypinaction.org/files/70/Background_on_the_Principles__Sanders__Douglas__The_Role_of_the_Yogyakarta_Principles.pdf>, accessed 6 April 2011.

[10] Human Rights Council, 3rd Session (2006), Norway: Joint Statement on human rights violations based on sexual orientation and gender identity on behalf of the following 54 States, including 18 members of the Human Rights Council, document available at <http://www.ilga-europe.org>, accessed 6 April 2011.

[11] See for the texts <http://www.ypinaction.org/content/human_rights_council_documents>, accessed 6 April 2011.

ment was delivered to the Council on 16 March 2011 by Columbia, and co-sponsored by a total of 84 States.

Since 1994 (in its landmark decision *Toonen v. Australia*) the Human Rights Committee has regularly questioned countries on their laws and policies on sexual orientation discrimination. Other treaty bodies, including the Committee on the Elimination of Discrimination against Women, also question governments on this basis[12]. Several UN Agencies and experts have made respective statements. In 2010, the Special Rapporteur for the Right to health, *Anand Grover*, caused tensions when he addressed the effects of the criminalization of same-sex sexual intercourse, and homosexuality in general, and how this lifestyle choice relates to the incidence of HIV/AIDS. The groups of African States and Islamic States criticized the choice of this topic as lacking universal recognition. Similarly, the 2009 reports by the Special Rapporteurs on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Protection of human rights and fundamental freedoms while countering terrorism, referred to the Yogyakarta Principles[13]. The Universal Periodic Review Process was repeatedly used to address the compliance of States with the Yogyakarta Principles[14].

Within the UN, the main focus of the debate remains upon the evaluation of the cause and level of violence against LGBT persons, and criminal prosecution for respective behaviour. The question of same-sex marriages, adoption, and migratory rights has so far not been treated in detail, in view of the strong resistance to more basic needs.

3. LGBT Rights in Regional Instruments in General

3.1. Council of Europe

Since the beginning, human rights have been at the core of the work of the Council of Europe. Since its' inception in 1981, the Parliamentary Assembly of the Council of Europe has passed a number of Recommendations, and a Resolution supporting LGBT rights[15].

[12] See Douglas Sanders, note 9.

[13] See for references <http://www.ypinaction.org/content/special_procedures_documents>, accessed 6 April 2011.

[14] See for references <http://www.ypinaction.org/content/universal_periodic_review_docume>, accessed 6 April 2011.

[15] In particular: Parliamentary Assembly of the Council of Europe, Recommendation 924 (1981) - on discrimination against homosexuals; Opinion No. 216 (2000) - Draft Protocol No. 12 to the European Convention on Human Rights; Recommendation 1470 (2000) - Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe; Recommendation 1474 (2000) - Situation of lesbians and gays in Council of Europe member states; Recommendation 1635 (2003) - Lesbians and gays in sport; Resolution 1728(2010) - Discrimination on the basis of sexual orientation and gender identity; Recommendation 1915 (2010) - Discrimination on the basis of sexual orientation and gender identity.

The Council of Europe's Committee of Ministers adopted a Recommendation on 31 March 2010 that supported the fight against discrimination relating to sexual orientation and gender identity[16]. This instrument is considered to be the first international legally binding instrument that explicitly addresses the discrimination of LGBT persons, although it is basically a concretization of the existing rights in the ECHR.

The Commissioner for Human Rights has made several contributions to LGBT rights[17].

3.2. OSCE

Although not an international or regional organization whereby States take on legal obligations upon joining, the OSCE is a political organization that seeks to exercise authority through political pressure on those States whom fall short of a dedicated commitment to upholding respect for human rights and the rule of law. According to ILGA Europe, the OSCE's relevance to LGBT rights has increased in the past years, as the OSCE has taken on an expanded mandate in the area of tolerance and non-discrimination. LGBT rights are normally addressed at the OSCE Human Dimension and Implementation Meetings (HDIM)[18].

3.3. Organization of American States (OAS)

In Asia and Africa, the debate is more difficult. In (Latin) America however, the role played by human rights bodies and political organizations is slightly more encouraging. On 3 June 2008, the General Assembly of the Organization of American States (OAS) adopted, by consensus, a Resolution that condemns any human rights violations based on sexual orientation and gender identity[19]. In parallel, the discussion of an Inter-American Convention against racism and any other form of discrimination continues[20]. The current proposal includes references to sexual orientation and gender identity.

[16] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.

[17] Such as by Thomas Hammarberg, Human Rights and Gender Identity, Issue Paper (Council of Europe Commissioner for Human Rights 2009) available online at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1476365>, accessed 6 April 2011.

[18] For more details see: <http://www.ilga-europe.org/home/guide/osce>, accessed 6 April 2011.

[19] General Assembly of the Organization of American States, AG/RES. 2435 (XXXVIII-O/08): Human rights, sexual orientation and gender identity, 3 June 2008, text presented originally by Brazil, available online at: *www.oas.org/dil/AGRES_2435.doc* (last visited on 6 April 2011).

[20] Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, available at <http://www.oas.org/OASpage/Events/default_ENG.asp?eve_code=2>, accessed 6 April 2011.

