

Conflicts of Law and the Mutual Recognition of Same-Sex Unions in the EU

a thesis submitted to the

School of Law of the University of Reading

in fulfillment of the requirements for the degree of

PhD

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31 March 2015

Declaration

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

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Acknowledgments

I would first like to thank my two supervisors, Professor Carl Stychin and Professor Grace James for their support, constructive criticism and spirited discussion.

Second I would like to thank many others for their encouragement, guidance and inspiration. I have been overwhelmed by the kindness of scholars and practitioners throughout Europe and by their generosity and willingness to share their expertise and experience. These include, in no particular order, Nigel Lowe, Daniel Monk, Lawrence McNamara, Richard Frimston, James Carroll, Nicola Barker, Anne Barlow, Nina Dethloff, Aleardo Zanghellini, Ioannis Kokkoris, Alina Tryfonidou, Andrea Woelke, Christina Gonz  les-Beilfuss, Alexander Schuster, Geoffrey Ross, Kees Waaldijk, Jens Scherpe and Eva de G  tzen. They may not realise the hugely positive impact they made in our various short meetings and conversations.

Finally I mention my partner Andrew Hubbard, who will be far more aware of his contribution in terms of practical and emotional support. I thank him for his patience, stoicism and forbearance over the last four years.

Abstract

My thesis uses legal arguments to demonstrate a requirement for recognition of same-sex marriages and registered partnerships between EU Member States. I draw on the US experience, where arguments for recognition of marriages void in some states previously arose in relation to interracial marriages. I show how there the issue of recognition today depends on conflicts of law and its interface with US constitutional freedoms against discrimination. I introduce the themes of the importance of domicile, the role of the public policy exception, vested rights, and relevant US constitutional freedoms.

Recognition in the EU also depends on managing the tension between private international law and freedoms guaranteed by higher norms, in this case the EU Treaties and the European Convention on Human Rights. I set out the inconsistencies between various private international law systems and the problems this creates. Other difficulties are caused by the use of nationality as a connecting factor to determine personal capacity, and the overuse of the public policy exception.

I argue that EU Law can constrain the use of conflicts law or public policy by any Member State where these are used to deny effect to same-sex unions validly formed elsewhere. I address the fact that family law falls only partly within Union competence, that existing EU Directives have had limited success at achieving full equality and that powers to implement new measures have not been used to their full potential. However, Treaty provisions outlawing discrimination on grounds of nationality can be interpreted so as to require recognition in many cases. Treaty citizenship rights can also be interpreted favourably to mandate recognition, once private international law is itself recognised as an obstacle to free movement. Finally, evolving interpretations of the European Convention on Human Rights may also support claims for cross-border recognition of existing relationships.

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Chapter 1: Background and Introduction

I. Introduction

Changing attitudes towards homosexuality in many developed countries, particularly in North America and Western Europe, have led to an increased willingness to grant (or, perhaps better put, to acknowledge) the right for same-sex couples to obtain legal recognition of their relationship.¹ Support for same-sex marriage is growing steadily in the USA and the EU, and in much of the rest of the world.² In Europe as elsewhere the proportion of the overall population in favour is likely to continue to increase³ as younger people are generally more supportive than older generations.⁴ Whilst acceptance of homosexual relationships remains lower in Eastern Europe,⁵ even here there is a growing willingness to accommodate alternative forms of relationship recognition, if not marriage. Hungary introduced civil partnerships in 2009,⁶ though it later amended its constitution so as to enshrine an opposite-sex definition of marriage.⁷ Slovakia and Croatia amended their constitutions similarly to 'protect' marriage,⁸ but Croatia still passed a Life Partnership Act on 15 July 2014, based on the German *Lebenspartnerschaft* model, which accords nearly all the benefits of marriage, including mutual

¹ Eekelaar introduces the important distinction between the existence of fundamental rights which, being fundamental, might exist independently of any legislative implementation, and the legal acknowledgment and recognition of those rights: John Eekelaar, *Family Law and Personal Life* (OUP 2006), Chapter 6 'The Central Case of Rights', 132.

² Tom W Smith, Jaesok Son and Jibum Kim, 'Public Attitudes towards Homosexuality and Gay Rights across Time and Countries' (November 2014, University of Chicago and The Williams Institute) available at <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/public-attitudes-nov-2014.pdf>> accessed 10 December 2014.

³ Joseph Chamie and Barry Mirkin, Same-Sex Marriage: A New Social Phenomenon. (2011) 37 Population and Development Review 529.

⁴ <www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx> accessed 1 August 2014.

⁵ i.e. the former communist states, see Smith, Son and Kim (n 2), 5. See further <www.pewresearch.org/fact-tank/2013/12/12/eastern-and-western-europe-divided-over-gay-marriage-homosexuality> accessed 1 August 2014 and the Eurobarometer survey 'Special Eurobarometer 393: Discrimination in the EU in 2012', available at <http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf> accessed 8 September 2014.

⁶ Tamás Dombos 'Hungary introduces registered partnership for same-sex partners', 20 April 2009, available at <http://www.ilga-europe.org/home/guide_europe/country_by_country/hungary/hungary_introduces_registered_partnership_for_same_sex_partners> accessed 26 October 2014.

⁷ 'Hungary, Constitutional Amendments Adopted', Global Legal Monitor (Library of Congress) 19 March 2013 available at <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403520_text> accessed 26 October 2014.

⁸ 'Croats vote to ban gay marriage', (--) *The Guardian* (London 1 December 2013) online at <<http://www.theguardian.com/world/2013/dec/01/croatia-vote-ban-gay-marriage-referendum>> accessed 10 December 2013. See also Radoslav Tomek, 'Slovak Lawmakers Approve Constitutional Ban on Same-Sex Marriage', Bloomberg 4 June 2014, available at <<http://www.bloomberg.com/news/2014-06-04/slovak-lawmakers-approve-constitutional-ban-on-same-sex-marriage.html>> accessed 25 October 2014.

inheritance and tax advantages.⁹ Slovakia, like Poland,¹⁰ is still grappling with proposals for civil partnerships, but public support is growing.¹¹ Meanwhile Estonia became the first former Soviet-bloc country to pass a civil partnership law, due to take effect in January 2016.¹² Finally, Cyprus, the last EU Member State to decriminalise homosexuality, in 1998, has seen a remarkable shift in public attitudes with both a majority of the population and both main political parties now expressing support for the introduction of same-sex civil partnerships.¹³

These developments demonstrate an emerging pattern of recognition, in which small incremental steps progress at varying rates in different countries towards full equality.¹⁴ Waaldijk suggested a ‘standard sequence’ which starts with the decriminalisation of homosexuality, followed by anti-discrimination legislation, and culminating with legislation recognising same-sex partnership and, eventually, parenting. Writing at a time when each step in that sequence might take a decade or more to achieve, he saw progress at an EU level as likely to be slow, mirroring the pace of progress being made at a Member State level.¹⁵ In fact progress at national level has been rapid, and appears to be getting faster, although progress at a pan-EU level continues to prove slow and difficult. The number of EU Member States recognising or planning to recognise same-sex marriage has doubled from five in October 2010 when I commenced this research project, to ten today. Similarly the number of jurisdictions

⁹ ‘Croatian Parliament passed same sex Life-Partnership Act’, Zagreb Pride 18 July 2013 available at <<http://ilga-europe.org/content/download/31615/194239/version/1/file/Croatian+Parliament+passed+the+Life-Partnership+Act.pdf>> accessed 25 October 2014.

¹⁰ <www.thenews.pl/1/9/Artykul/173878,Equality-Parade-demands-civil-partnerships> accessed 7 August 2014.

¹¹ The Slovak gay rights movement ‘Iniciatíva Inakost’ cites a 2012 opinion poll showing increasing support for a law on same-sex partnerships, with supporters outnumbering opponents: ‘Podporovateľov registrovaných partnerstiev pribúda, odporcov ubúda’ [‘Support for Registered Partnerships Increasing, Opposition Decreasing’], 14 August 2012, available at <http://www.inakost.sk/index.php?page=clanok_detail&id=279> accessed 25 October 2014.

¹² <<http://www.riigikogu.ee/index.php?id=180757>> accessed 24 November 2014.

¹³ Constantinos Psillides, <<http://cyprus-mail.com/2014/07/04/civil-partnership-bill-needs-consensus-hasikos-tells-mps/>> accessed 5 August 2014.

¹⁴ Kees Waaldijk, ‘Towards the Recognition of Same-Sex Partners in EU Law: Expectations Based on Trends in National Law’ in Robert Wintermute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships* (Hart 2001), 635, William Eskridge, ‘Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition’ (2000). Yale Law School Faculty Scholarship Series. Paper 1509 <http://digitalcommons.law.yale.edu/fss_papers/1509> accessed 4 November 2014.

¹⁵ On the need for time see also Kees Waaldijk, ‘Civil Developments, Patterns of Reform in the Legal Position of Same-Sex Partners in Europe’ (2000) 17(1) *Revue Canadienne du Droit Familial* 62.

making legal partnerships available, ostensibly as an alternative to marriage (although often ultimately as a precursor to same-sex marriage), has continued to increase.¹⁶

This wave of ‘cross-national policy convergence’ could be attributable to any number of factors, including the waning influence of the Catholic and Orthodox churches (which see marriage as a religious sacrament requiring protection from human intervention). When marriage is increasingly recognised as a secular rather than a religious institution (i.e. that it is the state which has the greatest interest and right to regulate and confer marriage status rather than God or the Church), then arguments that the state lacks competence to ‘redefine’ the meaning of marriage become less convincing. Secular definitions of marriage find it increasingly difficult to justify the exclusion of same-sex couples given the inherent inequality and discrimination on grounds of sexual orientation on which such exclusion is based.¹⁷

Another factor might be the growing recognition that same-sex relationships are inherently as valuable as heterosexual relationships, and therefore worthy of endorsement.¹⁸ This acceptance, or at least indifference,¹⁹ towards what were previously considered ‘alternative’ living arrangements starts in areas of higher wealth and education and hence spreads more rapidly in countries with high urban populations.²⁰ Finally, developing notions of national identity and the role of society in regulating conformity or controlling perceptions of deviance might also be relevant. The recent decision of Estonia to introduce same-sex civil

¹⁶ Within the EU, as of October 2010 same-sex marriage was available in Netherlands, Belgium, Spain, Sweden, and Portugal (and also Norway and Iceland). As of December 2014 same-sex marriage is now also available in Denmark, France, and England and Wales, with Luxembourg and Scotland to follow in 2015 and Finland with effect from 2016. With the exception of Spain and Portugal each of these jurisdictions previously had national registered partnership schemes, some of which now run in parallel and some of which were abolished after their replacement with marriage. Registered partnerships offering at least some if not most of the privileges and benefits of marriage to same-sex couples are available in Netherlands, France, Belgium, Germany, Finland, Luxembourg, UK, Czech Republic, Slovenia, Hungary, Austria, Ireland, and Croatia, with legislation enacted and due to come into force in Malta and Estonia. Thus the remaining EU Member States not to offer or recognise same-sex relationships in any form are currently limited to Latvia, Lithuania, Italy, Greece, Romania, Bulgaria, Slovakia and Cyprus.

¹⁷ Hugo Rifkind, ‘Eeeuw’ is no argument against gay marriage: Neither is saying ‘God doesn’t like it’. In fact when you think carefully, there is no plausible case at all’ *The Times* (London) 9 Mar 2012, 25.

¹⁸ Kelly Kollman, ‘Same-Sex Unions: The Globalization of an Idea’ (2007) 51 ISQ 329. Cf the contrary view, that only heterosexual marriage is worthy of legal recognition, because of its ‘uniquely valuable contribution’ to society and to individuals, in Lynn Wardle, ‘Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage,’ (1998) 39 *South Texas Law Review*:735, 754.

¹⁹ For more on the significance of the ‘right to indifference’ for minorities see Carl Stychin, ‘Sexuality and Citizenship in France’, Chapter 3 in Stychin, C., *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford, Hart 2003), 49,56.

²⁰ Larry D. Barnett and Pietro Saitta, ‘Societal Properties and Law on Same-Sex Non-Marital Partnerships and Same-Sex Marriage in European Union Nations’ (2010-11) 25 J CR & Econ Dev 625.

partnerships²¹ is interesting because acceptance of same-sex relationships is much higher there amongst ethnic Estonians than amongst ethnic Russians,²² with many viewing the promotion of same-sex equalities as distinctly ‘European’ and a way of embracing a modern conception of ‘being Estonian’ as far removed as possible from an unwelcome Russian heritage.²³

Waldijk was right though to recognise that the EU was unlikely to move faster than the Member States themselves.²⁴ Indeed the European Parliament, which has consistently called for progress to be made at an EU level,²⁵ has often encountered a lacklustre response on the part of the European Commission and Council of Ministers. This reflects both unwillingness and an inability of the EU institutions as a whole to move faster than the slowest common denominator of the Member States. The reasons for this will be discussed further in Chapters 5 and 6. The European Parliament appears to acknowledge the difficulties faced at EU level. It now appears to be focussing as much on encouraging the Member States as the EU institutions to take greater steps towards the achievement of LGBT equality, such as by introducing same-sex marriages or registered partnerships.²⁶

²¹ Peter Roudik ‘Estonia: Family Relations Extended Beyond Marriage’ (US Library of Congress 17 October 2014) available from <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404169_text> accessed 7 February 2015.

²² Mereke Tede, ‘Uuring: eestlased pole samasooliste kooselu registreerimise vastu’, (Postimees, Tallinn 13 September 2012) available from <<http://www.postimees.ee/971588/uuring-eestlased-pole-samasooliste-kooselu-registreerimise-vastu>> accessed 7 February 2015.

²³ Sirje Kiin, ‘Opposition to Civil Partnership Bill Is a Vestige of Authoritarian, Eastern Mindsets’ (news.err.ee, 27 June 2014) available from <<http://news.err.ee/v/opinion/71fc7bcc-41eb-4d2e-8b19-4ca84e36c0ad>> accessed 7 February 2015.

²⁴ Kees Waaldijk (n 14), 642.

²⁵ *ibid*, 639, referencing *inter alia* the ‘Resolution on Equal Rights for Homosexuals and Lesbians in the EC’ [1994] OJ C 104/46 which calls on the Commission to draft a Recommendation guaranteeing the full rights and benefits of marriage to same-sex couples and allowing the registration of partnerships.

²⁶ Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, 2007/2145(INI); European Parliament Resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), para 31 ‘welcomes the fact that a growing number of Member States are respecting the right to found a family through marriage, civil partnership or registered cohabitation and adoption, without discrimination on grounds of sexual orientation, and calls on the remaining Member States to do the same’, available from <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0173>> accessed 5 December 2014; also European Parliament resolution of 12 March 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union’s policy on the matter (2015/2216 (INI) para 159 ‘takes note of the legalisation of same-sex marriage or same-sex civil unions in an increasing number of countries – 17 to date – around the world; encourages the EU institutions and the Member States to further contribute to reflection on the recognition of same-sex marriage or same-sex civil union as a political, social and human and civil rights issue’ available from <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0076&language=EN&ring=A8-2015-0023> accessed 21 March 2015.

II. A Piecemeal Approach - Complex Outcomes and Formats

The granting of legal recognition has occurred in a number of ways. In the United States this has often resulted from litigation pleading the unconstitutionality of a ban on same-sex marriage.²⁷ Where successful, these cases mean that couples might move from a situation of having no legal right of recognition to being granted immediate access to marriage in its full form. So far these cases have all been at state level, meaning too that recognition between individual states has also only been a matter for the states concerned, rather than being required at a federal level. Indeed, at a federal level, the Defense of Marriage Act ('DOMA'), discussed in Chapter 2, ensured that states did not need to recognise each other's same sex marriages. In 2013 the Supreme Court struck down one part of DOMA which had required the non-recognition of same-sex marriages by the US Federal government and agencies.²⁸ However, the question whether individual states were free to recognise or deny each other's (or non-US) same-sex marriages remained unaffected. An opportunity has now arisen for the Supreme Court to revisit this question, with a ruling expected during 2015.²⁹

As an alternative to judicial activism, marriage or registered relationships can be made available to same-sex couples through legislative intervention, reflecting changes in political and social attitudes.³⁰ This legislative path is in many ways preferable as it results in stronger rights and broader acceptance.³¹ Legislative action is of course also part of the US story, where many states have introduced 'civil unions'³² but the US and its constituent states have often used legislation primarily to *avoid* same-sex marriage recognition, rather than enable it, through the use of DOMA or equivalent statutes at individual state level. In Europe, conversely, legislation rather than caselaw has been the primary means to implement relationship recognition, whether through opening up marriage or through the creation of civil partnerships. Again this legislation is predominantly at a national level rather than on a pan-EU or international basis.

²⁷ W Sherman Rogers, 'The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive' (2010-2011) 54 Howard L J 125.

²⁸ *US v Windsor*, US Supreme Court 26 June 2013, Docket 12-307, 570 US ____ (2013) available at <http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf> accessed 27 October 2014.

²⁹ See Chapter 2.

³⁰ Jens Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' (2013) Equal Rights Review 83, 84.

³¹ For a useful discussion on the nature of rights in relation to same-sex marriage, and an explanation of why constitutionally-set standards are controversial and weaker than rights recognised through social or institutional mechanisms, see John Eekelaar, *Family Law and Personal Life* (n 1), Chapter 6: "The Central Case of Rights".

³² Yuval Merin, *Equality for Same-Sex Couples - The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago 2002)

Constitutional challenges and case law developments have remained important in bringing about equality between registered partnerships and marriages in matters such as pension rights and inheritance taxation. These cases have occurred both at a national level,³³ and in the CJEU.³⁴ To date, however, they relate to how civil partnerships and marriages are to be treated in individual Member States. So far no legislation or caselaw requires the mutual recognition of these institutions by other Member States.

The emphasis on progress at national, rather than EU level, results, not unexpectedly, in numerous inconsistencies. There is no universal template for registered partnership formats where opening marriage to same-sex couples is politically unfeasible. The solutions adopted are country-specific and often incompatible, depending on the social and legal situation in the jurisdiction in question and the particular political drivers and compromises needed to introduce changes.³⁵ The precise nature of the rights granted (and duties imposed) under these regimes then varies from country to country. Whether dealing with marriages or partnerships, the formation and registration of such a union will normally affect the couple's civil status and their legal position concerning inheritance, taxation, social security, civil liability, property, insolvency, bankruptcy and eligibility for adoption rights (at least in the country in which it is registered).³⁶ However, the sheer variety of formats and rights in question has presented a challenge for cross-border recognition and the appropriate treatment in any particular Member State of couples with registrations or marriages from other jurisdictions.