4. Economic Movement of Persons and LGBT Rights in the EU

4.1. Introduction

In particular, the fact that individuals enjoying a particular civil status, such as marriage, civil partnership, or parenthood, may move between States as a family unit with increasing regularity, creates an urgent need to answer questions with regard to differing recognitions of this civil status when it comes to LGBT relationships. Normally, such questions are addressed by the domestic laws that serve to regulate the admission and presence of foreigners onto the territory of a State[21].

Generally, any elimination of barriers between various components of an economic integration area (including an internal market) must be based on both the progressive elimination of direct barriers, such as discriminatory treatment based on explicit access prohibitions or hindrances (quotas, import tariffs etc.), and, on the other side, the elimination of technical obstacles, such as differences in the applicable regulations. The latter is usually done through either harmonization or mutual recognition[22].

These issues are well studied when it comes to trade in goods and services, but less so when applied to the movement of persons. Traditionally, most States have access limitations in place, such as quotas for foreigners entering the labour market. Also, the non-recognition of diplomas or terms and regulations within social security systems may constitute technical barriers. In a similar way, the non-recognition of a person's civil status, and thereby the non-recognition of certain persons as family members that do constitute family members in the home State, may constitute a technical barrier to the (free) movement of persons. In cases where harmonization is not possible (or does not seem desirable), mutual recognition is often a preferred mechanism for creating a common economic integration area.

Normally, such an obligation to recognize legal decisions of another State are accompanied by an exception rule for a narrow number of cases where the goal of mutual recognition is balanced against the specific needs of each jurisdiction. Probably the most famous example of this balancing principle is the "mandatory requirements" contained in the Treaty of the European Union, with respect to the internal market. In the area of goods, this balancing principle is often referred to as "Cassis de Dijon" – a reference to the famous leading case establishing the obligation of mutual recognition, coupled with the possibility of preventing the market entry of a product that has been admitted in another Member State, by utilizing the safeguard of mandatory requirements of the importing State[23].

[21] For an example from Switzerland see: Alberto Achermann and Martina Caron, 'Homosexuelle und heterosexuelle Konkubinatspaare im schweizerischen Ausländerrecht' [2001] SZIER 125-141, or Martin Bertschi and Thomas Gächter, 'Der Anwesenheitsanspruch aufgrund der Garantie des Privat- und Familienlebens' [2003] ZBl 225-271.

[22] See e.g. Andreas R. Andreas Ziegler, Droit international économique de la Suisse - une introduction (Stämpfli, 2009).

[23] European Court of Justice, Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für*

While this terminology normally applies to products and not to the movement of persons, the idea is that the differences in foreign regulations regarding admissibility into a domestic labour market ought to be analyzed in a similar manner as are regulations that govern the access of goods and services into a foreign market. Many international private law instruments provide for the mutual recognition of civil status decisions and documents[24]. Here, it is normally the notion of "public policy" or "public order" – often expressed by using the French "ordre public (international)" – that allows States to depart from the general rules included in these treaties or under domestic law[25]. In a certain way, these references to domestic values and considerations of morality have the same functions as mandatory requirements (Cassis-de-Dijon Principle), and/or exceptions in the area of trade. If these value judgments or differences in domestic perception do make the exchange of production factors or goods and services too difficult, then there is an argument for harmonization, assuming there is sufficient political will, and it is feasible for the Parties to overcome the obstacles that arise from differing values[26].

In States that choose to favour the exchange of persons through a liberalization of the access to their labour markets, or even the free movement of their citizens, the necessity to harmonize the respective standards increases, and/or the State must provide specific rules on the mutual recognition of these standards. Moreover, any mutual recognition rules may lead to reverse discrimination and increased movements to obtain a specific status in another country. The fact that many States prefer not to address human rights issues, or even general questions relating to migration in economic integration agreements, leads to a certain scarcity of rules relating to the movement of persons and their family status. However, future demographic developments and increased levels of economic integration will certainly increase the debate regarding these issues.

4.2. Protection against Homophobia and Non-Discrimination

In the European Union (EU) the issue of LGBT rights and, in particular, the treatment of same-sex couples and (adopted) children, is very much characterized by the

Branntwein [1979] ECR 649ff. But see also, Article XX GATT and Article XIV GATS in the framework of the WTO.

[24] Most famously, the instruments elaborated by the Hague Conference on Private International Law – operating since 1893. For example, the Convention on Celebration and Recognition of the Validity of Marriages (*concluded 14 March 1978*) Article 5: "The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ("*ordre public*") of the State of celebration". And Article 14: "A Contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy ("*ordre public*")".

[25] See, for an early explanation: Gerhart Husserl, 'Public Policy and Ordre Public' [1938-1939] 25 Virginia Law Review, 37ff.

[26] See, for example, Susanne K. Schmidt, 'Mutual Recognition as a new mode of governance' [2007] 14:5 Journal of European Public Policy, 667-681.

general development of the EU's approach to human rights in general, family law, and the free movement of persons[27].