In France, for example, the PACS was created deliberately as an alternative form of relationship for both same-sex and opposite-sex couples, seen as a flexible 'intermediate' status between marriage and the limited rights given at the time to de facto relationships or opposite-sex

³³ In Germany, for example, the *Lebenspartnerschaft* did not originally enjoy the same inheritance tax privileges as opposite-sex marriages, but this discrepancy was found to be unconstitutional by the Federal Constitutional Court in BVerfG, 1 BvR 611/07 judgment of 21.7.2010, see also Hilary Stemple, 'Germany [sic] high court strikes down inheritance tax discrepancy for same-sex partners' Jurist 17 August 2010 available at <<http://jurist.org/paperchase/2010/08/germany-high-court-strikes-down-inheritance-tax-discrepancy-for-same-sex-partners.php>> accessed 5 December 2014.

³⁴ C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] I ECR 1757; C-267/12 *Hay v Crédit Agricole*, judgment 12 December 2013.

³⁵ See generally Ian Curry-Sumner, 'A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe' in K Boele-Woelki and A Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd edition, Intersentia 2012), 71.

³⁶ France is a notable exception as although a current PACS will prevent the registration of a second PACS with another person (Article 515-2 (3) Code Civil), it is no bar to a subsequent marriage (even one with another person of the same or opposite sex) and the act of marriage by one of the partners will simply automatically put an end to the PACS <<http://vosdroits.service-public.fr/particuliers/F1620.xhtml>> accessed 6 December 2014.

‘concubinage’.³⁷ Party autonomy was a key principle, one reason this kind of relationship has come to be known informally as ‘marriage-lite’.³⁸ The couple is free to incorporate such contractual promises and obligations as they wish with relatively little being implied or mandated into the contract other than an obligation of material mutual assistance and support. At the start it was not even clear that a PACS implied a conjugal relationship,³⁹ or an obligation of sexual fidelity.⁴⁰ Subsequent cases have shown an expectation of fidelity if the relationship is sexual.⁴¹ This cannot be said to be an obligation of any great importance, however, as there are no particularly adverse consequences for failing to meet the expectation. Grounds to dissolve the partnership are not needed. Either party can, without reason and at any time, freely choose to end the arrangement on three months’ notice. Although a person may be in only one PACS at a time, the couple retains considerable discretion as to how to organise the parties’ respective commitments and obligations, or to end them, with each partner able unilaterally to bring the relationship to an end without judicial intervention or approval.

This form of institution, which also exists in similar forms in Belgium, Luxembourg and the Netherlands, goes some way to satisfying the wishes of those who seek to avoid the perceived constraints and religious or gender-based connotations of marriage. Ironically this appears to be the case more for opposite-sex couples. The PACS has enjoyed great success as an alternative to traditional opposite-sex marriage, with 95% of the 1 million PACSed couples being opposite-sex,⁴² whilst its popularity amongst same-sex couples is noticeably lower.⁴³ As for a long time it was the only available option for same-sex couples, one can speculate that its lack of popularity for homosexuals could be because it was not a true alternative to marriage but only a substitute. With reduced material protections and fewer benefits it was a second-rate solution with lower symbolic value for those seeking full equality.⁴⁴ It also offers little in the

³⁷ Sylvie Dibos-Lacroux, *PACS, Le Guide Pratique* (6th edition, Prat Editions, Issy-Les-Moulineaux 2005), 6.

³⁸ Ian Curry-Sumner, *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe* (Antwerp, Intersentia 2005). Unlike Curry-Sumner, I refrain from converting the original American spelling into the English ‘marriage-light’ as that might confer a degree of gravitas not intended by the original.

³⁹ Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford, Hart 2003), Chapter 3 ‘Sexuality and Citizenship in France’, 49, 52.

⁴⁰ Sylvie Dibos-Lacroux, *PACS, Le Guide Pratique* (n 37), 27.

⁴¹ TGI Lille, ord. 5.6.2002, Dalloz 2003, II, 515.

⁴² <www.insee.fr/fr/themes/document.asp?reg_id=0&ref_id=ip1336> last accessed 17 Feb 2013. The PACS may now increasingly be used as a precursor to marriage, rather than an alternative, and its attraction for same-sex couples may well be waning now that same-sex marriage is also available.

⁴³ Joelle Godard, ‘PACS Seven Years on: Is It Moving Towards Marriage?’ (2007) 21 Int J Law Policy Family 310.

⁴⁴ Laurence Francoz-Terminal, ‘From same-sex couples to same-sex families? Current French Legal Issues’ (2009) 21 CFLQ 485, 489.

way of fiscal advantages if the parties have similar incomes, and this might be more often the case for same-sex couples, at least those not involved in child rearing. A similar growing rejection of registered partnerships by same-sex couples can be seen in the Netherlands where again both marriage and registered partnerships remain available for all couples but partnerships are more popular with opposite-sex couples than same-sex ones.⁴⁵

Conversely, other countries preserved marriage as the only legally-recognised institution for opposite-sex relationships, but created an alternative status which has come to be known as ‘**marriage-like**’ specifically, and exclusively, for same-sex couples. In some cases these institutions have developed and been modified over time, usually to make them closer to opposite-sex marriages in terms of tax treatment or adoption rights. The German *Lebenspartnerschaft*, was originally deliberately framed to grant only limited rights so as not to mimic opposite-sex marriage.⁴⁶ Following confirmation by the Federal Constitutional Court that the creation of a parallel status uniquely for same-sex couples did not undermine the special status of marriage under the German Constitution,⁴⁷ the law was then modified to align the new institution more closely to that of opposite-sex marriage.⁴⁸ In the UK, civil partnership was intended from the outset to match marriage as closely as possible⁴⁹ but, as in Germany, policy dictated that it was not to be made available to opposite-sex couples lest this undermine the supposed supremacy of marriage.

EU Member States’ legal regimes thus now encompass a variety of formats of relationship recognition. These range from marriage and ‘marriage-like’ registered partnerships, with increasingly (but not always) the same rights and obligations as married couples, to ‘marriage-lite’ registered partnerships. The latter are increasingly rare and are in any event also becoming closer to marriage in terms of expectations and rights. Finally a few Member States, notably Italy and Poland, maintain no recognition formats whatsoever. Depending on meeting certain

⁴⁵ Statistics Netherlands, ‘Marriages and partnership registrations; key figures’ 11 Sept 2014 available at <[http://statline.cbs.nl/StatWeb/publication/?DM=SLLEN&PA=37772eng&D1=0-47&D2=0,10,20,30,40,50,\(1-1\)-l&LA=EN&VW=T](http://statline.cbs.nl/StatWeb/publication/?DM=SLLEN&PA=37772eng&D1=0-47&D2=0,10,20,30,40,50,(1-1)-l&LA=EN&VW=T)> accessed 6 Dec 2014.

⁴⁶ Nina Dethoff, ‘Die Eingetragene Lebenspartnerschaft – ein neues familienrechtliches Institut’ (2001) NJW 2598.

⁴⁷ BVerfG, 17.07.2002 – 1 BvF 1/01, 1 BvF 2/10.

⁴⁸ Lebenspartnerschaftüberarbeitungsgesetz, BGBl. I 2004 nr. 69 vom 20.12.2004. For more on the transformation of German life partnerships from ‘marriage-lite’ to ‘marriage-like’ see also Marina Wellenhofer, ‘Das neue Recht für eingetragene Lebenspartnerschaften’ (2005) NJW 705 and (in English) Jens Scherpe, ‘National Report: Germany’, the German National Report to the 18th Annual Congress of International Academy of Comparative Law, Washington DC, July 2010, published in (2011) 19 *American Journal of Gender, Social Policy & The Law*, 151.

⁴⁹ Nicholas Bamforth, ‘The benefits of marriage in all but name? Same-sex couples and the Civil Partnership Act 2004’, (2007) CFLQ 133.

eligibility requirements as to residence or nationality, same-sex couples within most parts of the EU now have at least one available option to registering their relationship, and may even have a choice of formats, particularly if each of the partners originally comes from a different country.⁵⁰

Thus, given that only a few Member States still provide no recognition, the issue for the majority of EU same-sex couples today is no longer primarily the right to relationship recognition itself, as was the case when I started my research project in October 2010. More than half the EU's population lives in a Member State which recognises either same-sex marriage or some form of same-sex partnership.⁵¹

Instead the main issue addressed in this thesis is how a registered relationship or same-sex marriage is treated in other Member States. This question arises either when the couple physically cross borders, or simply when they seek to assert their relationship status in relation to a legal matter in another Member State, such as on questions of succession and inheritance. Different approaches to non-recognition might arise depending on the nature of the relationship in question. There is a secondary issue, also addressed in this thesis, which is relevant to the significant number of nationals of the Member States which do not permit same-sex relationships. This issue is the one of capacity and personal law, and the problems which may be encountered when nationals of such countries seek to register relationships or celebrate same-sex marriages elsewhere. In this context a Member State might hinder the ability of its citizens to emigrate permanently in order to enter into same-sex relationships abroad by refusing to provide the necessary documentation as to civil status.⁵²

⁵⁰ EU wide, of 2.4 million new marriages in 2007, 13% (310,000) had an international element. Similarly, 41,000 of the 211,000 partnerships registered in the EU in 2007 had an international dimension, where the couple either come from different Member States or live in a Member State other than that of their nationality: European Commission Press Release 'Commission proposes clearer property rights for Europe's 16 million international couples' IP/11/320, Brussels, 16 March 2011.

⁵¹ Based on my own calculations and population statistics provided by Eurostat <http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_and_population_change_statistics> accessed 14 March 2015.

⁵² European Parliament, Committee on Petitions, Notice to Members 27 November 2012, 'Petition 0632/2008 by Robert Biedron on the Polish authorities' unwillingness to issue certificates of civil status to Polish citizens wishing to enter into a registered partnership with a person of the same sex in another Member State', CM\920578EN.

1. A Personal Story

The problems caused by diverging policies on cross-border recognition first came to my knowledge through a personal experience concerning the recognition of UK civil partnerships in France. This provided the impetus for me commencing this project, because I suspected that the problems encountered were incompatible with rights under the EU Treaties.

In 2002 my partner and I, a same-sex (and obviously *de facto*, ‘unregistered’) couple of 10 years, bought a holiday home in France. At the time same-sex marriage was a remote ideal, available only in the Netherlands for Dutch nationals and enjoying no legal recognition anywhere else. A modified status, in the form of same-sex registered partnerships, had started to be made available to residents and nationals of a small number of countries, including Denmark, Sweden, Belgium, and France, but these were not available to us. The French registered partnership (PACS), in the form in which it then existed, conferring relatively few property or inheritance rights, was also only available to French nationals or residents.

In light of this, the question of what marital or similar rights might be enjoyed or asserted in France or any other Member State did not figure highly in our project. We had no expectation of being treated as a couple under French law. Just as was the case for our UK home, registration of the property in joint names was the only legal protection and commitment we could offer ourselves, and the only way in which to make a public declaration enforceable against interested third parties (as well as each other) of a legal connection subsisting between us. French law provided no greater rights. We were pleased to find a way to own the property in a form similar to an English joint tenancy to ensure that our respective share of the apartment could pass to the other in the event of death. This bypassed French ‘reserved legacy’ rules which require a proportion of any estate to be passed to certain blood relatives.⁵³ As well as coping with the unexpected loss of a partner these rules could have resulted in having to share the former joint home with the in-laws. Our relief was short-lived when we found that the inheritance tax payable by the surviving partner in such a case would be 60% of the half-share inherited (i.e. 30% of the overall property value at the time of death), as we would be treated as ‘unrelated’. Even so, we were being treated the same way as any French same-sex

⁵³ Article 757-1 Code Civil (France), although the rule in favour of ‘ascendants’ (i.e. parents) has since been removed.

couple. Obtaining national treatment was all we expected, even if we were denied privileges available to opposite-sex married couples.

We considered whether to register a PACS, using our new French address to establish eligibility, and to take advantage of forthcoming greater rights for PACSed couples. The decision was complicated by an awareness that we might soon also (or instead) be permitted to conclude a civil partnership in the UK. We decided not to register a PACS for several reasons. It was unclear legally whether the requirement to maintain a common French residence⁵⁴ implied or required becoming permanently or fiscally resident in France. There was also no certainty at the time that a French PACS would also be recognised in the UK, or whether concluding a PACS would later prevent us registering a civil partnership. Civil partnerships seemed to promise greater rights and protections. The progression of the Civil Partnership Bill clarified that forming a French PACS would cause us to be treated as civil partners in the UK, but would similarly prevent us registering a civil partnership. The resulting 'either/or' choice made it important to avoid any risk that the underlying PACS might be found to be defective, such as through being resident in the UK at the time of registration or having no intention to take up permanent residence in France.⁵⁵ Instead of registering a PACS we waited for the Civil Partnership Act 2004 to come into force and registered a civil partnership in the UK in 2006.

In 2007 French law started to treat French PACSed couples (both same- and opposite-sex) more like married opposite-sex couples when it abolished inheritance tax between partners.⁵⁶ Surprisingly, the same privileges were not made available to couples partnered under non-French laws. Although not PACSed, we considered ourselves to be in a comparable position by virtue of our civil partnership, and the decision to deny us the same treatment as a PACSed couple appeared unjustified. Our expectation of national treatment was now starkly at issue. It was not until 2009 that France started to recognise civil partnerships registered in other countries, despite the PACS having been in place for almost ten years.⁵⁷ In the meantime UK civil partners remained subject to 60% inheritance tax liability on any succession of French property. The option to register a French PACS no longer existed now that we were civil partners, as British couples in this situation were and are prevented from registering a PACS,

⁵⁴ Article 515-3 Code Civil.

⁵⁵ Admittedly a concern such as this might only vex an informed, risk-averse lawyer.

⁵⁶ Article 796-*Obis* Code Général des Impôts as inserted by Loi 2007-1223 of 21 August 2007, Journal Officiel (France) 22 August 2007.

⁵⁷ Loi 2009-526 of 12 May 2009, now Article 515-7-1 Code Civil.

even with each other. British authorities will not issue the necessary documentation confirming that the parties are “single” – one of the requirements for entering a PACS. Hence UK couples with property in France wanting later to benefit from any inheritance tax exemption were placed in the absurd position of first needing to dissolve their partnership in the UK before concluding a PACS instead.⁵⁸ I saw this as purely theoretical because it implied having to plead (dishonestly and perjuringly) the irretrievable breakdown of the relationship under CPA s44, as well as being largely impractical. Such a move would have required judicial decisions to be made to divide the couple’s property, assets, pension rights and possessions which the couple then had no intention of respecting.

It was becoming clear that my partner and I had opted for the ‘wrong’ sort of partnership. Both countries had same-sex relationship recognition, both treated their ‘own’ same-sex registered partnerships as equivalent to marriage for inheritance-tax purposes, yet France would not recognise the equivalence of our situation with that of a French married or partnered couple. Our long-term financial stability and retirement hopes were under challenge because of the intransigence of two conflicting legal regimes. Had we formed a PACS in France, our relationship would have been recognised and accorded tax privileges in both France and the UK. Having chosen a civil partnership instead, the potential impact of death duties could render the survivor unable to keep the property.

I acknowledge that the question of future potential inheritance tax on a second home may not be of great social significance or be seen as one EU Law’s main challenges. However, it became clear that this discrepancy in treatment would affect all same-sex couples who had moved to France having registered any form of partnership in another Member State other than a PACS, and threatened to impose such a tax burden on the surviving partner that he risked having to forego the former joint home in order to meet liabilities which would not have been imposed on an opposite-sex couple. This was then a free movement issue (of both persons and capital) affecting the EU Treaty rights of any EU same-sex couple. Sharon Bowles MEP and others had been campaigning since 2008 for wider cross-border recognition, at least between those Member States who had their own registered partnerships. As well as supporting increased mutual recognition she had called for the European Commission to

⁵⁸ Alain Piriou, ‘Quand la reconnaissance de son couple passe par le divorce...’ (Liberation.fr, 24 July 2008) <http://societales.blogs.liberation.fr/alain_piriou/2008/07/quand-la-reconn.html> accessed 15 June 2011.

produce Guidelines.⁵⁹ The European Parliament passed a Resolution in January 2009 calling on the European Commission to bring forward proposals to address mutual recognition.⁶⁰ The Commission's action plan for implementing the Stockholm programme notably failed to include any such proposals.⁶¹ Given this background, I was intrigued when, in a debate of the European Parliament on 7 September 2010, in response to a question on 'extending' the Free Movement Directive to cover same-sex couples, the Commissioner for Justice, Vivianne Reding, asserted:

If you live in a legally-recognised same-sex partnership, or marriage, in country A, you have the right – and this is a fundamental right – to take this status and that of your partner to country B. If not, it is a violation of EU law.⁶²

Not according with my own experience, this prompted the beginning of my research project and ultimately the formation of my thesis question below. As a practising lawyer with a solid grounding in EU Law, it seemed incomprehensible that the difficulties encountered in France were compatible with EU rights, particularly given the view of the European Commissioner. I set out to find out why the situation was so complicated, and on what basis the discrepancies could be considered to be a violation of a fundamental right of EU law.

2. Categories of Recognition Problems for Same-Sex Couples

The problems I had encountered over recognition of UK civil partnerships in France were ostensibly solved in 2009 by a new law which provided for a limited form of cross-border recognition, in that the effects of an overseas partnership in France are to be governed by the law of the state of registration.⁶³ Initially it was unclear whether the change would only take effect for overseas partnerships registered after the date of the new law. This was resolved in

⁵⁹ <<http://sharonbowles.org.uk/en/article/2008/095925/sharon-campaigns-for-equal-recognition-of-civil-partnerships-across-europe>> accessed 6 December 2014.

⁶⁰ Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, 2007/2145(INI).

⁶¹ European Commission Communication 'Delivering an area of freedom, security and justice for Europe's citizens- Action Plan Implementing the Stockholm Programme', 20 April 2010, COM(2010) 171 final.

⁶² Vivianne Reding in European Parliament PV 07/09/2010 available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20100907+ITEM-017+DOC+XML+V0//EN&language=EN>> accessed 15 June 2011.

⁶³ Loi 2009-526 of 12 May 2009 inserts a new Article 515-7-1 into the Code Civil which reads 'Les conditions de formation et les effets d'un partenariat enregistré ainsi que les causes et les effets de sa dissolution sont soumis aux dispositions matérielles de l'État de l'autorité qui a procédé à son enregistrement'.

June 2010 when a French court⁶⁴ applied the law retroactively to exonerate the surviving partner of a British couple from inheritance tax on their French property. The couple in question had registered a UK civil partnership in 2006. At first sight this solved the specific issue which had led to my interest in this subject. However, as already mentioned, it was by now clear that problems of cross-border recognition affected same-sex couples throughout the EU and gave rise to a number of unresolved legal questions.

The choice of relationship regime affects the extent of the recognition accorded to the relationship in other Member States. This choice can be the one made by the Member State in deciding which formats to make available (eg France initially choosing a ‘marriage-lite’ regime as the sole option for same-sex couples), or sometimes a choice made by the couple themselves. This is not simply a case of a hierarchy of relationships, and a marriage will not necessarily enjoy greater recognition than a partnership. Indeed the reverse may be true. The situation is rendered excessively complicated as the nationality and residence of each of the parties is critical. A real example from 2011 highlights these complexities. This involved a long-term relationship between an English man habitually resident in the Netherlands and now living in Paris, and his Japanese partner. The couple had a choice of how to formalise their relationship. Their options included either a marriage or a registered partnership (‘marriage-lite’ version) in the Netherlands, or registering a PACS in France or a civil partnership in the UK. Both a Dutch marriage or partnership would have been recognised equally as a civil partnership in the UK from 2005,⁶⁵ but a Dutch marriage would not have been recognised at all in France until 2014 as neither had capacity to marry under their personal law. The couple, whilst they said they would have preferred a marriage, chose a Dutch registered partnership instead. From 2009 onwards this was recognised in France in the same way as a PACS, and this was then the only form of relationship which would be recognised in each of their centres of interest, namely the Netherlands, France and the UK.⁶⁶

The situation is improved now that a Dutch marriage is recognised, as a marriage, in France. However, were the couple above to have married under Dutch law, there is still a question

⁶⁴ TGI Bobigny 8 June 2010, reported by Richard Yung, the French senator behind the 2009 change in law, in his blog <www.richardyung.fr/questions-sociales-senateur-yung/1609-reconnaissance-en-france-des-partenariats-civils-enregistres-a-letranger-premiere-application-de-larticle-517-7-1-du-code-civil.html> accessed 15 June 2011.

⁶⁵ Civil Partnership Act 2004, s215.

⁶⁶ Taina Tervonen, ‘Les couples binationaux unis pour le pire des casse-tête administratifs’, (Dec 2011 *Têtu*, Paris, no 172), 99, 100.

mark over how their marriage would be treated in England. If neither of the couple is domiciled in England and the Japanese partner is treated as domiciled in Japan rather than the Netherlands or France, then he still lacks capacity to form a same-sex marriage under English law. The provisions of the Marriage (Same Sex Couples) Act 2013 that such a marriage is ‘not prevented from being recognised’ may not be sufficient to mandate recognition if one of the couple later claims the marriage is void.⁶⁷

In light of the above, the issues of recognition can be divided into a number of categories, each giving rise to different legal questions which will be explored further in this thesis.

a) Non-Recognition

As mentioned, a small (and diminishing) number of EU Member States provide no recognition whatsoever for same-sex relationships. The consequences of non-recognition are far-reaching. Homosexuals from those countries might take the view that their lives would be better lived in another part of the EU, a perverse example of freedom of movement replacing the freedom of staying at home. Such a move may even be an unspoken part of the home-state’s policy, using marriage as a weapon to protect the state and the nation from perceived harms that would be caused by assimilation of ‘undesirables’.⁶⁸ Finnis, writing in the early 1990s, condemned moves to outlaw discrimination on grounds of sexual orientation claiming this would require the political community to abandon all attempts to discourage homosexual conduct by various means, including the ‘non-recognition of homosexual “marriages” and adoptions.’⁶⁹ This exemplifies how the non-recognition of same-sex marriage has been perceived as a means to discourage homosexual behaviour. Whilst I find it hard to accept that the lack of marriage options could have any effect whatsoever on the day-to-day sexual conduct of a European nation’s citizens and residents (whatever their sexuality), it may well have an effect of reducing homosexual behaviour in a particular state if it encourages the gay and lesbian population to move elsewhere.

⁶⁷ Marriage (Same Sex Couples) Act 2013, s.10(1)(b). See further Stuart Davis, ‘New Approaches to Same-Sex Marriage: the End of Nationality as a Connecting Factor in Private International Law?’ in K Boele-Woelki and N Dethloff (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Intersentia 2014), 263, 274.

⁶⁸ Zvi Triger, ‘Fear of the Wandering Gay: some reflections on citizenship, nationalism and recognition in same-sex relationships’ (2002) 8 *Int J Law in Context*, 268, 277.

⁶⁹ John Finnis, ‘Law, Morality and Sexual Orientation’ (1993-94) 69 *Notre Dame Law Review* 1049, 1052.

The stated reasons for a refusal to grant recognition are usually more subtle, invariably cultural or religious, based ostensibly on a desire to protect the institution of marriage. The real motive is only likely to be important if the state is required legally to justify its exclusion of same-sex couples, which so far has not been the case.⁷⁰ As yet neither the Court of Justice of the European Communities (CJEU),⁷¹ nor the European Court of Human Rights (ECtHR) has required the introduction of relationship forms for same-sex couples in any state, although there are factors which may change this, which will be discussed in due course. The CJEU may yet establish the recognition of relationships as part of a general principle of equality under EU law. As formalised same-sex relationship recognition spreads it becomes increasingly difficult for the remaining minority of Member States to refuse recognition for its own nationals. A blanket refusal by a particular Member State to grant any form of relationship recognition whatsoever (whether marriage or otherwise) becomes increasingly recognisable, not as a normal exercise of sovereignty and discretion, but as a specific victimisation of gays and lesbians, possibly motivated by a desire to make them invisible or encourage them to move elsewhere. The CJEU may then consider that the ‘emerging consensus’ amongst Member States in favour of relationship recognition justifies a revision to earlier case law and a new interpretation of Treaty freedoms, particularly as they apply to citizenship rights.

The lack of recognition in a particular Member State may cause couples to enter relationships and marriages elsewhere, even if they realise these may not be recognised back home. Lack of recognition at home may give rise to problems not only for the couple which wants to stay together, but also for the couple which does not. In a relationship breakdown the lack of recognition by the home state may mean it will be unable to grant the couple a divorce, or make financial provision as between the couple or for any children. This may be to the advantage of one of the couple, who might now claim never to have been validly married. Further, the state which granted the marriage may not be able grant a divorce to non-residents. Canada, for example, allowed non-resident same-sex couples to marry, but until reforms introduced in 2013

⁷⁰ The ECtHR in *Schalk and Kopf* was prepared to accept without much scrutiny the exclusion of same-sex couples from marriage – see Chapter 7.

⁷¹ For simplicity I refer throughout to the CJEU even when referring to decisions taken by its predecessor, the European Court of Justice, or ECJ.

would not then grant them a divorce unless one of couple had been resident in Canada for a year.⁷²

b) Partial non-recognition

As well as those Member States which refuse any recognition, there are others which, in creating same-sex marriage or a ‘marriage-like’ status almost equivalent to marriage, have decided deliberately only to recognise those foreign states’ relationships which are themselves marriages or which also resemble marriage to a sufficient extent. Under this model, ‘marriage-lite’ relationships are not recognised. This is the case for example for Ireland⁷³ and Finland, which have both created civil partnerships, and will assimilate a foreign same-sex marriage into this format, but will not recognise a French PACS which, construed originally as a contractual institution rather than a form of civil status, can be dissolved without judicial recourse.⁷⁴

There are logical reasons for this. The couple in question might previously have had an option to choose a more legally binding regime such as marriage but turned it down in favour of a ‘marriage-lite’ alternative. This choice is still available in France, Netherlands, Belgium and Luxembourg. Such a couple could be considered to have chosen a regime closer to unregistered or *de facto* couples. They may not want to assume a binding mantle of obligation or commitment equivalent to marriage under the new host state’s law. However, it is equally possible that there are couples whose choice of a non-marriage format might have been for another reason, as shown in the Anglo-Japanese Dutch example above where a ‘marriage-lite’ relationship was chosen only to ensure recognition in France. Further, historically in many jurisdictions ‘marriage-lite’ was the only available option for a same-sex couple. In France, prior to 2013, when marriage was not available to same-sex couples, a same-sex couple cannot be said to have been rejecting the constraints of marriage by choosing a PACS. In this respect they differ from opposite-sex couples whose choice of PACS could be seen as a deliberate rejection of marriage. For a same-sex couple, entering a PACS would have been to register the

⁷² Proposed amendments to the Civil Marriage Act were introduced 17 February 2012 to address this, see <<http://www.cbc.ca/news/canada/windsor/story/2012/02/17/gay-marriage-loop-hole.html>> accessed 12 March 2012; also Janet Walker, Legislative Comment ‘Same-sex divorce tourism comes to Canada’ (2012) LQR 344. These resulted in the Civil Marriage of Non-Residents Act (Canada) S.C. 2013, c. 30 in force since August 2013.

⁷³ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland), s.5

⁷⁴ See for example one French citizen’s response to the European Commission’s 2011 Consultation on its Green Paper ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ available at <http://ec.europa.eu/justice/newsroom/civil/opinion/files/110510/citizens/finland_en.pdf> accessed 14 February 2015.

maximum commitment possible at the time. It is then unfair that they should be treated as unrelated by a third state. True, it may be that if they had moved to Ireland they could have exercised a further choice to enter into an Irish civil partnership on top of their PACS. If they then choose not to, this may possibly justify the partners continuing to be treated as single under Irish law. However, this is complicated by the fact that under French law they might be expected to end their French PACS first, even though Irish law may not insist on this.⁷⁵ But the couple may have reason to assert their relationship status in Ireland without any intention of moving there, in which case entering into an Irish civil partnership may not be option. One example is where one of a PACSed couple inherits or otherwise has a property in Ireland. If he dies leaving everything to his partner, the surviving partner is exempt from French inheritance tax on the transfer of the estate, as already discussed, but will be subject to the imposition of Irish Capital Acquisition Tax unless a civil partnership is acknowledged.⁷⁶ Having been unable to conclude an Irish partnership and having until 2013 been limited in France to concluding a PACS, the imposition of higher inheritance tax as a result of non-recognition of the relationship would then clearly raise questions as to a potential breach of EU Treaty rights or ECHR freedoms.

c) Selective Non-Recognition

Depending on the legal regime put in place to accord recognition to its own same-sex couples, a Member State may make a distinction not on the basis of the form of relationship in question but on the identity of the couple which formed it. This category creates the broadest range of legal questions, as the criterion for recognition is often the nationality of the couple. Such a model is based on the notion of connecting factors under private international law giving rise to capacity to marry. It was the model used until 2013 by France, which would recognise a foreign same-sex marriage between two Dutch people or between a Dutch man and a Spaniard, as both the Netherlands and Spain allowed same-sex marriages, but would not recognise a Dutch marriage if one of the couple was French or British (even though it would have been a

⁷⁵ Persons entering into a French PACS remain *célibataires* (single) as the existence of a PACS is deliberately not to be a bar to a subsequent marriage. Nevertheless, under Article 515-2 al.3 Code Civil, a person cannot enter into more than one PACS at a time. French authorities may be reluctant to allow a French citizen or resident to enter into an Irish civil partnership if they are already subject to a PACS.

⁷⁶ Inheritance tax on transfers of property is normally payable in the first instance in the country where the property is situated, and only later does the domicile of the owning parties become relevant for assessing any additional payments due. Hence a person resident in France will be exempt from paying inheritance tax in France if they inherit property from a spouse or PACS partner, but will still first need to pay whatever Capital Acquisition Tax is due in Ireland and will not receive any rebate if the amount due in Ireland exceeds the amount payable in France – see <<http://www.revenue.ie/en/tax/cat/gift-inheritance.html>> accessed 7 December 2014.

valid marriage in the Netherlands) as same-sex marriage was not permitted in France or the UK. Such a model sits uneasily with the EU Treaty prohibitions on discrimination on grounds of nationality, and even though the CJEU to date has not sought to override different treatment arising from so-called neutral conflicts-of-law rules, I highlight in Chapter 5 why this now needs to be revisited.

d) Over-Recognition

The alternative to non-recognition of ‘marriage-lite’ relationships is also problematic, namely where a Member State ‘upgrades’ a relationship in order to provide recognition. The UK, for example, in treating a French PACS as though it were a UK civil partnership,⁷⁷ converts it into a legal institution of greater consequence and weight than the couple may have originally intended. Take a hypothetical French couple, Yves and Pierre, both now living in London but whose relationship has broken down as Pierre wants to marry someone else. The PACS is no longer terminable simply by mutual consent, or even unilaterally by one of the parties.

Although under French law Pierre is free to marry without Yves’ consent this is not the case under English law. Pierre must go to court to obtain a dissolution of what has in the meantime been translated into a civil partnership, with provision being made for financial allocation of property and pension rights.⁷⁸ If Pierre returned to France to try to evade this hurdle and terminate the PACS unilaterally or marry, the termination and subsequent marriage might well not be recognised by the English courts, leaving Yves either entitled to treat himself as still partnered under English law or to bring his own action for dissolution of the partnership in an English court. In the meantime Pierre is unlikely to be able to marry in England, and might even claim a breach of his right to marry under Article 12 ECHR, arguing that as both his nationality *and* his domicile are French there is nothing under either English or French law which should affect his capacity to marry.⁷⁹

Depending on the circumstances this ‘upgrading’ of their relationship might well be fair, and the couple might well have moved to the UK specifically in order to take advantage of that

⁷⁷ Civil Partnership Act 2004, s.212 and Schedule 20.

⁷⁸ Conversely, if they were a French opposite-sex PACSed couple, their relationship would not be recognised at all, but I leave that discussion for others to take on.

⁷⁹ As will be shown in Chapter 7, a claim to marriage under Article 12 ECHR may not currently be likely to succeed as a standalone claim. However, in this example the claim is not one of access to same-sex marriage but one of access to marriage generally. Pierre’s claim is about restrictions on his ability to marry imposed by English (but not French) law by virtue of his PACS. His claim might be even more likely to be successful if he now perhaps wants to marry someone of the opposite sex.

enhanced relationship status, given that a ‘marriage-like’ or same-sex marriage would not previously have been available to them in France. Perhaps they should have been aware of the implications to their relationship status of moving to the UK. If so, it is disingenuous for one or both of them to now claim that they should not be subject to English law, at least if either of them remains in the UK after the split. As mentioned above, for a couple PACSed prior to 2013 the upgrade may be justifiable if one takes the view that they had originally sought the maximum form of status available to them under French law and should therefore be subject to the maximum status available in England. But for a Belgian couple in a *cohabitation légale* or a Dutch couple in a registered partnership the situation is less satisfactory. The same applies for couples, resident in France prior to 2013, for whom same-sex marriage elsewhere (eg Spain, Portugal, Belgium or Netherlands) was an option by virtue of nationality or domicile of one of the parties, but rejected by the couple in favour of entering into a PACS. Finally the same is true after 2013 for any couple which chooses a PACS in preference to a French same-sex marriage. These couples rejected the option of a same-sex marriage at home in favour of a more flexible form of union capable of termination by unilateral declaration. Now they find themselves denied the ‘right’ to terminate their relationship without judicial intervention, simply by virtue of having moved to another Member State. If that couple (or even arguably just one of its members) moves to the UK they will now find themselves treated as a civil partnership and potentially subject to the full weight of judicial intervention should one or other decide to terminate the partnership – hardly the contract the parties intended to enter into.

The issues of under- and over-recognition can of course be combined, depending on the circumstances. The same PACSed couple whose relationship is ‘upgraded’ if they move from France to Northern Ireland will then find it vanishes completely if they then move to the Republic of Ireland, where they will be treated as being in no recognised relationship at all.⁸⁰

⁸⁰ It is unlikely (but perhaps worth further investigation) that it is possible to “cumulate” civil status, such that a couple who originally entered into a PACS in France but moved to the UK and automatically became civil partners by virtue of Civil Partnership Act 2004 are then subsequently treated as civil partners in Ireland. After many years living as civil partners in Belfast, the couple otherwise find their relationship dissolves as soon as they cross over to the Republic, unless they have in the meantime married in England or Scotland. It might be a matter of public policy for Eire to recognise the PACS at least as a subsequent bar to marriage, (even though this could not stop a French partner returning to France and marrying there). Otherwise one of the couple concerned could marry someone else, and this is the case whether or not Eire allows same-sex marriage. The person in question, PACSed in France and treated in Northern Ireland as being in a civil partnership, could otherwise still move to Ireland and marry someone of the opposite sex.

e) Alternative Recognition and Assimilation

As shown above, problems arise where states convert or assimilate other forms of relationship into one which resembles their own formats. The UK civil partnership regime treats most forms of registered same-sex couples in the same way, whether they are a married couple from Belgium, a ‘marriage-like’ partnership from Germany or a ‘marriage-lite’ PACS from France. Scant regard is given to the original intention of the parties. Belgium, conversely, will assimilate a UK civil partnership into a Belgian marriage, considering it to be of a more binding nature than its own *cohabitation légale*. The alternative is not to assimilate the relationship into a locally-recognised format, but to treat the partnership or marriage as giving rise only to those consequences which would have arisen in the state where it was registered, rather than engendering the effects associated with the host state’s own relationship models. This is the German system, where a foreign partnership (between foreigners) continues to be governed by the applicable foreign law, even though the effects arising are not permitted to exceed those which would have subsisted under a German *Lebenspartnerschaft*.⁸¹ Whilst this approach has been supported by certain scholars,⁸² it risks creating discriminatory categories of civil partnership statuses with differences in treatment based solely on where the partnership was originally registered.

For this reason I approach this view with caution. It suggests that a registered partnership, as originally based on contract law, should be governed by the law of the place of registration regardless where the couple now happen to be living.⁸³ Admittedly this solution could have its attractions. It is consistent with normal conflicts rules relating to contracts, and affords considerable party autonomy to couples in choosing the extent of the obligations and duties associated with their relationship. For a couple in a UK civil partnership living in Italy, for example, it would provide a legal framework where none exists under Italian law. Indeed it makes little sense to say in such a case that the relationship should be governed exclusively by Italian law. Although the couple may live in Italy they may also have property interests in the UK or another Member State. For the couple’s interests outside of Italy it would indeed be preferable that UK law or the *lex situs* should apply. But a proposed solution whereby Italy has

⁸¹ Article 17(b)(1) EGBGB.