For a long time, the absence of a competence for the unification of family rights, and a lack of clear references to human rights in the treaties, led to no direct implication of the EU institutions in the debate. This was the time when the EU was mostly perceived as an internal market based on the idea that economic integration would eventually allow for more political integration. There was no EU Member whom allowed for civil unions or same-sex marriage until 1989, when civil unions were introduced in Denmark, and 2001, when the Netherlands opened marriage to same-sex couples. The absence of allowances for same-sex civil unions and marriages in any EU Member State caused a delay to the debate. Even today, the situation regarding same-sex relationships and adoption rights remains strongly heterogeneous among EU Member States[28].

Article 19.1 (ex Article 13 TEC) on the Functioning of the European Union sets out:

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation [emphasis added]*.

The protection against discrimination and violence against LGBT persons was addressed as early as 1994 in the European Parliament, and continues to be addressed to the present[29]. Since 1994, various organs and institutions within the EU have made statements in this area. Besides the judgments of the European Court of Justice regarding human rights protection within the European Union, the existence of the Charter of Fundamental Rights of the European Union, 2000 (incorporated into the treaties in 2009), and the creation of an EU Agency for Human Rights in 2007, are important steps towards increasing the role of the EU in terms of how it protects the human rights of its' citizens.

[27] For an overview consult: Kees Waaldijk and Andrew Clapham (eds.), *Homosexuality: A European Community Issue, Essays on Lesbian and Gay Rights in European Law and Policy*, (Martinus Nijhoff 1993), or Anne Weyembergh and Sinziana Carstocea (eds.), *The gays' and lesbians' rights in an enlarged European Union*, (Editions Université de Bruxelles, 2006).

[28] For an account of the developments see Katharina Boele-Woelki and Angelika Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, (Intersentia 2003); Robert Wintemute and Mads Andenas (eds.), *The Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, (Hart Publishing 2001); Jürgen Basedow and others (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, (Mohr Siebeck 2000).

[29] See European Parliament: Resolution of 8 February 1994 on equal rights for homosexuals and lesbians in the EC (A3-0028/94, OJ C 61, 28 February 1994, 40-43); for later developments see <http://www.ilga-europe.org/home/guide/eu/lgbt_rights/european_parliament>, accessed 6 April 2011.

For example, the EU Agency for Fundamental Rights (FRA) has dedicated an important study to the topic of homophobia, and compared the situation in the twenty-seven Member States of the EU. The study took place during the first part of July 2008, and the second part of March 2009. The first section of the study led to a decision by the European Commission, on 2 July 2008, to adopt a new draft Resolution regarding non-discrimination. According to the study, the treatment of this group still differs tremendously amongst EU Member States. Also, EU law, as it currently stands, does not sufficiently address these issues. The FRA requested, in a press release of 30 June 2008, clarifications and amendments of existing law relating to same-sex relationships with regard to the free movement of persons, and recognition and family reunification according to international human rights standards.

Today, the focus within the European Union clearly lies with the general question of discrimination against LGBT persons. This is evident from the current debate on the Proposal for a Council Directive that was launched in 2008, implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age, or sexual orientation[30].

4.3. (Economic) Migration within the EU

The relation of economic migration and economic integration, and how this relationship affects the rights of LGBT families, is best studied by using the EU as the subject of analysis[31]. Here, the existence of an "internal market"[32], and with today's

[30] COM/2008/0426 final available online at <http://eur-lex.europa.eu>, accessed 6 April 2011.

[31] See, for example, Hans Ulrich Jessurun d'Oliveira 'Lesbians and Gays and the Freedom of Movement of Persons' in: Kees Waaldijk and Andrew Clapham (eds.), Homosexuality: A European Community Issue - Essays on Lesbian and Gay Rights in European Law and Policy, (Martinus Nijhoff 1993) 289-316; Kees Waaldijk, 'La libre circulation des partenaires de même sexe' in: Daniel Borrillo (ed.), Homosexualités et Droit. De la tolérance sociale à la rteconnaissance juridique, (2nd edn., Presses Universitaires de France 1999) 210-30; Heather Hunt, 'Diversity and the European Union: Grant v. SWT, the Treaty of Amsterdam, and the Free Movement of Persons' [1998-1999] 27 Denver Journal of International Law and Policy 633ff.; Mark Bell, 'We are Family? Same-Sex Partners and EU Migration Law' (2002) 9 Maastricht Journal of European and Comparative Law 335-55; Andrew Stumer, 'Homosexual Rights and the Free Movement of Persons in the European Union' [2002] 7 International Trade and Business Law 205 ff.; Helen Toner, 'Partnership Rights, Free Movement, and EU Law' (Oxford, 2004); Mark Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partners within the European Union' [2004] European Review of Private Law, 613ff.