⁸² Notably Hugues Fulchiron, ‘Mariage et Partenariats Homosexuels en Droit International Privé Français’ (2006) RIDC 409, 422 ; see also Curry-Sumner (n 38); Martina Melcher, ‘(Mutual) Recognition of Registered Relationships via EU Private International Law’ (2013) 9(1) Journal of Private International Law 149, 166.

⁸³ Fulchiron (n 82), 422.

to apply English law to couples living in Italy and accord greater effects (and hence potentially more privileges) than it provides its own same-sex couples is unlikely to enjoy much success. Indeed the threat of having to give effect to foreign law in this way is one of the reasons the Matrimonial Property Proposals have not been more successful, as I discuss in Chapter 5.

III. Methodology and Sources

1. A Doctrinal Approach

I adopt a doctrinal approach in preference to a theoretical approach such as one based on queer theory. My argument is not to address the inherent desirability or otherwise of same-sex marriages or alternative forms of relationship recognition, although I explain below my view on the inherent justice of opening marriage to same-sex couples. Whilst this view has been a motivation behind my research, I have sought to maintain an unbiased approach. Starting from the basis, as suggested by Commissioner Reding,⁸⁴ that legally a registered partnership or same-sex marriage registered in one EU Member State should be recognised and produce effects in other Member States in the same way as an opposite-sex marriage, I adopt a pragmatic and neutral approach in order to examine the doctrinal arguments which could be made to support such a result.

As a practising lawyer with a background in EU Law I originally assumed, like Reding,⁸⁵ that EU Treaty rights and powers would provide the answer. I suspected that the failure to ensure mutual recognition was simply due to a lack of enforcement on the part of the European Commission, or was due to another factor which the CJEU might be able to correct, such as a case of an overly lenient interpretation of the public policy exception. My research revealed that existing EU rights and powers did not explicitly require Member States to accept each other's same-sex unions. This finding led to an analysis of private international law and how its application is implicitly constrained or shaped by EU law and human rights requirements. In Chapter 5 I question why Community institutions have not done more to improve matters for same-sex couples under express Treaty powers, but my thesis is not primarily about the desirability of legislative intervention or expansions to EU powers. It has been argued

⁸⁴ Reding (n 62).

⁸⁵ *ibid.*

vigorously that EU legislation should be enacted to harmonise private international law,⁸⁶ but this needs to take into account the difficulty that under existing Treaty provisions the unanimous consent of all Member States is required. Another argument put forward is that the CJEU should reverse its jurisprudence and adopt a new line of caselaw if not to ‘collude in a persistent state of illegality’.⁸⁷ Whilst sympathetic to these views, the doctrinal approach addresses the topic whether, as a matter of EU law, including human rights, there is *already* a requirement for a Member State to accord recognition to a same-sex couple who have registered a marriage or partnership elsewhere. If, using analogy and doctrinal analysis, I can demonstrate that such a requirement implicitly already exists, this would lead to the recognition of at least some forms of same-sex relationships throughout the EU. Of course the express implementation of such a position might still require clarifications to be made by the CJEU or ECtHR as to the interpretation of the EU Treaties or existing secondary legislation, or the European Convention on Human Rights. It should not, however, require either new legislation to be passed, with the inherent difficulties this has in achieving the required majority in the Council of Ministers, or treaty amendments to be negotiated.

My approach therefore uses doctrinal analysis to seek to establish a right to cross-border recognition under existing norms. In this respect it could be considered comparable to that adopted by Murphy where he sought to establish a so-called ‘legalistic’ approach to same-sex marriage as a human right. Focussing on the scope to reinterpret existing provisions, Murphy argued that a ‘non-theoretical’ approach could be useful.⁸⁸ I understand his argument to be that a claim for the acceptance of same-sex marriage can be made not simply on the basis of constitutional or other morally-based claims, but also through an interpretation of existing legal provisions, such as the right to family life as enshrined in Article 8 of the European Convention on Human Rights,⁸⁹ or a combination of Articles 12 and 14. In other words, the right to same-sex marriage is already established in existing norms, without needing to resort to other theories to justify its inclusion as a human right.

⁸⁶ Melcher (n 82).

⁸⁷ Justin Borg-Barthet, ‘The Principled Imperative to Recognise Same-Sex Unions in the EU’ (2012) 8(2) *Journal of Private International Law* 359, 388.

⁸⁸ John Murphy, ‘Same-sex marriage in England: a role for human rights?’ (2004) 16 CFLQ 245.

⁸⁹ John Murphy, ‘The recognition of same-sex families in Britain – the role of private international law’ (2002) 16 Int J Law Policy and the Family 181, 191.

Murphy was criticised for underplaying the importance of moral and philosophical justifications for same-sex equality.⁹⁰ I do not seek to enter that debate. Whilst I agree that claims to recognition are made easier through moral or other justifications, I share Murphy's view that a doctrinal analysis of existing norms can be useful in itself. My approach goes further in that it is not limited to human rights considerations, but is expanded to include free movement rights under the EU Treaties, as well as traditional and modern interpretations of private international law rules. My approach is also different in that I use this analysis to see if these interpretations support a claim for cross-border, as opposed to domestic, recognition of same-sex relationships. The doctrinal approach requires the norms in question (the forum state's rules preventing or prohibiting recognition) to be judged not simply on the basis of a moral or social standpoint. Instead, having established what these norms are, I then assess them against higher norms enshrined in the EU Treaties and human rights conventions relating to citizenship rights, free movement and fundamental rights.

2. The Desirability of Marriage

As mentioned, in adopting a legal doctrinal approach this thesis is not primarily an argument for the creation of same-sex marriage. It is nevertheless useful to set out my views by way of background. This makes clear why my analysis seeks to favour the increased recognition of marriage and partnership statuses, and why I believe same-sex marriage should be an option for same-sex couples as it is for opposite-sex couples.

The arguments in favour of offering an option for same-sex marriage are compelling, and are not limited to satisfying human rights claims.⁹¹ Despite strongly held views that the concept of marriage should be narrowly defined in accordance with religious precepts, in many countries marriage is no longer primarily a religious sacrament but is instead a social, political and legal institution.⁹² Viewed thus, the arguments limiting marriage to opposite-sex couples are weak and circular, based largely on a moral code which itself only makes sense in a religious

⁹⁰ Nicholas Bamforth, 'The role of philosophical and constitutional arguments in the same-sex marriage debate: a response to John Murphy' (2005) 17(2) CFLQ, 165.

⁹¹ William Eskridge, 'The Ideological Structure of the Same-Sex Marriage Debate (and some Postmodern Arguments for Same-Sex Marriage)', Chapter 6 in Wintemute, R and Andenaes, M (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart 2001), 113.

⁹² France and most civil law systems do not allow religious institutions to confer the status of marriage on citizens. In the UK, relatively rare in Europe in allowing (some) religions to conduct marriages, the religious aspect is rejected by 70% of couples in England and Wales who chose instead to marry in a civil ceremony - Office for National Statistics, *Marriages in England and Wales (Provisional) 2012* (London 12 June 2014) available from <http://www.ons.gov.uk/ons/dcp171778_366530.pdf> accessed 18 January 2015.

context.⁹³ Once religious precepts are removed, the reasons *against* extending marriage to same-sex couples can be critically assessed and found wanting.⁹⁴ Arguments can also be presented in *favour* of extending marriage, with the resulting debate concerning the place of same-sex relationships in society focusing on moral and philosophical justifications for gay rights, and for same-sex marriage in particular.⁹⁵

I acknowledge, however, those who question whether access to marriage as an institution is worth fighting for from a queer or feminist perspective, or whether marriage in its present form is even desirable. For some feminists same-sex marriage forms an unsuitable template for same-sex relationships as it risks reinforcing outdated notions concerning gender roles and economic dependence of one spouse on the other.⁹⁶ Another perspective sees marriage as an unsuitable model because of what are perceived to be overly high expectations of physical (as opposed to emotional) fidelity. This view sees expectations of physical fidelity as having been entrenched in opposite-sex marriages (and on women in particular) because of a risk of unwanted children, and seen in this way it may not necessarily be as relevant to same-sex couples.⁹⁷ I share Lind's view, however, that a lowering of expectations as to physical exclusivity is not justified on this basis.⁹⁸ More importantly, arguments that procreation outside the primary relationship might require more forethought and effort for homosexuals have in the past been used judicially to support upholding bans against same-sex marriage.⁹⁹ Maintaining this distinction is therefore unhelpful. Same-sex couples are increasingly having and raising children, and there is no longer any reason (if indeed there ever was one) to treat

⁹³ Nicholas Bamforth, 'Same-Sex Partnerships and Arguments of Justice', Chapter 2 in Wintemute, R and Andenaes, M (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart 2001), 31.

⁹⁴ Andrew Koppelman, 'Judging the Case against Same-Sex Marriage' (2014) U Ill L Rev 431.

⁹⁵ Nicholas Bamforth, *Sexuality, Morals and Justice: A Theory of Lesbian and Gay Rights Law* (London, Cassell 1997).

⁹⁶ Rosemary Auchmuty, 'Same-sex marriage revived: Feminist Critique and Legal Strategy' (2004) 14 Fem & Psych. 101; Nichola Barker, *Not the Marrying Kind, A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2012).

⁹⁷ Kenneth McK Norrie, 'Marriage is for Heterosexuals - May the Rest of Us Be Saved From It' (2000) 12 Child & Fam LQ 363.

⁹⁸ Craig Lind, 'Sexuality and Same-Sex Relationships in Law', Chapter 6 in Brooks-Gordon and others (eds), *Sexuality Repositioned: Diversity and the Law* (Hart, Oxford, 2004), 109, 126.

⁹⁹ Kerry Abrams and Peter Brooks, 'Same-Sex Couples and the Rhetoric of Accidental Procreation' (2009) 21 Yale J L & Human., 1.

same-sex couples as being subject to special rules.¹⁰⁰ In any event, claims to equality speak against differential treatment.¹⁰¹

I also acknowledge that the path towards equality often entails aspiring to a stereotyped and idealised version of heterosexual wedded bliss. Emulating opposite-sex couples and adopting their values by aspiring to marriage on identical terms may well mean that ‘Equality is granted, but only on heterosexual terms’.¹⁰² As Norrie goes on to discuss in relation to the first House of Lords case in which a same-sex couple were recognised as a ‘family’,¹⁰³ it was the couple’s emulation of ‘heterosexual orthodoxy’ which garnered favour in the Court, and their claim would have had less chance of success had their relationship not been found to be ‘faithful, monogamous and permanent’.¹⁰⁴ The challenges to the heterosexual interpretation of ‘spouse’ are indeed an attempt by gay claimants ‘to demonstrate that their intimate relationship is qualitatively no different from that of the paradigmatic heterosexual couple’.¹⁰⁵ McGlynn sees this as a reinforcement of the paradigm of “coupledom” which further excludes those that do not conform to such a norm: ‘the law benefits those engaged in long-term, monogamous, stable relationships in which the parties are interdependent, share a home and finances and exhibit a public face of coupledom’.¹⁰⁶

The need for the ‘emulation of orthodoxy’ may dissipate, however, once marriage or registered partnership is available and taken up, as those who choose that path are legally recognised as a couple whether or not they demonstrate they are living ‘as husband and wife’. This is another argument in favour of registered relationships and marriages over cohabitation, and critics should recognise the ‘transgressive and subversive assault on heteronormativity’ which same-sex partnerships and marriage could represent.¹⁰⁷ Once a couple is married or partnered, expectations as to appropriate behaviour might still remain from a sociological standpoint.

¹⁰⁰ Koppelman (n 94).

¹⁰¹ *ibid.* See, also, for an illuminating discussion on why same-sex couples should receive identical treatment to different-sex couples, not because they are the same, but despite their differences, Robert Leckey, ‘Must equal mean identical? Same-sex couples and marriage’ (2014) 10(1) *Int J L Context* 5.

¹⁰² Norrie (n 97), 365.

¹⁰³ *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL) – Mr Fitzpatrick was unsuccessful in his claim to be recognised as the former ‘spouse’ of his deceased life partner, but the denomination of ‘family member’ still enabled him to accede to the protected tenancy of their joint home under the Rent Act 1977.

¹⁰⁴ Kenneth McK Norrie, ‘We are family (sometimes): legal recognition of same-sex relationships after *Fitzpatrick*’ (2000) *Edinburgh LR* 256.

¹⁰⁵ Didi Herman, ‘Are We Family? Lesbian Rights and Women’s Liberation’ (1990) 28 *Osgoode Hall LJ* 789, 794.

¹⁰⁶ Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006), 114.

¹⁰⁷ Jeffrey Weeks, *The World We Have Won* (Routledge 2007), 184.

There may be pressure on all newly-weds to adhere to a certain ideal of what marriage should look like, as though needing to prove they are worthy of the newly-acquired status. This pressure may be even greater for same-sex married couples, given the yet greater novelty of their status. Legally, however, the parties to a same-sex marriage are as free to organise their life together as any other married couple, and free to choose the extent to which they conform to social expectations. These expectations cover gender roles, financial support, cohabitation practices or even exclusivity. To summarise Lord Millett in his dissenting judgment in *Ghaidan v Godin-Mendoza*, 'Marriage is... a legal relationship between persons of the opposite sex... which need not be loving, sexual, stable, faithful, long-lasting, or contented.'¹⁰⁸ This definition is broadly correct even if most prefer to see marriage more romantically. It applies equally to same-sex couples now that the opposite-sex requirement has been removed. *Ghaidan v Godin-Mendoza* also provides, in one short passage by Baroness Hale, a concise view on why discrimination against same-sex couples, in not granting the same rights as opposite-sex couples, is unjustified. She makes the following points: (i) the traditional family is not protected by granting it a benefit which is denied to people who cannot or will not become a traditional family; (ii) granting rights only to heterosexual couples might be aimed at discouraging homosexual relationships generally, but is inconsistent with the right to respect for private life under Article 8 ECHR since *Dudgeon v United Kingdom*¹⁰⁹ and (iii) 'if it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships'.¹¹⁰

I am also aware of the view that, rather than providing 'equality', opening marriage to same-sex couples simply expands the injustices inherent in opposite-sex marriage to same-sex couples, with many of the benefits which might otherwise be provided to unmarried same-sex domestic partners being removed unless the couple 'choose' to get married – thereby removing any real element of 'choice'.¹¹¹ This argument seems to suggest that equality could be better achieved by abolishing marriage, which, however true it may be, is highly unlikely. Assuming therefore, that marriage is retained as a legal and social institution, I agree with Weeks that the availability

¹⁰⁸ *Ghaidan v. Godin Mendoza*, [2004] UKHL 30; [2004] 2 AC 557, 588.

¹⁰⁹ *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

¹¹⁰ As recognised by Baroness Hale in *Ghaidan v. Godin Mendoza*, (n 108), para. 143.

¹¹¹ Nancy Polikoff, 'Why Lesbians and Gay Men Should Read Martha Fineman.' Am U J Gender, Social Policy & the Law 8, no.1 (2000), 167-176, at 175. This is the view taken for example by the 'Beyond Marriage' organisation in the US whose campaign principles advocate forms of relationship recognition other than same-sex marriage: <www.beyondmarriage.org/full_statement.html> accessed 13 October 2014. See also Tom Geoghegan, 'The gay people against gay marriage', BBC Online, 10 June 2013, available at <<http://www.bbc.co.uk/news/magazine-22758434>> accessed 20 July 2013.

of same-sex unions is part of bringing LGBT people into ‘full citizenship’.¹¹² Any injustices inherent in marriage are not solved by restricting access to opposite-sex couples. Discriminating against same-sex couples is not an appropriate response, logically or morally, to the separate question of what rights or privileges the state should accord in granting marriage.¹¹³ Sullivan regards marriage as a social and public recognition of a private commitment and therefore the highest public recognition of personal integrity, whereby denying it to homosexuals is ‘the most public affront possible to their public equality’.¹¹⁴

In a similar vein, Murphy recognises the possibility of claiming a ‘natural law’ right to marriage.¹¹⁵ It is perhaps overstated to invoke the ‘Kantian categorical imperative that a person should marry to ensure that he or she is not a mere means for others but is at the same time an end for them’.¹¹⁶ Nevertheless many will share the Hegelian notion that love is ‘incomprehensible’ without a marriage that allows the individual properly to experience self-consciousness.¹¹⁷ Even at a simpler, non-philosophical level, marriage is a deep-rooted aspiration for many. Most couples see advantages in a permanent, exclusive, mutually interdependent and stable relationship, and this is as true for same-sex couples as opposite-sex ones.¹¹⁸ For same-sex couples, obtaining legal recognition of their relationship has been found to confer psychological and emotional benefits, independent of any financial or fiscal benefits which may also arise, and greater levels of stability and satisfaction than occurs in unregistered relationships.¹¹⁹ In addition, with married couples statistically more likely to stay together than unmarried ones, society might consider it sensible to ‘encourage’ that permanence and

¹¹² Jeffrey Weeks, ‘A very British Compromise? Civil Partnerships, Liberalism by Stealth and the Fallacies of Neo-Liberalism’, in Jones J et al (eds) *Gender, Sexualities and Law* (Abingdon, Routledge 2011), 271, 279.

¹¹³ Andrew Koppelman, ‘Why Discrimination against Lesbians and Gay Men is Sex Discrimination’ (1994) 69 *NYU L Rev* 197, 198 fn1.

¹¹⁴ Andrew Sullivan, *Virtually Normal: An Argument about Homosexuality* (London, Picador 1995), 179.

¹¹⁵ John Murphy, ‘The Recognition of Same-sex Families in Britain – the Role of Private International Law’ (2002) 16 *Int J Law, Policy and the Family*, 181, 191.

¹¹⁶ *ibid.* See also John Murphy, ‘Some Wrongs and (Human) Rights in the English Same-Sex Marriage Debate’ (2004) *BYU J Pub L* 543, 546.

¹¹⁷ A Wooley, ‘Excluded by Definition: Same-Sex Couples and the Right to Marry’ (1995) 45 *University of Toronto Law Journal* 471.

¹¹⁸ Baroness Hale in *Ghaidan v. Godin Mendoza*, para. 142.

¹¹⁹ Ellen Riggle, Sharon Rostovsky and Sharon Horne, ‘Psychological Distress, Well-Being, and Legal Recognition in Same-Sex Couple Relationships’ (2010) *J Family Psychology* 82; Kimberly Balsam et al, ‘Three-Year Follow-Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples not in Civil Unions, and Heterosexual Married Couples’ (2008) *Developmental Psychology* 44(1), 102.

commitment by allowing the couple to publicly declare their intentions and to register their commitment in a legal format.¹²⁰

Despite these benefits, and regardless of the arguments for and against marriage, calls for its reform or abolition, or objections against the preconceptions and expectations which may be associated with it, my starting point remains one of equality. Marriage, regardless of the financial incentives, social privileges or emotional stability which might or might not accompany it, should not be denied to a proportion of the population solely on the basis of sexual orientation.