[32] It should be noted that LGBT discrimination, as such, may also affect other aspects of economic integration, such as discrimination of workers or discriminatory rules with regard to the offering of services and goods, on this see: Mark Graham, 'LGBT Rights in the European Union: a Queer Affair?', in: Ellen Lewin and William L. Leap (eds.), *Out in Public: Reinventing Lesbian/Gay Anthropology in a Globalizing World* (Wiley-Blackwell 2009), ch. 16; Kees Waaldijk and Matteo Bonini Baraldi (eds.), Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive, (TMC Asser Press 2006); for a particular emphasis on Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for

notion of an "area of freedom, security, and justice", allows for differences between the family laws of individual Member States. The fact that the family laws of States can vary quite drastically leads to a situation that is, at least, comparable to that of federal States with important residual powers of the States relating to family law, such as the United States. Although it may be difficult to completely separate the questions of human rights protection and non-discrimination on one side, and economic access and treatment guarantees on the other, there is clear evidence that the desire to promote migration, particularly for economic reasons, may lead to a need for mutual recognition and/or harmonization of the treatment of persons, including LGBT and their families[33].

Already, the Treaty on European Union provides, in Article 3.2, that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". With regard to the free movement of persons, in its' current state EU law allows citizens of the European Union to basically move freely and reside within the territory of the Member States of the European Union. Exceptions based on public interest, such as protection against criminals, abuse of social security, or health dangers, are granted on a very restrictive basis; i.e., Article 21 of the Treaty on the Functioning of the European Union. With regard to third-country nationals, Article 79 of the Treaty on the Functioning of the European Union provides a competence to establish measures that affect family reunification; i.e., Article 79, paragraph 2(a). Furthermore, according to Article 81.2, "[t]he Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgements and of decisions in extra-judicial cases". However, according to Paragraph 3 of Article 81.2, "measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure".

The main source of EU law regarding the migration of EU citizens is currently Directive 2004/38/EC of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[34]. The Directive was borne through the long process of the creation of the

equal treatment in employment and occupation [2000] OJ L303/16, see: Dimitry Kochenov, 'Gay Rights in the EU: A Long Way Forward for the Union of 27' [2007] 3 Croatian Yearbook of European Law and Policy, 469-490.

[33] For a comparison, see: Adam Weiss, 'Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union' [2007] 41 Columbia Journal of Law and Social Problems, 81ff.

[34] On the situation regarding closely associated States like Switzerland, see: Christine Kaddous, 'La situation des partenaires de même sexe en droit communautaire et dans le cadre de l'Accord sectoriel sur la libre circulation des personnes entre la Suisse et l'Union européenne' [2001] 1 Revue suisse de droit international et de droit européen (RSDIE), 143-172.

"internal market" and the "area of freedom, security, and justice"[35], by merging all of the important points in the previously existing legislation on the right of entry and residence for Union citizens into a single legal instrument.

The Directive governs the European citizen and his or her family members. The definition of the family member is the crucial issue when it comes to LGBT families – here the existing divergences in regulations (and values) had to be taken into account[36]. Therefore the definition of family members in Article 2.2 of the Directive reads as follows:

> "Family member" means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

Two particular problems exist with regard to same-sex couples and adopted children (of same-sex couples or LGBT persons). Firstly, countries which do not (yet) know a form of same-sex marriage or registered partnership, or recognize the same in only a very limited form, are not required to recognize the civil status of immigrant people that is recognized in their country of former residence, and/or extend the same benefits as are related to that civil status[37]. Secondly, in order to be treated as family members, specific documents must be produced. Here, experience has shown that the recognition of such documents may cause difficulties. Both aspects are ultimately linked to the divergence of private law and related procedural law in the Member States. This divergence is technically a typical issue of private international law[38], and thus ought to be addressed on this level in an attempt to

[35] For the details of this Directive and its relevance for LGBT issues, see: ILGA-Europe, EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process, October 2005, available at <http://www.ilga-europe.org>, accessed 6 April 2011.

[36] Under the former legislation, the European Court of Justice had found that that the term "spouse" only covered married partners. In this case the unmarried, opposite-sex partner of a British man working in the Netherlands argued that she was entitled to a residence permit because she should be treated as his 'spouse' (ECR, Case 59/85 *Reed v Netherlands* [1986] 1283).

[37] This problem is widely discussed. With regard to the specific issue of social security see: Simon Roberts and Maija Sakslin, 'Some are more equal than others: the impact of discrimination in social security on the right of same-sex partners to free movement in the European Union' [2009] 17:3 Benefits, 249-261.

[38] See, in this respect, Mateusz Jozef Pilich, 'The Problem of Recognition of the Same-Sex Relationships in Poland in the Light of the EU Law and the New Polish Act on Private International Law', electronically available at <http://ssrn.com/abstract=1779289>, accessed 6 April 2011; Ian Curry-Sumner, *All's Well that Ends Registered? The Substantive and Private International Law*

avoid the fundamental debate on the underlying values[39]. According to a recent green paper of the European Commission, civil status records raise a question of quite a different magnitude concerning, not the actual documents themselves, but their effects[40]. Although the European Commission accepts that the EU has no competence to intervene in the substantive family law of Member States, this green paper states that the Commission supports the usefulness of facilitating recognition of the effects of civil status records legally established in other EU Member States (page 13).