The divergences between homosexual claims to marriage and feminist, queer or other arguments against it can then perhaps best be reconciled using the words of Clare McGlynn. She rightly summarises the debate as being that the argument around gay and lesbian aspirations to marriage is ‘not about the desirability of marriage but rather the desirability of the *right to marry*’.¹²¹

3. Sources

My research commenced with the cases and articles specifically discussing same-sex marriages and civil partnerships. Most works at the time I started my research related to the need to provide recognition nationally,¹²² or provided a comparative approach to how this had been achieved in various countries.¹²³ Discussions in English on the question of cross-border recognition were relatively few. Some looked primarily at the discussions in the European institutions culminating in the Free Movement Directive.¹²⁴ Others focussed on treaty rights relevant for the purposes of free movement, particularly those affecting third country nationals.¹²⁵

¹²⁰ Rebecca Probert, ‘Cohabitation: Current Legal Solutions’, (2009) 62 Current Legal Problems 316.

¹²¹ Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006), 115.

¹²² *ibid.*

¹²³ Wintemute, R and Andenaes, M (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart 2001), Merin, Y, *Equality for Same-Sex Couples, The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago 2002).

¹²⁴ Mark Bell, ‘Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union’ [2004] 5 ERPL 613.

¹²⁵ Helen Toner, *Partnership Rights, Free Movement and EU Law* (Hart 2004), Elspeth Guild, ‘Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC’ in Wintemute and Andenaes (n 123).

British articles on the situation of mutual recognition under conflicts law were initially rare.¹²⁶ This may be because the conflicts debate was effectively stifled by the solution provided by the Civil Partnership Act and its application in *Wilkinson and Kitzinger*.¹²⁷ Coincidentally, whilst this case concerned a Canadian marriage, Canada provided another illuminating source on the treatment of conflicts in a common law system.¹²⁸ An examination of US materials proved fruitful, resulting in the decision to look at conflicts issues under US law. Materials published abroad, sometimes in English¹²⁹ but more often in French and German, by writers in France, Belgium, Netherlands, Italy and Germany, provided a significant source of analysis. Clare McGlynn points out that the discussion of family law harmonisation is relatively new.¹³⁰ Although the debate has been developing, ‘this is a debate which has been taking place largely among continental scholars. Thus the vast majority of work in this field has been written in languages other than English and by scholars of the civil law tradition’.¹³¹ During the course of my research considerably more works were published which discuss many of the same issues covered in this thesis.¹³² These have helped me to clarify and reflect upon my critique and analysis.

Continental scholars also provided the greatest clarification as to the different approaches to conflicts law, as well as the related issues of public policy exceptions and *ordre public*. Doctrinal analysis published in both UK and continental journals pointed to the most important cases and legislative developments taking place nationally in Europe. In an area of law with relatively few cases but great public interest developments in this area are quickly covered by the press and taken up in scholarly comment. In addition to a watching brief on certain national case

¹²⁶ But see Kenneth Mck Norrie, ‘Would Scots Law Recognise a Dutch Same-Sex Marriage?’ (2003) 7 Edinburgh LR 147; Curry-Sumner, (n 38).

¹²⁷ Eg Katie Rainscourt, ‘The Limitations of the Civil Partnership Act 2004: an analysis of cross-border recognition of same sex marriage’ (2006) 25 CJQ 150.

¹²⁸ Wendy A. Adams, ‘Same-sex Relationships and Anglo-Canadian Choice of Law: An Argument for Universal Validity’ (1996), 34 Can. Y.B. Int. L. 103-13.; Martha Bailey, ‘Same Sex Relationships Across Borders’ (2004) 49 McGill LJ 1005.

¹²⁹ For example Boele-Woelki, K and Fuchs, A (eds), *Legal Recognition of Same-Sex Relationships in Europe*, (2nd edition, Intersentia 2012), and in particular ibid, Patrick Wautelet, ‘Private International Law aspects of same-sex marriages and partnerships in Europe – Divided we Stand?’ 143.

¹³⁰ Clare McGlynn, (n 121), 181.

¹³¹ ibid, 182.

¹³² Including various contributions in K Boele-Woelki and A Fuchs(eds), (n 127), and D Gallo et al (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, Berlin 2014); Martina Melcher, ‘Private International Law and Registered Relationships: An EU Perspective’ (2012) 4 Eur R Priv L 1075; Justin Borg-Barthet, ‘The Principled Imperative to Recognise Same-Sex Unions in the EU’ (2012) 8(2) *Journal of Private International Law* 359 and Alina Tryfonidou, ‘Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships : The Case for Mutual Recognition’ (2015) 21(1) *Columbia Journal of European Law* (2015) (forthcoming).

reports, I followed the reports and press releases of the ECtHR and CJEU, and the press releases of certain NGOs and European Parliament committees. I monitored the debates of the European Parliament and the published working documents of the European Commission.

One challenge has been that cases at both national and EU level were relatively scarce. Wautelet rightly points out that much of the work looking at cross-border recognition needs to be speculative given the ‘surprising paucity’ of case law’.¹³³ It then becomes necessary to construct hypothetical examples of cross-border conflicts and personal injustices to highlight the potential consequences of the conflicting legal regimes. The danger in doing so is to imagine scenarios which could never arise in practice, either because of a little-known local administrative practice or because of incorrect assumptions about what local law will require or allow, so whilst I have allowed imagination to run free on occasion I have also attempted to avoid under-substantiated hypotheses.¹³⁴

In passing I might mention that I do not find the paucity of caselaw in Europe surprising. Same-sex couples wanting a long-term, registered relationship or marriage might well campaign for such a right in their home state, and progress over the last 20 years is largely as a result of sustained and cogent lobbying on the part of local activists in addition to international pressure.¹³⁵ However, most of Europe’s metropolitan areas offer extensive relationship recognition, and younger gays and lesbians from less accepting Member States may well already have exercised free movement rights and be living there, having taken advantage of improved employment prospects, a higher standard of living and greater opportunities to find partners.¹³⁶ The availability of a marriage or partnership in their new home will also have motivated their decision to move. For now they may have little interest in returning to their original home

¹³³ Patrick Wautelet, ‘Private International Law aspects of same-sex marriages and partnerships in Europe – Divided we Stand?’ in K Boele-Woelki and A Fuchs(eds), (n 128), 143, 147.

¹³⁴ Melcher, for example, argues in favour of applying the *lex loci celebrationis* to all same-sex relationships, citing the possibility that otherwise a long-term Dutch married couple resident in France might find their marriage capable of being terminated in the same way as a PACS: Martina Melcher, ‘(Mutual) Recognition of Registered Relationships via EU Private International Law’ (2013) 9(1) Journal of Private International Law 149, 166. This scenario will not now arise under the new French regime, as the marriage will be treated as such, but I doubt that prior to 2014 French law would have treated a Dutch marriage as a PACS for these purposes or allowed French law to apply, nor would the Netherlands have accepted the termination in this way.

¹³⁵ Kelly Kollman and Matthew Waites, ‘The global politics of lesbian, gay, bisexual and transgender human rights: an introduction’ (2010) 15(1) *Contemporary Politics*, 1.

¹³⁶ Noting the anecdotal but credible example of Polish homosexuals moving to England as discussed by Adam Weiss, ‘Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union’ (2007-2008) 41 Colum. J.L. & Soc. Probs. 81, 89 as mentioned by Alina Tryfonidou, ‘Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition’ available at <<https://www.academia.edu/8098636>> accessed 5 January 2015.

state, in which case issues of non-recognition in the so-called ‘homeland’ become less pressing. Strategic cases do arise but are unlikely to succeed where a couple are evading a home-state prohibition.¹³⁷ Meanwhile those couples who have formed a same-sex partnership or marriage in their home state and encounter difficulties in another may not want to take on the administration of their new host state for the sake of a point of principle. For example, a UK same-sex married couple moving to Italy for one of them to take up a new job is unlikely to refuse to pay their income tax bill on the basis that statutory deductions for a dependent spouse have not been allocated. The couple might prefer not to become embroiled in a lengthy Italian tax dispute, particularly one whose greatest chance of success entailed persuading an Italian court to refer the matter to the CJEU. There are therefore likely to be a significant number of cases of non-recognition resulting in various degrees of hardship or inconvenience which are simply not brought to the scrutiny of the courts.

Finally I drew on reports and campaigns highlighted in the press or by lobbying organisations such as ILGA-Europe.¹³⁸ I was fortunate to take part in a number of international conferences where the potential problems and cases were discussed, notably the European Parliament’s LGBT Intergroup Meeting ‘The mutual recognition of same-sex unions in the EU’ (Brussels, 21 October 2010), the International Conference organised by L’Autre Cercle, ‘The lack of mutual recognition of same-sex partnerships and marriages in the European Union and member states of the Council of Europe: an obstacle to the freedom of movement of persons’ (Strasbourg, 18 and 19 November 2011),¹³⁹ the fifth conference of the European Commission on Family Law (CEFL) entitled ‘Family Law in Europe: New Developments, Challenges and Opportunities’ (Bonn 29-31 August 2013)¹⁴⁰ and finally the University of Trento ‘Rights on the Move – Rainbow Families in Europe’ (Trento, 16-17 October 2014).¹⁴¹

¹³⁷ Andrew Koppelman, ‘The Limits of Strategic Litigation’ (2008) 17 Law & Sexuality Rev 1.

¹³⁸ <<http://www.ilga-europe.org>> accessed 5 December 2014.

¹³⁹ <<http://www.autrecercle.org/sites/default/files/conferenceprogv7-ev-print.pdf>> accessed 8 December 2014.

¹⁴⁰ Published as Boele-Woelki, K, and Dethloff, N, (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Antwerp, Intersentia 2014).

¹⁴¹ <<http://events.unitn.it/en/rotm2014>> accessed 8 December 2014.

4. Terminology

a) Descriptions of marriages

It is helpful to explain at the outset the descriptions I have adopted which are used by many authors in relation to types of marriage, and which are equally applicable to registered partnerships. For cross-border cases, four categories of marriage have been identified.¹⁴²

1. The first, *evasive marriage*, relates to those where the couple travel out of their home jurisdiction specifically to evade that state's rules prohibiting them from getting married at home, but where they intend to return home immediately after getting married elsewhere.¹⁴³ In the US this was until recently a common occurrence for same-sex couples, perhaps where the symbolism and experience of a marriage ceremony is considered more important than the effects which might flow from it at home. It enables the couple truthfully to say 'we are married' even if legally that status is not recognised in their home state.¹⁴⁴ In Europe it is probably less common for various reasons. There is the issue of capacity to marry discussed in Chapter 3, the need often to obtain documentation from the home state confirming the parties' civil status, and the fact that many countries impose nationality and residency requirements before allowing a same-sex marriage or partnership to be registered by any particular couple.
2. The second category, *migratory marriage*, relates to the scenario where the couple were lawfully married according to the laws of where they lived but subsequently move somewhere where their marriage was prohibited. In the EU this gives rise to particular issues where the residency rights of one of the couple are dependent on their registered relationship

¹⁴² Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale 2006), 101. See also Silberman who identifies three cases, namely "evasive", "mobile" and "transient" - these correspond broadly to the first three of Koppelman's four categories. Linda Silberman, 'Same-Sex Marriage: Refining the Conflict of Laws Analysis' (2004-2005) 153 U. Pa. L. Rev. 2195.

¹⁴³ As well as the problem in correctly identifying someone's domicile, unless the couple returns to their original state immediately after the ceremony or honeymoon there is a difficult question as to whether the motive was truly one of evading their home jurisdiction, or whether the couple, genuinely intending to settle in the new state, later returned "home" for other reasons, such as family illness or financial difficulty. This might explain the relative lack of cases of marriages being found void for evasive reasons. The view of the Maryland Attorney-General in Opinion 2010, 49 <<http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>> was that "the factual inquiry required to distinguish 'evasive' marriages from others might make such a distinction impractical in many contexts".

¹⁴⁴ Brenda Cossman, 'Migrating marriages and comparative constitutionalism' in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge 2006), 209.

being recognised in the Member State to which they want to move.¹⁴⁵ This is usually where one of the individuals concerned is not already a Community national and has no right to free movement independent of the relationship status.¹⁴⁶

For example, a Belgian and an Argentinian living in a same-sex marriage in Belgium but wishing to move to Poland (where same-sex marriage is not recognised in any form) will encounter difficulties obtaining a residence permit for the Argentinian, meaning effectively that the Argentinian is denied the rights granted to opposite-sex couples to move to Poland, and the Belgian is unable to exercise her existing right to go and live in Poland without enduring the break-up of the family. Again this impacts the Belgian's free movement rights as well as related human rights to family life.

3. The third category, *visitor marriages*, is relevant to where a couple (or one of the couple) finds themselves temporarily in a state which might not recognise that they are married. This desire for recognition is therefore temporary, but might still require acknowledgment of a married status. A same-sex married couple from the Netherlands taking a holiday in another EU Member State might reasonably expect still to be recognised as a couple, and not to be prevented by law from sharing a hotel room (or even a double bed if they want one).¹⁴⁷ In the event of a medical emergency they will expect to be able to make healthcare decisions on behalf of the other.¹⁴⁸ If the emergency results in the death of one of them, they would then expect the law to treat the surviving spouse accordingly, and accord her the necessary privileges to be able to sign legal documents and make funeral arrangements.

In the US it has been argued that such marriages should always be recognised for all purposes in other US states, as anything less interferes with the US constitutional right to free travel.¹⁴⁹ Within the EU, a lack of recognition in other Member States affects the free movement

¹⁴⁵ Elspeth Guild, 'Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC' in Robert Wintemute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships* (Hart 2001), 677. More generally see Helen Toner, *Partnership Rights, Free Movement and EU Law* (Hart 2004).

¹⁴⁶ Directive 2004/58/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 [2004] OJ L229/35 (Free Movement Directive).

¹⁴⁷ Prospective guests of the Grand Pier Conference Hotel, Bucharest, for example, are requested to note 'Local laws may restrict unmarried guests from sharing rooms. Guests are responsible for providing proof of marriage, if requested by the hotel' according to <<http://www.expedia.co.uk/Bucharest-Hotels-Grand-Pier-Conference-Spa.h5500445.Hotel-Information>> accessed 3 November 2014.

¹⁴⁸ The right to consultation over medical treatment in the event of a gay partner's illness has been highlighted as an entitlement not available to same-sex couples in Cyprus, see 'Thousands march in Cyprus' first gay pride, seeking equal rights', Reuters 31 May 2014, <<http://uk.reuters.com/article/2014/05/31/us-cyprus-gaypride-idUKKBN0EB0O120140531>> accessed 25 October 2014.

¹⁴⁹ Strasser, *Same-Sex Unions Across the United States* (Carolina 2011), Chapter 7 'The Right to Travel'.

provisions guaranteeing the couples' right to travel to another Member State for the purpose of procuring goods or services. It may then be possible to demonstrate an implied right to the effect that free movement rights cannot be properly exercised if the host state insists on altering the civil status accorded by the state of origin. The right to make healthcare decisions on behalf of a spouse or partner is particularly important, for example, where a couple exercise their right specifically to travel to another Member State in order to obtain medical treatment.

4. The fourth category is *extraterritorial cases*. Here the parties have never lived in a state which prohibited their marriage, but the marriage is relevant to administrative proceedings or litigation conducted there. An example is if one of the couple held property in that State and his surviving spouse is now seeking to inherit under intestacy rules. Alternatively, that surviving spouse might have been bequeathed the property but wants to take advantage of an inheritance tax exemption available to married couples in the country where the property is located. These cases are relatively rare, as discussed above, but are likely to become a significant body of case law in future given the potentially high value of the cases concerned.

b) Other Terminology

I have taken account of various sensitivities in describing marriages, partnerships and sexuality. I avoid the expression 'gay marriage' as it suggests an inherent distinction between 'gay marriage' and 'heterosexual marriage', a distinction I refute. It may also be an inappropriate moniker for lesbian couples, yet the alternative 'homosexual marriage' sounds clinical. Like 'homosexual partnership' these descriptions all risk being inaccurate in their assumption of the sexuality of those involved. It is factually more accurate to use the expressions 'same-sex' and 'opposite sex' to describe relationships, rather than 'homosexual' and 'heterosexual', unless referring specifically to the sexuality of the persons concerned. Whilst a same-sex 'marriage-like' registered relationship is highly unlikely to be formed between heterosexuals, the same is not true for 'marriage-lite' regimes which are open to non-conjugal relationships. A same-sex marriage could lawfully be formed between a gay man and another man who identifies as bisexual, just as an opposite-sex marriage might be formed by a heterosexual man and a woman who considers herself bisexual. An ostensibly 'heterosexual' marriage might even be formed

between a gay man and a lesbian, and be no less valid in the eyes of the law.¹⁵⁰ In each case it will be seen that the relationship between two people is either same-sex or opposite-sex, rather than being ‘heterosexual’ or ‘homosexual’. A clear example of this is shown in the ECtHR’s judgment in *Hämäläinen v Finland*, where the applicant, a transgendered male-to-female, had argued in national proceedings (whilst awaiting gender reassignment surgery but already living as a transsexual woman) that her existing marriage to a woman should not be converted into a registered partnership, even though this was required under Finnish law which prohibits same-sex marriages. One of the grounds pleaded as to why she should be permitted to remain married to her wife was that conversion to a registered partnership ‘required that her wife become a lesbian’.¹⁵¹ Whilst sympathetic to her cause I am nonetheless relieved this highly distasteful argument was not accepted (as though her wife’s purported sexuality made any difference). Nevertheless, the case highlights the sensitivities which can arise over assumptions of sexuality in same-sex marriages and partnerships. These sensitivities can be addressed by not making sexuality the determinative factor in describing a relationship, and any relationship can then be described as being either same-sex or opposite sex.

The wide-ranging and fast-moving legislative framework in the European Union and elsewhere also requires a word of explanation as to how I describe legal regimes. References to ‘the current regime’ are to my understanding of legal situations as they exist in November 2014. Given the speed of developments I also make references to earlier frameworks which no longer exist but which were in place at some point since starting this research project in 2010. Principally these concern situations prior to same-sex marriage coming into effect in a particular jurisdiction. In referring to France, for example, references to “the former regime” refer to the situation before the implementation of its same-sex marriage law in May 2013,¹⁵² (rather than that which existed prior to the law instituting the PACS in November 1999).¹⁵³ Similarly for England and Wales the ‘new regime’ is the one put in place by the Marriage (Same Sex Couples) Act 2013, not the one introduced by the Civil Partnership Act 2004.