The easiest would be mutual recognition, but of course this is closely related to the variety of nationally accepted concepts, and how these concepts constitute the definition of a civil status. As a matter of fact, certain NGOs have already warned that:

> However, the simplistic audit of the issues involved – as conducted by the Commission in its Green Paper – leads to an even greater issue: that of compelling EU Member States to recognize same-sex civil unions (or same-sex adoption) even when this goes against their national laws and public morality (and despite the fact that Member States are theoretically protected against such coercion by Article 81.3 of the Treaty on the Functioning of the European Union). Since family law is a competency of each Member State – and not of the EU – the imposition of a recognition of civil unions and other practices that contradict their domestic public morality would constitute a serious infringement of national sovereignty and a violation of the principle of subsidiarity. This is precisely the danger posed by the idea of "automatic mutual recognition" of public documents, as the European Commission seems to suggest[41].

Therefore the Commission suggests:

Aspects of Non-Marital Registered Relationships in Europe, (Intersentia 2005); Dagmar Coester-Waltjen, 'Das Anerkennungsprinzip im Dornröschenschlaf?', in Heinz-Peter. Mansel and others (eds.), *Festschrift für Erik Jayme*, Vol. 1 (Sellier 2004), 120ff; Dagmar Coester-Waltjen', Anerkennung im Internationalen Personen-, Familien - und Erbrecht und das Europäische Kollisionsrecht' [2006] 4 IPRax, 392-393; or Johan Meeusen, 'The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC' [2010] 1 ZEuP, 197ff.

[39] For a comparative approach in this respect, looking at the United States and Europe, see: Vanessa Abballe, 'Comparative Perspectives of the Articulation of Horizontal Interjurisdictional Relations in the United States and the European Union: The Federalization of Civil Justice' [2009], 15 New England Journal of International and Comparative Law 1 or Curry-Sumner, (note 36).

[40] See European Commission, Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, Brussels, 14.12.2010, COM(2010) 747 final, 1.

[41] Statement by "European Dignity Watch" of 25 February 2011, available online at: <http://www.europeandignitywatch.org/reports/detail/article/tell-the-european-commission-no-forced-eu-wide-recognition-of-same-sex-marriage.html>, accessed 6 April 2011.

> This recognition would also have the advantage of providing the legal certainty which citizens can expect when they exercise their right to freedom of movement It can be argued that legal uncertainty and the various problems a citizen could encounter in terms of recognition of the legal situation established in the Member State the citizen is leaving should not act as a disincentive or constitute an obstacle preventing the exercise of European citizens' rights
> In this case, this possibility should, however, be accompanied by a series of compensatory measures to prevent potential fraud and abuse and take due account of the public order rules of the Member States Moreover, automatic recognition might, where appropriate, be better suited to certain civil status situations such as the attribution or change of surnames This might prove to be more complicated in other civil status situations such as marriage[42].

A related problem regarding the differences in civil status laws between the Member States is currently being discussed in the context of a Proposal for a Council Regulation on jurisdiction, applicable law, and the recognition and enforcement of decisions regarding the property consequences of registered partnerships[43]. Here, again in the interest of an area of freedom, security and justice, the Commission proposes that, "the law of the Member State where the partnership was registered will apply to all the partners' property, even if this law is not the law of a Member State" (Recital 18), but adds that, "the courts of the Member States should be allowed to set aside the foreign law in a given case where its application would be manifestly incompatible with the public policy of the forum" (Recital 20). Recital 21 concludes that, "the courts must not be able to invoke overriding mandatory provisions or public policy as exceptions in order to set aside the law of another Member State or to refuse to recognise or enforce a decision… where application of such an exception would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination. Nor may these courts set aside the law applicable to registered partnerships merely on the grounds that the public policy of the forum does not recognise registered partnerships". Finally, one should notice that the importance of national "public order" considerations within the EU was recently confirmed by the Court in a judgment involving differing views among the Member States about titles of nobility[44].

As an illustration of the insecurity prevailing in this field – especially with regard to public order concerns – it can be noted that on 24 February 2011, the Cour d'Appel de Paris (Paris Court of Appeal) has effectively legalized the adoption of a child by same-sex couples, through two different decisions; i.e., a joint adoption pronounced in Canada, and a joint adoption pronounced in the United Kingdom, both cases involving a male couple. These two decisions follow an earlier decision

[42] At page 13.
[43] COM(2011) 127/2 presented on 16 March 2011.
[44] ECJ, Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010.

of the Court of Cassation on 8 July 2010, which had recognized the validity of the adoption by the second parent, partner of the biological mother, pronounced in United States[45]. These decisions are surprising, as the French law on adoption of 1966 is considered to prohibit the adoption of a child by a same-sex couple, and the recognition of foreign adoptions of this kind therefore leads to reverse discrimination[46]. At the same time, the Paris Court of Appeal has refused to recognize surrogate mother contracts, and the registration of the parents recognized by foreign law[47].

5. Lesser Forms of Economic Integration (FTAs, BITs etc.)

5.1. Introduction

Immigration rights granted to individuals in the context of economic integration agreements are less dynamic and complex than the immigration rights found in EU law, in that they simply favour the movement of persons in the context of the provision of services, the facilitation of trade, or the promotion of investment. Examples of these types of immigration rights are found in many modern Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs).

Customary international law leaves States with complete freedom regarding the admission of foreigners, with the exception of certain humanitarian admissions (e.g. refugees). With regard to the admission of foreigners to the domestic labour market, most States have instituted important barriers to protect the domestic work force from competition. In times of economic growth, this can lead to shortages with regard to certain types of (skilled) workers[48].