¹⁵⁰ Questions of consummation, monogamy and exclusivity being left entirely a matter for couples in question, particularly as the law does not concern itself with the sexuality of the spouses – see further Leslie Green, ‘Sex-Neutral Marriage’ (2011) 64 Current Legal Problems, 1.

¹⁵¹ *Hämäläinen v Finland* [2014] ECHR 37359/09, judgment 16 July 2014, [17].

¹⁵² Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

¹⁵³ Loi n° 99-944 du 15 novembre 1999 relative au pacte civil de solidarité.

IV. Thesis Question and Chapter Outline

In the European Union free movement of persons, capital and investment is supposedly guaranteed by the Treaties, and so-called fundamental rights of citizenship and human rights seek to put an end to all discrimination on grounds of nationality, sex or sexual orientation. Against this background, this thesis examines how same-sex couples who have registered a partnership or celebrated a marriage in one Member State can still be subject to uncertainties over their civil status and its corresponding implications in other Member States. Is a refusal by a State to acknowledge the marriage or partnership status of a same-sex couple compatible with EU law or human rights?

The first step is to consider the rules applicable to determine whether the marriage or partnership in question has indeed been validly entered into, according to the law of the State where the question of validity has arisen (the forum state). This entails a doctrinal analysis of conflicts rules. Given that this debate has some history in the US in relation originally to interracial and now to same-sex marriages, Chapter 2 considers how conflicts rules for marriages have been managed in the US and determines what can be learned from the US approach.

The main reason US solutions do not work in Europe is that account needs to be taken of the concept of personal jurisdiction affecting capacity to marry. Capacity questions are frequently cited by hostile Member States as the reason to deny recognition to those of its own nationals who have travelled elsewhere to register a relationship validly recognised in other countries. In Chapter 3 I track the development of the concepts of capacity and personal jurisdiction, showing their political heritage, and assess the various ‘connecting factors’ which are used to apply personal law such as nationality, domicile or habitual residence. I explain the implications of these rules for same-sex relationship recognition, and the steps which Member States have had to take to change these rules to ensure recognition of same-sex relationships. Taking by example the facts which led to the challenge by Wilkinson and Kitzinger to have their Canadian marriage recognised in the UK, I set out the legal framework which exists and which has been modified in a number of other Western European countries to facilitate recognition, showing the problems which such modifications can then cause. This serves to demonstrate the complexities of creating a coherent regime capable of facilitating recognition, but I show which concepts of private international law are best placed to attempt this.

Chapter 4 looks at the role played by public policy. Refusing to recognise same-sex marriage is often expressed to be a question of *ordre public*, and this discussion logically follows the analysis of private international law. The exception of *ordre public* prevents the normal application of conflicts rules, so as to avoid the application of a foreign law where the effects of doing so are deemed unacceptable to the forum state. In this Chapter I look at different concepts of the exception, and the extent to which the exception is sustainable under EU Law. I also show how the concept has been developed in France over recent years, with the doctrines of attenuated effects and the proximity principle, and determine whether these developments could be used as additional factors supporting same-sex relationships.

The fifth Chapter looks at how the EU Treaty has responded to the challenges of private international law. In the first instance it looks at the CJEU's previous tolerance of using nationality as a connecting factor even though discrimination on grounds of nationality is prohibited under the Treaty. Given that this results in differences in treatment between EU citizens, I argue the CJEU has been too lenient in tolerating such divergences and that it should revisit this approach when the opportunity arises. The Chapter then assesses EU's competence to harmonise private international law rules, using the examples of the Commission's proposals to harmonise conflicts rules concerning Matrimonial Property Regimes, with a view to determining if the EU institutions could be doing more to solve the problems which arise.¹⁵⁴

The sixth Chapter focuses on substantive provisions of EU Law, both under the EU Treaties and under secondary legislation. It shows the controversies and difficulties experienced by the EU institutions in attempting to use Treaty powers to make adequate provision for same-sex cross-border relationships. I analyse the CJEU's caselaw in relation to citizenship rights, free movement, and mutual recognition, arguing that for some, if not all types of same-sex relationship, existing interpretations of Treaty provisions could already be used to require the recognition of the civil status of free movers.

Under human rights, as already mentioned, the question is whether the right to form a family under Article 12 ECHR extends to the ability of same-sex couples to marry. As will be discussed in Chapter 7, case law to date has not yet accepted this, although there are signs it may do so eventually. The Court has also not yet had to consider a cross-border case involving

¹⁵⁴ See also Ian Curry-Sumner, 'European Recognition of Same-Sex Relationships: We Need Action Now!' [2008] IFL 102.

an existing same-sex family (with or without children) already formed under the law of another state, in order to decide what rights they have to receive equivalent treatment elsewhere.

Finally I summarise my findings and consider the future prospects for EU law, including human rights, to be used to further cross-border relationship status.

Chapter 2: Lessons from America: – Conflicts Law, Full Faith and Credit, Interest Analysis and the Defense of Marriage Act

I. Introduction – Relevance and Background

As the focus of this thesis is the European Union, it might seem odd to start by looking at the United States. However, cross-border recognition of same-sex marriage has been under debate in the US for over twenty years. Moreover, this debate has taken place independently of the parallel discussion on whether a ban on same-sex marriage is compatible with rights enshrined in the US federal or state constitutions. The discussions over conflicts of laws, such as the question of which state has the greatest interest, and how to manage the dichotomy between free movement rights and home state control, are illuminating to the discussion of similar issues in Europe.

The US also currently provides the main existing state-based ‘federalist’ system of marriage recognition rules, in the sense that jurisdiction over marriage within the US is retained within the residual sovereignty of the individual states, rather than being governed at a federal level.¹ This is despite the fact that US citizens and residents enjoy complete rights of free movement throughout and between the states. There is an obvious parallel with the situation in the EU, where family law and same-sex marriage is similarly left to the Member States. The US so far maintains a bottom-up approach, further strengthened by the US Supreme Court’s ruling in *US v Windsor*² striking down Section 3 of the Defense of Marriage Act (“DOMA”).³ This differs from other federal systems, such as Australia or Canada, which have minimised conflicts

¹ Amendment X (1791) of the US Constitution provides that powers not delegated to the United States by the Constitution are reserved to the States respectively, or to the people. The federalist approach to domestic relations was expressly acknowledged by the Supreme Court in 1890 in *re Burrus* 136 US 586, 593-94 (1890).

² *US v Windsor*, US Supreme Court 26 June 2013, Docket 12-307, 570 US ____ (2013) available at <http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf> accessed 27 October 2014.

³ Pub L no 104-199, 110 Stat 2419 (1996) codified as 28 USC § 1738C [1996].

between their various internal jurisdictions by defining the requirements for marriage (and the question whether same-sex marriage is permitted) at a federal level.⁴

The state-based approach, shared with the EU, has caused American scholars to grapple with many of the issues now facing the EU. In particular, the divergence of views between US states on the acceptability of same-sex marriage resonates with an earlier conflict surrounding bans on interracial marriages ('anti-miscegenation laws'). These bans dated from the 1660s and existed at one time or another in 41 American colonies and states.⁵ US discussions over same-sex marriage conflicts have therefore been informed by a long line of cases and comment which might prove relevant. Koppelman considers these cases to be:

a useful precedent for assessing the extraterritorial validity of same-sex marriages because they deal with the same problem we face today: a deep moral disagreement about the value of a certain kind of marriage, reflected in widely varying state laws.⁶

Disagreements over interracial marriages were only consigned to history in 1967 (at which time no fewer than 16 states still retained interracial marriage bans) when the US Supreme Court struck down Virginia's anti-miscegenation statute as a violation of the US constitution.⁷ The long transition of the status of interracial marriages from 'unnatural' and 'corrupt'⁸ to constitutionally and morally benign exemplifies shifting attitudes towards marriage.⁹ For this thesis, however, even more important than this political precedent is the doctrinal approach towards cross-border recognition. Legal arguments previously used with some success to obtain recognition of cross-border interracial marriages can also be used for same-sex

⁴ Section 21(96) of the Canadian Constitution Act grants powers to the federal government to legislate over marriage and divorce: *The Constitution Act, 1867*, 30 & 31 Victoria, c 3. This sole federal competence was upheld in 2004 by the Canadian Supreme Court in *Reference re Same-Sex Marriage* [2004] 3 SCR. 698, 2004 SCC 79 enabling the adoption of same-sex marriage to take place under the Civil Marriage Act 2005 with effect throughout Canada.

Conversely Australia amended its Marriage Act 1961 (which regulates marriage throughout the Australian Commonwealth) by the Marriage Amendment Act 2004 so as to replace common law with a federal pan-Australian definition of marriage which *excludes* both same-sex marriage and the recognition of overseas same-sex marriages. This definition has prevailed over subsequent attempts to introduce same sex marriage at a state level, see *The Commonwealth v Australian Capital Territory* [2013] HCA 55 (Austr. 12 December 2013).

⁵ Andrew Koppelman, 'Same Sex, Different States: When Same-Sex Marriages Cross State Lines' (Yale 2006), 32.

⁶ Andrew Koppelman, 'Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges' (2004-2005) 153 U Pa L Rev 2143.

⁷ *Loving v Virginia* 388 US 1 (1967).

⁸ *Naim v Naim*, Virginia Supreme Court 197 Va 80; 87 S.E.2d 749 (1955).

⁹ William N Eskridge, 'The Case for Same-Sex Marriage', (Simon & Shuster 1996).

marriages.¹⁰ The same applies for arguments which seek to limit the public policy doctrine in any conflicts-of-law analysis.¹¹

This Chapter draws out the themes which emerged from these discussions. This is not to overestimate the role which can be played by the US experience, and ultimately it does not provide the solution. European discussions over equality and cross-border treatment are informed by a different set of rules and principles, and developments in the doctrine of capacity to marry mean questions over nationality and domicile are more important in Europe than in the US. Similarly the US discussions have little place in the discussion on the role and impact of the EU Treaties and secondary legislation, the interpretation of the European Convention of Human Rights, the correlation between Member State notions of capacity to marry versus fundamental principles of EU Law, or the developing concept of European citizenship.

However, the US angle is still important. It provides an opportunity to explain how a conflicts of law analysis is used to determine which law applies to assess the validity of an extra-territorial same-sex marriage. It also highlights the difficulties faced in using such an analysis. A traditional conflicts approach does not provide a consistent and coherent answer, and there is no clear view in migratory or extraterritorial cases as to which state has the greater interest to determine the matter. Applying the US default principle of *lex loci celebrationis* purports to solve the problem, but then raises questions as to whether any ‘vested right’ is created capable of resisting the application of a public policy exception by disapproving states.

This Chapter also provides a helpful context to explain certain notions still under discussion in the EU, as shown in later Chapters. These include the notion of conflicts law itself, the vested rights theory, the duty of loyal cooperation compared with the full faith and credit obligations under the US Constitution, and the public policy exception. Even if American notions on the use and limits of these concepts differ from those in Europe, the US context provides a useful background. This then provides the basis for a more informed analysis in later Chapters for considering these concepts when they arise in the EU.

¹⁰ Koppelman (n 5 and 6).

¹¹ Koppelman (n 5), 27.

II. US conflicts law and marriage

1. Principles of Recognition – *Lex Loci Celebrationis*

With each state free to determine its own marriage laws there are inevitably differences in the substantive rules. These usually do not relate to matters so significant as to cause most people distress: the age at which people can get married; the rules on whether people are allowed to marry certain categories of relatives (the most common divergence being the rules on first cousins,¹² rules relating to marrying aunts or uncles,¹³ or those previously related by marriage such as brothers- or sisters-in-law); whether divorce is permitted and in what circumstances; whether divorcees can thereafter remarry¹⁴ and within what timeframe. Historically the exception, as mentioned, was the difference between those states which had a ban on interracial marriages and those which did not, and it is worth examining how these cases were handled and considering whether this provides a model for the treatment of same-sex marriages today.

Before addressing this it is first necessary to understand the principles behind the rules adopted to deal with conflicts. I use an example based on minimum age requirements, as follows:

If the State of Beta allows 15 year olds to marry, but the State of Alpha requires its residents to be 16, then if a Betan resident, Lisa (15) marries Tom (also 15) and they move to Alpha, they may not persuade anyone in Alpha that they are unmarried simply by virtue of having been too young at the time to marry in Alpha. The courts will view the marriage as valid as they were both old enough to get married in Beta and that is where the event took place. The basic principle applied in the US is that a marriage valid where celebrated is valid everywhere, even in those states which would not have allowed such marriages to have taken place on home soil. This *lex loci celebrationis* constitutes a ‘general rule of validation’ under which states should rely solely on the law of the state in which the marriage was celebrated in order to determine its validity.¹⁵

¹² 20 American states permit first cousins to marry, 30 do not, but each of these will recognise marriages between first cousins performed in states where such marriages are legal, according to the National Conference of State Legislatures <<http://www.ncsl.org>> accessed 30 October 2011.

¹³ *Fensterwald v Burk*, 129 Md 131, 98 A 358 (Maryland 1916).

¹⁴ *Inhabitants of West Cambridge v Inhabitants of Lexington*, (1823) 18 Mass (1 Pick) 506, 510.

¹⁵ Rebecca S Paige, ‘Wagging The Dog - If the State Of Hawaii Accepts Same-Sex Marriage Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices’ (1997-1998) 47 Am. U. L. Rev. 165, 175.

It would be different if Tom had come from Alpha and ran away to Beta specifically to marry Lisa. Alphan courts might well not recognise the *evasive* marriage if they perceived a deliberate and fraudulent attempt to evade Alphan law. Conversely Alpha would not want Tom to return a few months later, now aged 16, claiming that his marriage to Lisa is void and wanting to marry someone else. This could particularly be the case if Lisa is now pregnant.¹⁶ Here it can be seen that the status of the marriage may also depend, as a matter of public policy, on the purpose for which that status is being sought, namely whether the court is sympathetic to the applicant's predicament.¹⁷

A different scenario arises if the couple remain in Beta and bring up a family but then move back to Alpha at a later stage. This now resembles more closely a *migratory* marriage. Indeed, had the couple intended to stay permanently in Beta after their marriage, rather than returning to Alpha, they might claim to be domiciled in Beta at the time of marriage and the validity of their marriage should be governed solely by Betan law. Even if this was not the case and the couple had remained domiciled in Alpha, Alpha no longer retains significant interest in claiming that Tom and Lisa are unmarried. That interest diminishes as time goes by.

If Alpha does apply its laws and policies on evasive marriage, this leads to a 'limping relationship' where a marriage lawful in one state is considered void in another. Being void, the question then arises as to the extent to which either party can re-marry. If Lisa returns to Alpha immediately after her Betan wedding and is not recognised in Alpha as being married, does that mean she can then (once she reaches 16) marry someone else? If so, would Beta still regard her as being married to Tom whilst Alpha regards her as married to a new husband? Although a deliberately fanciful scenario, this issue of 'legalized polygamy' was in fact of great concern to American lawyers. Recognised as a potential outcome if marital status could be changed by crossing a state line, it was frequently cited as another reason in support of the place of celebration rule.¹⁸ In light of this, one can understand the rationale behind one famously quoted dictum: 'If there is one thing that the people are entitled to expect from their

¹⁶ If a failure to recognise the marriage would mean a failure to accord a status of legitimacy to the child, then recognising even an evasive marriage was considered preferable for the child's sake and courts traditionally sought to avoid illegitimizing children of a marriage, see eg *Medway v Needham* (1819) 16 Mass 157 where an evasive mixed race marriage was upheld.

¹⁷ Wardle highlights cases involving recognition of marriages of teenagers as being particularly 'context specific' in Lynne Wardle, 'From Slavery to Same-Sex Marriage: Comity versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations' (2008) *BYU L Rev* 1855, 1900.

¹⁸ Joanna Grossman, 'Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws' (2005) 84 *Oregon LR* 101, 140.

lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.¹⁹

This principle is not without exceptions, otherwise there would already be US-wide recognition of any same-sex marriage validly celebrated in the state which performed it. The main exception provides that the state seized of the matter, assuming it has jurisdiction to decide the case in which the question of the validity of the marriage has arisen, does not need to apply another state's rules on validity of marriage where to do so would offend against an important public policy and interest of the forum state. The 'public policy' exception was later embodied in categorical exceptions for polygamous and incestuous marriages and those that violated a state's 'positive law'.²⁰

Nevertheless, the principle of *lex loci celebrationis* remained the starting point for recognition. One way to look at the history of the rule, and its exceptions, is to consider the two Restatements of Laws on Conflicts, published by the American Law Institute. These are not binding statements of law unless specifically adopted by a particular State, but seek to be highly persuasive and authentic summaries.

a) First Restatement

A 'territorial approach' prevailed in early American law based on the idea that each state had power over events within its borders. This contrasts to a 'personal approach' whereby states have power over events involving their citizens even if such events occur in other states.²¹ I expand upon this distinction further in Chapter 3 as it is key to the development of European notions of 'personal law'. However, once the event in question had occurred, it was no longer for a second state to apply its own laws to that event. Joseph Beale, the reporter for the Restatement (First) of Conflict of Laws, had developed a 'theory of vested rights' which was intended to operate as successor to the rules on comity - once a legal right had been created, (in this case, the right to be recognised as married) in one state, it was thought to 'vest' and then be carried like personal property from one state to another.

¹⁹ *Estin v Estin*, 334 US 541, 553 (1948) (Jackson J dissenting).

²⁰ Grossman, (n 18), 103.

²¹ Koppelman (n 5), 14, discussing Mark P Gergen, 'Equality and the Conflict of Laws' (1988) 73 Iowa LR 893, 902.

The First Restatement thereby enshrines the principle of *lex loci celebrationis* – ‘a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with’.²² As mentioned above, there are exceptions. A marriage against the law of the state of domicile of either party will not be valid anywhere (even though the requirements of the law of the state of celebration have been complied with) where those laws relate to (a) polygamy, (b) incest between persons so closely related that marriage is contrary to the ‘strong public policy’ of the domicile, (c) interracial marriages where such marriages are at the domicile regarded as ‘odious’ and (d) marriage of a domiciliary which a statute of the domicile makes void even though celebrated in another state.²³

The First Restatement shows then the situation in 1934 that, absent the marriage evasion statutes which existed in a minority of states and which are covered by exception (d), there were really only three exceptions to the general principle of recognition, namely polygamy, incest in its strictest sense, and interracial marriages. The exception at (d) covers the concept of ‘evasive marriages’ discussed above. Except in cases of incest or miscegenation, states wishing to prohibit evasive marriages as a matter of public policy were expected to have a statute in place to implement this as a demonstration of its ‘positive law’.²⁴ Interestingly, it demonstrates that the ‘personal approach’ had not been entirely displaced by the ‘territorial approach’, as states still retained a right to determine how their citizens could behave (i.e whom they could marry) even if they travelled to another state to try to evade such rules.