Regionally, a certain integration of labour markets has been achieved by a number of countries[49]. Apart from very specific agreements regarding certain quotas in

[45] Arrêt n° 791 du 8 juillet 2010 (08-21.740) - Cour de cassation - Première chambre civile: "… Attendu que le refus d'exequatur fondé sur la contrariété à l'ordre public international français de la décision étrangère suppose que celle-ci comporte des dispositions qui heurtent des principes essentiels du droit français; qu'il n'en est pas ainsi de la décision qui partage l'autorité parentale entre la mère et l'adoptante d'un enfant…".

[46] See also Stefania Ninatti, "Adjusting Differences and Accommodating Competences: Family Matters in the European Union" (Jean Monnet Working Paper no. 6/10), available online at <http://centers.law.nyu.edu/ jeanmonnet/papers/10/100601.html>, accessed 6 April 2011.

[47] See Arrêts n° 369 (09-66.486), 370 (10-19.053) et 371 du 6 avril 2011 (09-17.130).

[48] See Asif Qureshi and Andreas R. Ziegler, *International Economic Law*, (2nd edn. Sweet and Maxwell 2007), Para. 15-002.

[49] See, for example, Aderanti Adepoju, 'Fostering free movement of persons in West Africa' [2002] 40 International Migration, 3-28; or Christopher J. Cassise, 'The European Union v. the United States under the NAFTA: A Comparative Analysis of the Free Movement of Persons within the Regions' [1995-1996] 46 Syracuse Law Review, 1343ff.

specified professions[50], these agreements, generally speaking, do not go very far. The reason for this stems from the general fears associated to opening labour markets, such as the threat this brings to the job security of the domestic population, as well as general concerns regarding cultural changes that increased immigration may bring. The discussions above have highlighted the most famous examples of how the European Union has managed the specific problems that have arisen in regards to differing recognitions of civil status amongst Member States.

5.2. WTO-GATS

In the context of the multilateral trading system, the issue of migration was first discussed within the context of the integration of services into the WTO. The provisions dealing specifically with trade in goods of the GATT of 1947, and later agreements, never included any rules relating to the trans-border movement of persons. While a comprehensive regulation of migratory flows is obviously politically impossible, the concept of service supply through the temporary presence of foreign workers on the territory of another Member State leads to the need to address the issue. Mode 4 of the GATS defines supply of a service, "as by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member" (Article I:2(d) GATS). A specific Annex[51] makes clear that this particular aspect of the trade in services is intended to be of limited scope, especially limiting the access to a market of temporary presence. It does not concern persons seeking access to the employment market in the host Member, nor does it affect measures regarding citizenship, residence, or employment on a permanent basis.

As it is for all services-commitments under the WTO, any opening for the presence of natural persons is subject to an explicit opening of the respective sector through commitments in the respective national schedule. In most instances, Members have scheduled an initial "unbound" commitment; i.e., no binding of access conditions, and then qualified it by granting admission to selected categories of persons, with a marked bias towards persons linked to a commercial presence (e.g., intra-corporate transferees), and highly skilled persons (e.g., managers, executives, and specialists).

States are normally under an obligation to grant most-favoured-nation (MFN) treatment. They can, however, lodge specific exceptions, especially for regional integration arrangements, such as the EU. In addition, States can grant national treatment (NT) when they grant specific market access commitments, but are not obliged to do so. The issues of civil status and sexual orientation are obviously not addressed in these provisions. However, when a WTO Member does not provide

[50] See, for example, the 'Memorandum of Understanding signed between the Philippines and the United Arab Emirates (UAE)' on 11 April 11 2007; or the Japan-Philippines Economic Partnership Agreement (JPEPA), including an important part on the movement of labour (Filipino nurses and other care-givers working in Japan's welfare institutions), signed on 9 September 2006.

[51] Annex on Movement of Natural Persons Supplying Services Under the Agreement.

for specific exceptions from the MFN status, and does grant NT in a specific sector, one could claim that he has to treat the natural persons providing a service in a specific sector in a non-discriminatory way, with regard to its own nationals and foreigners providing such services. One can interpret this as including the obligation to allow the entry of service providers without discrimination relating to their sexual orientation or civil status, although for the time being the GATS does not provide for any rights of a service provider to bring along his or her family members.

The GATS further allows WTO Members to apply measures that are necessary to, inter alia, protect public morals or maintain public order as well as to protect human, animal or plant life or health (Article XIV). One cannot dismiss the possibility that such an exception may be invoked to exclude persons due to their sexual orientation, although this has not been reported so far, and it could be argued that such an exclusion should not be considered necessary or non-discriminatory, in view of the presence of a domestic LGBT population.