Further, it shows that the territorial approach did not have unlimited application as a state could not regulate every aspect of behaviours taking place within its borders. The First Restatement did not countenance that a host state might pass a statute invalidating or refusing to recognise marriages celebrated in another state between persons who were **not** domiciliaries at the time of marriage, as in fact happened in the case of the ‘mini-DOMAs’ discussed below. Instead, it refers in this context only to marriages ‘of a domiciliary’, showing a state only had

²² Restatement (First) on Conflicts of Laws (1934) §121, subject to exceptions as stated in §131 [individuals barred from remarrying] and §132 [conditions under which a marriage which violates the domicile’s law will not be valid anywhere].

²³ *ibid*, §132.

²⁴ Relatively few states adopted evasion statutes. The Uniform Marriage Evasion Act (1942) 9 ULA 480 provided an example of this type of statute. It provided that any form of evasive marriage would be void and not be recognized by the state where the parties were domiciled. Not being of general effect, the Act only came into force in those states that chose to adopt it into state legislation, and this turned out to be only five states before it was withdrawn from the list of recommended Uniform Acts in 1943: see Joseph W Hovermill, ‘A Conflict of Law and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages’ (1994) 53 Md L Rev 450, 493.

jurisdiction to rule on the validity of marriages of its own citizens or residents, rather than those of couples domiciled elsewhere at the time of their marriage.

Visitors to the state from elsewhere or couples who migrated to the state years after getting married in another state would, according to the First Restatement, still have the validity of their marriages determined in accordance with the rules of that other state (or, at least, the rules of the state where the couple had been domiciled at the time of the marriage). The application of the 'territorial approach' effectively meant that a state could determine who could marry within its borders, but it did not go so far as grant a right to determine whether or not a couple married elsewhere would continue to be treated as married within the territory in question.

b) Second Restatement

The First Restatement (whose principles are still followed by 15 states²⁵) came to be considered problematic because it applies the laws of a state which often will not experience the consequences of the application of its law.²⁶ An alternative view, reflected in the Second Restatement, is that another state might have a greater interest to determine the validity of the marriage.²⁷ The vested rights approach is thereby replaced by an 'interest analysis' which balances the legitimate interests of different states in seeing their own laws applied.²⁸ These legitimate interests cover both the territorial approach (a state has the right to decide what happens within its borders) and the personal approach (a state can exercise political authority over its citizens). The relevant provision, which has been adopted by a large majority of States, reads as follows:

§ 283. *Validity of Marriage*

(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage [...].

²⁵ Alabama, Georgia, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming, according to Barbara Cox, 'Same-Sex Marriage and Choice-of-Law: If we marry in Hawaii, are we still married when we return home?' (1994) *Wis L Rev* 1033, 1088, quoting Patrick J. Borchers, 'The Choice-of-Law Revolution: An Empirical Study' (1992) 49 *Wash & Lee L Rev* 357, 373.

²⁶ Koppelman (n 5), 14.

²⁷ *Restatement (Second) Conflict of Laws* (1971), s283.

²⁸ Koppelman (n 5), 15.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

Section 283(1) taken by itself could be interpreted as applying the law of the state with the most significant relationship at the time of the dispute or court proceedings, even many years after the marriage. This means a couple might marry validly in one state, live for ten years in another state which also recognises that marriage as valid, but thereafter move to a third state which does not recognise such marriages and suddenly find themselves ‘unmarried’. But this would conflict with Section 283(2) which suggests that only the law of another state having an interest at the time of the marriage (such as the state where the couple were domiciled) can override the validity of a marriage conferred by the law of the place of celebration. Hence the time for applying the formula in section 283(1) must relate to the time of the marriage, otherwise if a subsequent domicile is relevant then a person’s civil status would change each time he moved across a state line.²⁹

Section 6(2) then sets out a wide range of criteria which can be taken into account in determining the state with the greatest connection, such as ‘the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue’ and ‘protection of justified expectations’ but also (unhelpfully) ‘the relevant policies of the forum’.

2. Same—Sex Marriages under American Conflicts Rules

The application of the First Restatement principles would mean that, unless the marriage was evasive, couples domiciled in a state permitting same-sex marriage would be able to assert that marriage in every other state. Couples domiciled in a prohibition state would have to change domicile first, however, otherwise their marriage would not be recognised in *any* state, even those which normally permit same-sex marriage. A strict reading of s282 Second Restatement would also lead to same-sex marriages obtaining widespread recognition, as a state whose ‘strong public policy’ was violated by the marriage would only be able to deny recognition to the marriage if it happened to be the state which had the closest connection to the couple at the

²⁹ Mark Strasser, *Same-Sex Unions Across the United States* (Carolina Academic Press 2011), 44.

time of the marriage. In each case, states with strong public policies against same-sex marriages would be required to recognise them for couples who move to that state even when they have had no previous connection or business in that state (migratory marriages), and even though such marriages between its own residents would not be recognised. However, in such cases recourse to the public policy exception might then become more prevalent, as seen further below.

Before considering the public policy exception, I take account here of one suggestion that the problem can be solved, at least partly, by instead adopting an incidents approach. Whether or not the marriage is recognised, a forum state is entitled to determine which aspects of the marriage to recognise. In a positive sense it allows a forum state to recognise certain incidents of marriage even where it chooses not to recognise the marriage itself. Alternatively, in a negative sense, it can allow the forum state to decide to recognise the marriage but then refuse to accord certain incidents to that marriage which it would generally accord to its own marriages.

Silberman looks at the negative sense, maintaining, in the case of a migratory marriage, that a second state to which a couple later moves does have a relevant interest in deciding whether or not to confer particular benefits under its own law 'and may choose that its own policy against same-sex marriage may be such that it chooses not to privilege the relationship with any economic benefits'.³⁰ She looks at s284 of the Second Restatement³¹ relating to 'incidents of foreign marriage', observing that comment (c) suggests that a 'state will not give a particular incident to a foreign marriage when to do so would be contrary to its strong local policy.' This means the marriage itself *is* purportedly recognised, but that its effects can be determined by local law.³² Silberman suggests this might lead to certain incidents of marriage (such as the right to adopt) being denied to an out-of-state same-sex married couple whose marriage does not conform to the (opposite-sex) model recognised in the forum state. In theory this approach, whilst a compromise, could be reasonable if it led to greater recognition. A state vehemently opposed to same-sex marriage might at least then be able, for example, to accept the right to an inheritance tax exemption for a recently-bereaved same-sex spouse. The couple are no longer

³⁰ Silberman, 'Same-Sex Marriage: Refining the Conflict of Laws Analysis' (2005) 153 U Pa L R 2195, 2206

³¹ 'A state usually gives the same incidents to a foreign marriage, which is valid under the principles stated in s283, that it gives to a marriage contracted within its territory.'

³² 'without denying the validity of a marriage in another state, the privileges flowing from marriage may be subject to the local law': US Supreme Court Justice Harlan Fiske Stone (dissenting) in *Yarborough v Yarborough*, 290 US 202, 218 (1933).

living together as married. Taxing the inheritor's acquisition of the remaining portion of what would have been considered to be joint property can lead to hardship and injustice. Finally the state does not forego the tax revenues in question as these are likely to become due when the surviving spouse herself dies and passes the estate on.

However, I do not agree it would be appropriate to allow the forum state to deny all economic benefits normally flowing from marriage. That approach might allow the forum state to apply all the 'burdens' of marriage, such as obligations of mutual support, reductions in social security benefits, or increased taxation, whilst refusing to accord any corresponding 'benefits'. A decision not to allow same-sex couples to adopt also fails to solve the issue of couples who have *already* adopted a child in other State and then move into the State later.

However, as a general principle the assimilation of a 'foreign' marriage into a local format appears appropriate. If the incidents of marriage varied depending on where it had been celebrated then this leads to widely differing rules within one and the same territory. Knowing what rights and obligations flow from the marriage is easier to establish using the forum state's laws and facilitates equal treatment between all residents.

Koppelman, oddly, takes the opposite approach and, in the case of migratory marriages, concludes that these do *not* need to be recognised but only that certain incidents of marriage arising from them should be recognised.³³ He suggests incidents of same-sex marriages which can be recognised in other ways (such as being redefined as a contractual right) should be recognised in those alternative ways, but that the marriage need only be recognised as a 'marriage' by the forum state to the extent of being an impediment to a subsequent marriage. This analysis is surprising in that it appears to take a view against recognition. It has been criticised insofar as it appears to suggest that migratory marriages should *not* be recognised.³⁴ However, Koppelman's argument is limited to those states 'with a strong public policy, stated in its statutes, against same-sex marriage.' Further, even when a state acts in accordance with its rights and passes a non-recognition statute, he suggests that the state might still be required under Second Restatement principles to give effect to certain incidents of a foreign marriage but without having to recognise it as a marriage.³⁵

³³ Koppelman (n 5), 108.

³⁴ Hillel Levin, 'Resolving Interstate Conflicts over Sam-Sex Non-Marriage', (2011) 63 Fla L Rev 47, 68.

³⁵ Koppelman (n 5), 108.

As such his view is consistent with that of Barbara Cox. She also uses the ‘incidents of marriage’ analysis, but makes it clearer that as a default she would prefer to see universal recognition. Like Koppelman, she asserts that the forum state, even if unwilling to recognise a marriage, should at least try to give effect to such incidents of that marriage which do not offend its strong public policy.³⁶

This, however, shows the limitations of the incidents approach. It might be useful in trying to restrict the scope of application of the public policy exception. It encourages the forum state to consider which aspects of the marriage in question offend its principles, and to allow other aspects (such as an inheritance right under a marriage which has ended by the death of one of the spouses) to take effect. Ultimately, however, it does not replace or even constrain the use of the public policy exception. Further consideration therefore needs to be given to the exception in order to understand other arguments which might be made against its use.

3. Public Policy Exception

It can be said that First Restatement principles would have led to the recognition of cross-border same-sex marriage unless an evasion statute applied, and would then require the recognition of all incoming migratory and visitor same-sex marriages. This is of course an entirely theoretical argument. Had the subject been raised in 1934, same-sex marriage, and indeed any same-sex intimate relationships, would have been regarded as being at least as ‘odious’ as polygamy, incest or interracial unions. If they had existed anywhere as a legal status, an additional category of non-recognition would doubtless have been added to the list. But the important point here is that, as a general matter, the question of non-recognition in the US is still primarily a matter of the public policy exception (rather than, as will be seen for Europe, a matter of personal law).

Under the Second Restatement, recognition would also normally be accorded unless the marriage falls under the category of breaching the ‘strong public policy’ of the forum state. Section 2 DOMA modified this in providing a federal mandate that no state had to recognise another state’s same-sex marriage. As explained below, the constitutionality of that provision is under review by the Supreme Court and may well not survive. Once removed from the statute

³⁶ Barbara Cox, ‘Using an “Incidents of Marriage” Analysis when considering Interstate Recognition of Same-sex Couples’ Marriages, Civil Unions, and Domestic Partnerships’, (2004) 13 Widener LJ 699.

books then, to the extent states are still allowed to decide to maintain a same-sex marriage ban, the old rule will again apply. In other words, any remaining states who wish to deny recognition to an otherwise valid out-of-state same-sex marriage will be obliged to use the public policy exception, and provide justifications for its use, to override the normal presumption of *lex loci celebrationis*. The extent to which they will be permitted, or able to provide such justifications remains unclear, particularly if the Supreme Court also uses the opportunity to clarify a constitutional right to same-sex marriage. However, as an exception to the general principle, I submit that in any event the public policy exception, when applied to same-sex marriage, should be construed as narrowly and as strictly as when applied to other types of marriages.

a) What is the public policy exception?

Once a choice-of-law principle exists under which courts in a forum state might normally be required to apply a foreign law rather than their own, there will usually be exceptions under which those courts might, exceptionally, be permitted instead to apply their own laws. Clearly this does not work to enable courts simply to apply their own law to the detriment of the foreign law, despite one roundly-criticised case³⁷ to the contrary in the New York Court of Appeals, where it was held that ‘a state can have no public policy except what is to be found in its Constitution and laws.’³⁸

Instead, in the words of respected American judge Justice Cardozo:

the courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.³⁹

³⁷ Andrew Koppelman, ‘Same-Sex Marriage, Choice of Law, and Public Policy’ (1997-1998) 76 Tex L Rev 921 (1997), 935.

³⁸ *Mertz v. Mertz*, (1936) 3 N.E.2d 597, 599 (New York).

³⁹ *Loucks v. Standard Oil Co.*, (1918) 120 N.E. 198, 202 (New York), cited with approval by the House of Lords in *Kuwait Airways Corp'n. v Iraqi Airways Co. (Nos 4 and 5)* [2002] UKHL 19, at para [17]. David McClean and Kisch Beevers, ‘*Morris: The Conflict of Laws*’ (6th edition, 2005 Sweet & Maxwell), para 3-003 fn 7.

Koppelman divides the doctrine into two limbs, covering the 'legitimate-interest rationale' and the 'repugnance rationale'.⁴⁰

b) Legitimate Interest Rationale

In the past public policy was used to justify the application of the forum state's rules in cases where normally the law of the state of origin would apply, but where there was an important connection between the forum state and the subject matter of the dispute. Paulsen and Sovern, after an extensive review of the decisions, concluded in 1956:

Rather than to change or modify the supposedly applicable rule the court may refuse on public policy grounds to apply the law to which the rule makes reference. The closer the tie between the forum and the facts of a given transaction the more readily we may expect the forum to use its own law to judge the matter before it... The overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection. It is apparent, then, that in most cases the choice of local rather than foreign law cannot be regarded simply as a matter of parochialism. The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it.⁴¹

This today might better be categorised not as a public policy exception but as an assertion that the choice of law rule was wrong in the first place. Koppelman sees this as a rejection of the vested rights approach and the beginnings of the application of the interest analysis.⁴² Paulsen and Sovern's conclusions, themselves based on the rules summarised in the First Restatement, have been subsumed into the Second Restatement rules on identifying the state with the greatest connection to the marriage. The distinctions between visitor marriages and migratory marriages show the importance of identifying the state with the greatest connection in order to determine the *prima facie* applicable law. Today this step occurs as part of the conflicts analysis, in other words *before* the court turns to consider whether, having identified the nominally correct law, the court now wishes to invoke a public policy reason to override that outcome.

⁴⁰ Koppelman (n 5), 23.

⁴¹ Monrad Paulsen & Michael Sovern, 'Public Policy: in the Conflict of Laws', (1956) 56 Colum L Rev 969, 981.

⁴² Koppelman (n 5), 23.

c) Repugnance Rationale

Traditionally, exceptions to the rule of *lex loci celebrationis* applied where the marriage in question was considered repugnant, or a breach of 'natural' law. But a marriage could not be considered 'repugnant' simply because it was not permitted to be performed in a particular state, otherwise no conflicts analysis would be needed and a state would simply apply its own laws. Rather, the exception applies to a category of conflict where the issue in question is considered so shocking, so repugnant, that the forum state feels unable to accord recognition to another state's system of rules. It is not a question of deciding which jurisdiction's rules might be morally superior, as that would obviate the conflicts analysis and lead simply to a weighing up by the forum state's courts as to which law it preferred to apply. Instead, the exception applies where the forum court finds that, notwithstanding that *on a true conflicts of law analysis it should be applying the law of some other state rather than its own*, it declines to do so on the grounds of public policy.

As already seen, the line was drawn at the most acute forms of incest, polygamy or marriages between adults and children, and interracial marriages. But as a general 'escape clause' allowing non-recognition, the concept only occurs in the Second Restatement, not in the First. As already discussed, the Second Statement arguably does not apply to enable *any* forum state to apply non-recognition, but only the state with the closest connection to the marriage and the spouses at the time of the marriage.

Koppelman summarises the public policy exemption as being 'that some foreign laws are so repugnant that they ought not to be enforced'.⁴³ He then objects to this because 'it implies that the forum state will impose its own rule even if another state has a greater interest in regulating the transaction and so would appropriately look to its own law'. Hence he agrees with Laycock that it is 'irreconcilable with basic principles of federalism' in that, 'in a federal system, no state can have a legitimate interest in deliberately subverting the legitimate operation of the laws of other states'.⁴⁴

Kramer goes as far as to suggest that the public policy exception is unconstitutional and that the Full Faith and Credit clause prohibits states from selectively discriminating in choice of law

⁴³ Koppelman (n 37), 939.

⁴⁴ *ibid*, 943, quoting Douglas Laycock, 'Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law' (1992) 92 Colum L. Rev 249, 313.

based on judgments about the desirability or obnoxiousness of other states' policies.⁴⁵ He argues that the public policy exception, whilst useful in its historical context in relation to international conflicts, has no place in determining conflicts within the national US legal system, in a country whose citizens (apparently) have a shared culture and values. This is an interesting argument which may also be relevant to the EU, where aspirations towards a shared culture, or possibly at least shared values, might be used as an argument to restrict the use of the public policy exception.

The discussion above shows how the US moved away from accepting the *lex loci celebrationis* to develop a conflicts system based on an interest analysis depending on which state, at the time of the marriage, had the greatest interest in seeing its law applied. For same sex marriages this is not sufficient to ensure recognition in every state for all time, as the public policy exception is still available to deny effect either to the marriage in question, or to all or some of its effects. The remainder of this Chapter looks at how these concepts were refined in relation to interracial marriages, before looking at how the application of these concepts has been modified by obligations of recognition, or non-recognition, under the US constitution.

III. The Application of Conflicts Law in Anti-Miscegenation Cases

Although the public policy exception and choice-of-law principles grappled to a large extent with such matters as incest, polygamy and underage marriage, the topic giving rise to the greatest debate and confusion was the question of recognition of interracial marriages.⁴⁶ This topic also has the greatest similarity to the modern challenge of same-sex marriage recognition.