5.3. Mercosur

Probably among the regional integrations schemes that exist today world-wide, the Mercosur is the second most comprehensive (leaving aside the attempts in Africa to simulate the European Union). The founding Treaty dates from 1991, and a number of consecutive treaties have led to a continuous deepening of the "Common Market of the South"[52]. In this context, the four current full Members of Mercosur (Argentina, Brazil, Paraguay and Uruguay)[53], as well as the associated Members (Bolivia and Chile), established, in 2002, an Area of Free Residence with the Right to Work (*Área de Libre Residencia con derecho a trabajar*). It is meant to allow all nationals of the countries involved to take up work in any other Member State. The only requirements with respect to this Area of Free Residence and the Right to Work are the proof of nationality, and the absence of a criminal record. A health certificate may be requested. The legal basis is found in the respective Agreement signed in Brasilia on 6 December 2002 (Articles 1 and 4)[54]. All citizens of the Members of this area are initially entitled to a simplified residence permit procedure for a stay of up to two years (Article 4). This simplified residence permit is also available to naturalized persons five years after they obtain citizenship. Furthermore, the temporary residence permit can be exchanged for permanent residency upon proving sufficient means to support the petitioner and his family (Article 5). The permit gives a right to take up employment and be self-employed under the same conditions as nationals (Article 8). This is a major achievement with respect to the integration of labour markets, although it does not yet go as far as the free movement of persons within

[52] Treaty of Asunción of 26 March 1991.

[53] Venezuela's full accession (as signed in 2006) is still pending – due to the missing ratification by Paraguay – at the writing of this Chapter.

[54] Spanish: Acuerdo sobre Residencia para Nacionales de los Estados Parte del Mercosur, Bolivia y Chile firmado el 6 de diciembre de 2002 / Portuguese.

the European Union, which is an ultimate goal of the parties (found in the Preamble of the Agreement). At a summit in June 2008, the Members confirmed their willingness to facilitate border crosses among the Members, as well as Columbia, Ecuador and Peru – very much like the original Schengen system in Europe.

Family reunification (even with non-nationals of a Mercosur Member State) is expressly provided for as a human rights component of the agreement (Article 9:2). Furthermore, the agreement expressly guarantees access to schools for a migrant's children (Article 9:6). The Treaty speaks of the "Grupo familiar convivente/grupo familiar de convívio" (Article 5, Sub-paragraph d) and of the "familia" (Article 9) of a petitioner.

In Argentina, marriage and adoption has been open to same-sex couples since 22 July 2010. Civil unions were recognized in four jurisdictions of Argentina, for the first time in Buenos Aires as of 2002. On 1 January 2008, Uruguay had become the first Latin American State to have a national civil union law (*Ley de Unión Concubinaria*). In September 2009, homosexual civil unions were given the right to adopt children in Uruguay, and finally, on 5 April 2011, the Uruguayan Parliament started the debate about following Argentina's example by introducing a law legalizing same-sex marriage. In Brazil, adoption by same-sex couples – as practised since 2005 – is legal according to a Supreme Federal Court decision of 27 October 2010, but no civil union or right to marriage exists so far for same-sex couples in Brazil[55], as is the case in Chile, Bolivia, and Paraguay. The recognition of marriage and civil unions, as well as adoption by gay couples, thus varies widely amongst the Members of this economic integration area.

Article 2 of the Treaty of Asunción, provides that "[t]he common market shall be based on reciprocity of rights and obligations between the States Parties"[56]. According to Susana Vieas, a professor at the University of Brasilia, this should lead the authorities in the Member States of Mercosur to recognize marriage certificates (as well as adoption certificates) by other Mercosur Members[57]. This seems a rather

[55] On 5 May 2011 the Brazilian Constitutional Court has decided, unanimously, that same-sex couples, who live in a union that is continuous, public, and lasting, legally qualify as a family unit, in the same way as a different-sex couple living in the same kind of union qualify under Article 1273 of the Brazilian Civil Code (2002). It remains to be seen whether this will also be used with regard to Mercosur residents applying for residence and work permits under the Mercosur system.

[56] Spanish: "El Mercado Común estará fundado en la reciprocidad de derechos e obligaciones entre les Estados Partes" / Portuguese: "O Mercado Comum estará fundado na reciprocidade de direitos e obrigações entre os Estados Partes".

[57] "Para um documento internacional ter validade no Brasil, é preciso que ele esteja dentro de parâmetros brasileiros, o que não ocorre com as uniões homoafetiva… De início pode haver problemas em situações onde a certidão de casamento é um documento obrigatório, como para solicitar residência permanente ou para viajar com crianças, mas com o tempo as autoridades brasileiras devem se adaptar e a situação se normalizar", Interview reported on 27 July 2010 online at <http://www.portalg.com.br/mostra_ultimas.php?id=461>, accessed 6 April 2011.

daring interpretation of a standard clause in an international agreement that does not directly refer to the recognition of civil status documents in the Member States – especially when one remembers the complicated situation in the European Union as described above. In particular, it should be noted that the Mercosur Agreement in its Article 8 refers to any prior commitment made in the context of the Latin American Integration Association (ALADI). Article 50 Letter a of the Treaty Establishing the Latin American Integration Association (Treaty of Montevideo of 12 August 1980) provides in its Article 50 explicitly that Member States may take measures that violate the agreement if these are taken in order to safeguard the public order[58].

At least in Brazil, the report on same-sex marriage by the Federal Supreme Court, expected for April 2011, may make the mutual recognition easier. It should also be noted that there is more common ground between Mercosur countries when it comes to the issues of homophobia, and violence and discrimination against LGBT persons. Various working groups and conferences, established by the Mercosur Members, have addressed these issues and have called upon the Members to take appropriate action[59].

5.4. BITs and FTAs

Some countries have also entered trade-related obligations with respect to certain types of temporary entry of foreigners, especially business visitors, in their bilateral agreements. These obligations are normally found in Free Trade Agreements (FTAs) and/or Bilateral Investment Agreements (BITs), although today they are often located in other documents in view of political goals, such as Association Agreements of Economic Partnership Agreements in the case of the EU.

Typical examples of migration-related rules contained in such agreements are the obligations entered into by NAFTA States, or by the members of other agreements modelled after NAFTA (e.g. the bilateral Canada-Chile Free Trade Agreement CCFTA)[60]. Chapter Sixteen of NAFTA provides for temporary entry for business persons. According to Article 1601, these rules are based on the "desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and

[58] "Artículo 50: Ninguna disposición del presente Tratado será interpretada como impedimento para la adopción y el cumplimiento de medidas destinadas a la: a) Protección de la moralidad pública…" This coresponds of course to the system found in Article XX of the GATT.

[59] See Ryan Richard Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name' [2009] 8:4 Journal of Human Rights 323-339; David Brown, 'Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles' [2010] 31 Michigan Journal of International Law, 276ff.; Pinar Ilkkaracan and Susie Jolly, *Gender and Sexuality: Overview Report* (2007), available at: *www.bridge.ids.ac.uk/reports/CEP-Sexuality-OR.pdf* (last visited on 6 April 2011).

[60] See also Cassise (note 49).

to protect the domestic labour force and permanent employment in their respective territories". Under Article 1603, "[e]ach Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security…".

With regard to business persons from Mexico, NAFTA originally limited the number of permits to 5500, and declared not to take into account, "the entry of a spouse or children accompanying or following to join the principal business person". This avoids the discussion on the term spouse, although in view of the current legislation in the United States it seems clear that this cannot be easily interpreted as covering same-sex partners. Some authors have tried to argue that at least a cross-cultural influence; i.e., Canadian openness to same-sex marriage, may influence the United States, however this is certainly not due to the current legal rules on migration under NAFTA.

Similar provisions can be found in many bilateral investment treaties (BIT) of combined trade and investment agreements, where the temporary presence of investors and so-called 'key personnel' is a very common feature. A typical example would be the following provision from the BIT between Australia and Argentina of 1997[61]:

Article 6 Entry and sojourn of personnel: 1. A Contracting Party shall, subject to its laws and regulations relating to the entry and sojourn of non-citizens, permit natural persons who are investors of the other Contracting Party and personnel employed by companies or legal persons of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments. 2. A Contracting Party shall, subject to its laws and regulations, permit investors of the other Contracting Party who have made investments in the territory of the first Contracting Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship.

Here again, it is evident that it is not yet common to find any provisions to allow for the temporary immigration of family members of the key personnel. An interesting exception can be found in certain newer agreements, like the *FTA concluded between the EFTA States and Singapore* in 2002[62]:

Article 45:3. The Parties are encouraged to grant, subject to their laws and regulations, temporary entry and stay to the spouse and minor children of an investor of another Party or of key personnel employed by such investors, who has been granted temporary entry, stay and authorization to work.

Again, neither the term "spouse", nor the term "child", of the investor or key personnel is defined. As the whole provision is merely hortatory, and additionally subjects the granting of permits to domestic laws and regulations, it does not go very far and remains of rather symbolic value.

[61] Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol (Canberra, 23 August 1995), Entry into force: 11 January 1997.

[62] Agreement between the EFTA States and Singapore of 26 June 2002.

6. Conclusion

This paper gives an overview of existing international instruments that address this field, and focuses on the new questions relating to the recognition of civil status rights granted to LGBT individuals and couples in other States. This paper also considers the question of how common institutions address these differences amongst States, and whether modern economic integration agreements can properly deal with these issues.

The above analysis shows that, normally, traditional agreements for the liberalization of trade and investment; i.e., FTAs, BITs, or combinations thereof, do not include provisions allowing for extended or permanent movement of persons leading to a right of family reunification. This can be explained by the traditional caution to include migration and human rights aspects in these types of agreements. Therefore, the right of a person to be considered as "key personnel" in a BIT, will normally not allow him or her to take a spouse or children along and hence no rights can be derived for civil partnerships and adopted children of same-sex couples.

At the same time, the above analysis shows that any agreement that attempts to achieve a common or internal market will most likely have to address these questions. If the internal market concept is designed to allow for longer or permanent residence of foreign workers and self-employed individuals, then it must address the issue of family reunification. In these circumstances, the existence of differing regulations regarding the civil status of persons – and hence the definition of what constitutes a family – will cause obstacles to the realization of the basic integration goal. The developments in the European Union (as well as its' closely associated partner States such as Switzerland) and Mercosur, are typical examples. While the parties to agreements may not endeavour to harmonize their respective legislations, the political pressure to either mutually recognize or have similar, if not identical standards, does normally increase.