Even in the realm of interracial marriage some authors claim there developed a body of law favouring recognition, even in those states where such relationships were considered abhorrent. This history might teach important lessons for same-sex marriages. If a state court felt able to recognise an interracial marriage celebrated in another state even when such a marriage would be considered unnatural, abhorrent, and forbidden in the forum state, why should such tolerance and recognition also not prevail in the context of a same-sex marriage validly celebrated in another state? Koppelman examines the cases in the light of the various

⁴⁵ Larry Kramer, 'Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception' (1996-97) 106 Yale LJ 1965.

⁴⁶ This was despite the paucity of cases, such marriages being relatively rare at the time: Andrew Koppelman, (n 6), 2150.

categories discussed below. He found that southern states, despite a vehement antipathy to interracial marriages based on institutionalised racism and multiple state interests, did not maintain a blanket policy of non-recognition of interracial marriages but would weigh the interests of the parties ‘...against the countervailing interests of the forum. Where the forum’s interests were “attenuated”, southern courts sometimes upheld marriages between blacks and whites’.⁴⁷ In the evasion cases ‘southern courts always invalidated these marriages’, but in the extraterritorial cases, typically involving inheritance claims to property within the forum state, he believed the courts always recognised the marriages even in the most racist states.⁴⁸ This approach seems to have certain connections with the French doctrine of attenuated effects and its approach of allowing non-evasive marriages to take effect whilst preserving a strict approach to evasive cases, as set out in Chapter 6. It would be interesting, but not a discussion for here, to consider whether this connection is real and, if so, whether French and hence Louisiana law had an influence on the southern US approach.

1. Evasion Cases

In an evasion cases the forum (home) state retains the greatest interest in not according recognition to the laws of the state where the marriage was validly celebrated.⁴⁹ One typical, harsh example is the case of Edmund Kinney, a black man who travelled with his white girlfriend from their homes in Virginia to get married in Washington DC in October 1878. They returned home to Virginia shortly afterwards, to be arrested and convicted under Virginian law for the felony of interracial marriage, and sentenced to five years hard labour. Kinney claimed a marriage recognised in Washington DC was lawful everywhere in the US, but the federal district court found him to have committed ‘a fraud on the laws of Virginia’ and upheld the conviction.⁵⁰ A similar fate befell Isaac and Mag Kennedy, an interracial couple convicted of fornication in North Carolina in 1876 despite having been married legally in South Carolina.⁵¹ Their conviction was upheld on appeal (unlike Pink and Sarah Ross, discussed below, whose conviction was overturned) because the Kennedys had remained domiciled in North Carolina and hence their ban on getting married under North Carolina law was ‘a personal incapacity which follows the parties wherever they go so long as they remain

⁴⁷ Koppelman (n 5), 36.

⁴⁸ Koppelman (n 5), 37.

⁴⁹ Strasser (n 29), 34.

⁵⁰ *Ex parte Kinney*, 14 F. Cas. 602 (CCED Va 1879)(No 7825).

⁵¹ *State v Kennedy*, 76 NC 251 (1876).

domiciled in North Carolina.⁵² Nearly every other court that addressed the issue came to the same conclusion. Evasive marriages were almost never recognized, although the antievasion principle was only applied where the parties were domiciliaries of the forum at the time of marriage.⁵³

Not every evasive marriage was denied recognition, but here the exception proves the rule. The first evasive case, involving an interracial couple from Rhode Island who had gone to Massachusetts to get married in 1819, was upheld on the basis that:

it would produce greater inconveniences than those attempted to be guarded against, if a contract of this solemn nature valid in a neighbouring state, could be dissolved at the will of either of the parties, by stepping over the line of a state, which might prohibit such marriages.⁵⁴

But the case was never followed in subsequent miscegenation cases.⁵⁵ The court's refusal to set aside the marriage 'at the will of the parties' shows that one reason for upholding the marriage was because one or both of the parties desired it to end. In the interests of the offspring, the court refused to grant an annulment at a time when divorce was not permitted.

2. Extraterritorial Cases

Courts routinely upheld marriages in those cases where the marriage was only required to be recognised for the purposes of litigation or inheritance rather than to allow the couple to live together as married within the state borders.⁵⁶ In *Miller v Lucks*⁵⁷ the interracial couple had fled Mississippi when the district attorney agreed to drop charges for unlawful cohabitation if the couple left. Having moved to Chicago and married there, Alex Miller later found his right to inherit property from his (intestate) deceased wife being challenged by her relatives, who claimed their Illinois marriage was 'unlawful and void' under the Mississippi state constitution. The Mississippi Supreme Court, however, found the marriage valid on the basis that the anti-

⁵² *ibid*, 252.

⁵³ Koppelman (n 6), 2153.

⁵⁴ *Inhabitants of Medway v. Inhabitants of Needham* 16 Mass (16 Tyng) 157, 158-59 (1819)

⁵⁵ In any event it was subsequently overruled in 1836 by a specific Massachusetts marriage evasion statute preventing marriages taking place in Massachusetts which the couple would not have been able to celebrate in their state of domicile; Koppelman (n 5), 39.

⁵⁶ *ibid*.

⁵⁷ 36 So. 2d 140, 142 (Miss. 1948).

miscegenation law was intended only to prevent interracial couples living together as husband and wife. It would not prevent the marriage being recognised for the purposes of allowing Miller to inherit.

If that approach were followed for same-sex marriages, then couples would at least have the benefit of having their relationship recognised for important purposes concerning property rights or inheritance, with important tax and financial consequences. However, mini-DOMAs denied recognition of same-sex marriages for *all* purposes, and even DOMA itself explicitly enables states to deny recognition to any ‘rights and claims’ arising from the existence of the marriage. Thus same-sex marriages may be ignored even where the couple are not seeking to take up residence in the state. On this basis one might even argue that the mini-DOMAs, pending their repeal or striking down on constitutional grounds, effectively provide for less equitable treatment for same-sex marriages than was sometimes granted to interracial marriages even when American racism was at its most virulent.

3. Migratory Cases

These are the cases which caused the most controversies but whose teachings are arguably the most relevant for the discussion on the modern situation of same-sex marriages. The reverse corollary to an evasion case (where the marriage is void if the parties are trying to evade their home state’s restriction), a marriage validly celebrated in the parties’ home state should be capable of surviving the couple’s move to a subsequent state, even if they would not have been able to celebrate such a marriage in that new home state.

*State v Ross*⁵⁸, decided in 1877, shows the principle at work. In May 1873 Sarah Spake, a white woman, left her North Carolina home and travelled to South Carolina where she married a black man, Pink Ross, a longstanding South Carolina resident. Again their marriage was legal in South Carolina but would have been illegal in North Carolina. There was no evidence that Sarah intended ever to return to North Carolina, although she did in fact return with her husband to North Carolina just a few months after her marriage, in August 1873. Three year’s later they were arrested for fornication, a charge they defended on the basis they were lawfully married. The North Carolina Attorney General tried to argue the application of the public policy exception, namely that, just as incestuous and polygamous marriages, although valid

⁵⁸ *State v Ross* 76 NC 242 (1877).

where celebrated, need not be recognised as valid in a subsequent domicile, so interracial marriages also need not be recognised in a subsequent domicile, even if valid in the state of celebration and domicile at the time of marriage.⁵⁹ That argument was rejected by the court, which held by a majority opinion that, although regarding interracial marriages as ‘revolting’, the general rule under ‘comity to our sister States’ should prevail: a marriage valid where celebrated should be recognised throughout the United States.⁶⁰ The decision is particularly interesting in that the same court in the same term chose to recognise a migratory marriage under principles of comity whilst refusing to recognise what it saw as an evasive marriage of its own domiciliaries in the case of the Kennedys.

If, as claimed, ‘non-evasive interracial marriages... were routinely recognised in states that banned miscegenation’⁶¹, then recognition of same-sex marriages should also be routine, even if considered ‘revolting’ by the forum state. In reality, however, the recognition was not as widespread as some authors claim. The Virginia federal court in *Kinney* commented (*obiter*) that it would not have recognised Kinney’s marriage even if it had involved ‘citizens of another state, lawfully married in that domicile, afterward migrating thence in good faith into this state’.⁶² Wardle likewise believes that the recognition of other state’s interracial marriages was primarily driven by increasing acceptance in the forum state, and that this is what may explain the decisions of the Mississippi courts in *Miller*, in that in 1923 the policy forbidding intimate relations between races was strong but had waned sufficiently by 1948 to permit inheritance.⁶³

4. Visitor Cases

Even the Virginia federal court in *Kinney* declared that Virginian law would not prevent a interracial couples being able to exercise their ‘right of transit... through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence’. The US Constitution also grants a right to unimpeded travel, which has led most authors to conclude that visitor marriages should always be respected.⁶⁴ In practice visitor marriages were rarely tested in courts, as the circumstances in which a claim to marriage recognition might be made

⁵⁹ Strasser (n 29), 47.

⁶⁰ *State v Ross*, (n 58), 247.

⁶¹ Grossman, (n 18), 103.

⁶² 14 F Cas 602 (CCED Va 1879) (no 7825), 606.

⁶³ Wardle (n 17), 1896, fn 182.

⁶⁴ Mark Strasser, ‘Interstate Marriage Recognition and the Right to Travel’ (2010) 25 Wisconsin J Law, Gender & Society 1

by a temporary visitor are limited. For example, white couples seeking to book a hotel room as a married couple were unlikely to be refused on the basis of questioning as to their degree of consanguinity, and refusals to grant married status in temporary situations might not always justify the time and expense of taking legal action. Koppelman rightly points out that visiting interracial married couples would not even have had the opportunity to obtain judicial recognition because such rights were often unenforceable under the prevailing lack of rule of law: 'Interracial couples attempting to travel through the deep South would not have been tried for miscegenation. They would have been lynched...'⁶⁵

As a result there is no extensive body of American caselaw pointing out how visitor marriages might be treated. Authors point to the lack of authority on this precise question and bemoan the resulting lack of clarity.⁶⁶ Although in theory recognition should not be problematic, practice does not bear this out. For same-sex couples this means that their status is vulnerable as soon as they travel to a different state, and might affect them in such matters as hospital visitation rights in the event of an accident or the right to make medical decisions on behalf of their partner, or even the propensity of hotel owners to accord them a double room.

The miscegenation cases are interesting because they already show the distinctions which can be drawn between different types of marriage, showing that cross-border recognition can be more justifiable in some cases (migratory and visitor) than others where the forum state retains control over its own residents (evasive). As I will show in later chapters, these distinctions are highly relevant in the EU. The US angle also shows, however, the power of the public policy exception, and its tendency to be used as an expression of political will, again a recurring theme.

IV. Full Faith and Credit

One argument also used to try to mandate cross-border recognition of same-sex marriages and civil unions is the 'full faith and credit' article of the US Constitution, and the discussion here has certain analogies with arguments used in the EU concerning the mutual recognition of civil status documents.⁶⁷ Full Faith and Credit has also been used, wrongly, as a reason to support

⁶⁵ Koppelman, (n 5), 49.

⁶⁶ Andrew Koppelman, 'Against Blanket Interstate Non-Recognition of Same-Sex Marriage' (2005) 17 Yale JL & Feminism, 205, 208.

⁶⁷ Per Cramér, 'Reflections on the Roles of Mutual Trust in EU Law', Chapter 3 in Dougan, M. and Currie, S. (eds), *50 Years of the European Treaties* (Hart 2009), 43, 52. See further Chapter 6.

marriage-recognition, and similar arguments, with arguably no greater success, have been made in Europe on the basis of the TFEU obligation of ‘loyal cooperation’.⁶⁸

The US Constitution provides:

Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, recordings and proceedings shall be proved, and the effect thereof.⁶⁹

Since 1790 the implementing Statute adopted by Congress⁷⁰ made clear that the duty extends to giving effect to judgments handed down in other states. However, the first sentence was generally interpreted as relating to the evidentiary weight of public acts and records (ie that they would indeed be treated as being public acts and records and, in the case of statutes, would be treated as reflecting the law applicable in that other state), but not that it prescribed the effect that such statutes and acts would have in other states.⁷¹

Whitten asserts that it was not until 1887 that the first sentence was interpreted in a broader sense of requiring a state to give effect to another state’s statutes, and that evolved into a modern interpretation where the forum state is entitled to apply its own law to a case “any time it has sufficient contacts with the parties or events giving rise to suit to give it a legitimate interest in doing so.”⁷² This view is shared by Koppelman, who explains:

Except for judgments of courts, the full faith and credit clause has never been much of a constraint on states’ power to fashion choice of law rules. The Supreme Court has held that full faith and credit does not impose any limitation on a state’s choice of law distinct from the limitation imposed by the requirements of due process.⁷³

⁶⁸ Roberto Baratta, ‘Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC’ [2007] 1 *Praxis des Internationalen Privat- und Verfahrensrechts* [IPRax], 4.

⁶⁹ US Constitution Article IV, s1.

⁷⁰ Act of May 26, 1790, ch 11, 1 Stat. 122 codified at 28 USC § 1738 (2000).

⁷¹ Ralph G Whitten, ‘Full Faith and Credit for Dummies’ (2005) 38 *Creighton L Rev* 465, 466-469.

⁷² *ibid*, 469.

⁷³ Koppelman (n 5), 118, citing *Sun Oil v Wortman*, 486 US 717, 729-30 n.3 (1988).

Many commentators⁷⁴ and even judges⁷⁵ have argued that the clause would require States to recognise same-sex marriages granted by other States.⁷⁶ However, their argument only works if one of the following two approaches is used: either the first sentence of Article IVs1 is treated as relating to non-evidentiary effect, and as constituting a standalone principle capable of application independently of any implementing statute; or marriages themselves (i.e. marriage certificates) are treated as analogous to judgments in the same way as divorce decrees.

The first of these interpretations cannot stand, as it would mean that every law or public act made by one State would be valid *and take effect* in every other State regardless of what the host or forum state's laws said, and would obviate at a stroke the entire conflict of laws doctrine. Koppelman gives the analogy of the holder of a licence to carry a concealed handgun (not uncommon in Texas and some other states) who would then have the right to carry the gun in every other state, including those which do not permit carrying handguns.⁷⁷ This may not be the best analogy, as the Texan gun licence presumably does not purport to give its holder permission to carry a weapon generally, but only in Texas. However, other documents clearly are expected to have wider application, such as a licence confirming the right to drive a car, but this cannot be expected to overrule any restrictions or conditions which might be imposed by another state's laws.

The second interpretation, that a civil union or marriage is equivalent to a judgment in the same way as a divorce decree, is also widely rejected as 'a fundamental misconception'⁷⁸ or even 'a preposterous idea'.⁷⁹ Koppelman points out:

the Clause requires states only to recognize other states' judgments, rendered after adversarial proceedings. There is almost no authority for the proposition that 'full faith and credit' applies to marriage, and there is a great deal of authority to the contrary,

⁷⁴ Habib A Balian, 'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status', (1994-95) 68 S Cal L Rev 397.

⁷⁵ Robert H Bork, *Slouching Towards Gomorrah, Modern Liberalism and American Decline* (1996), quoted (and scathingly dismissed) in Whitten, (n 71), 488.

⁷⁶ Rebecca Paige, (n 15), 167 fn 4.

⁷⁷ Andrew Koppelman, (n 5), 118.

⁷⁸ *ibid.*

⁷⁹ Whitten, (n 71), 479. See also Patrick J Borchers, 'The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate' (2005) 38 Creighton L Rev 353, 358.

indicating that states may decline to recognize foreign marriages when those marriages are contrary to the strong public policy of the forum state.⁸⁰

Despite the strength of animosity, some continue passionately to assert a role for full faith and credit, dismissing the ‘smug certitude’ of those who disagree and bemoaning how they portray anyone who assumes differently as ‘something close to a dimwit.’⁸¹ Sanders claims that, in the absence of any Supreme Court decision on the matter, there is still a good argument to be made for applying full faith and credit to marriage, particularly to migratory marriages if not evasive ones, and that nothing in the Constitution creates a public policy exception to the full faith and credit mandate.⁸²

The Supreme Court decision in question will soon take place and can be hoped to put an end to the discussion. The 6th Circuit Court of Appeals held in November 2014 that ‘If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries.’⁸³ The Court goes on to say that the plaintiffs ‘wisely’ do not invoke the Full Faith and Credit Clause. Citing *Nevada v Hall*⁸⁴ which found that the clause ‘does not require a State to apply another State’s law in violation of its own legitimate public policy’, the Court concluded ‘If defining marriage as an opposite-sex relationship amounts to a legitimate public policy – and we have just explained that it does – the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.’⁸⁵ The Supreme Court is expected to confirm or reject this in April 2015, as discussed below.

⁸⁰ Andrew Koppelman, ‘Interstate Recognition of Same-Sex Civil Unions after *Lawrence v Texas*’ (2004) 65 Ohio St L J 1265.

⁸¹ Steve Sanders, ‘Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom’ (2014) 89 Ind LJ 95, 96.

⁸² *ibid*, 102.

⁸³ Case 14-1341 *DeBoer v Snyder*, Document 184-2, US Court of Appeals for The Sixth Circuit, Opinion filed 6 November 2014 in Cases 14-1341/3057/3464/5291.5297/5818, 38 available from <<http://www.ca6.uscourts.gov/opinions.pdf/14a0275p-06.pdf>> accessed 8 March 2015.

⁸⁴ *Nevada v Hall* (1979) 440 US 410, 422.

⁸⁵ *DeBoer v Snyder* (n 83), 38.

V. The Defense of Marriage Act and the Significance of State Statutes denying Recognition

Massachusetts was the first US state to introduce same-sex marriage, in 2004, but the debate about cross-border recognition started some years earlier. In the early 1990s it appeared that Hawaii was about to introduce same-sex marriages following the judgment in *Baehr v Lewin* to the effect that a ban on same-sex marriage breached the Hawaiian constitution.⁸⁶ The case did not in fact lead to the introduction of same-sex marriages in Hawaii. After many years of judicial activity Hawaii put the argument on hold when it changed its constitution in 1998. However, the case triggered the beginnings of a discussion which continued for many years.⁸⁷ Initial academic debate on same-sex marriage had focussed on whether there was a constitutional right to marry someone of the same sex, and whether marriage was an option for same-sex relationship recognition.⁸⁸ As soon as *Baehr v Lewin* presented a vision of same-sex marriage becoming a reality,⁸⁹ the focus then turned to how such a marriage would be treated across borders, and whether the traditional conflict of laws rules would continue to apply.⁹⁰ As mentioned, extensive literature and case law was already in place resulting from conflicts issues concerning the interstate recognition of interracial marriages.

Cox immediately recognised the question as one of traditional conflicts law, working from the underlying choice-of-law principle which generally controls recognition of out-of-state marriage cases: 'if a marriage is valid where celebrated, then it is entitled to recognition in the celebrants' home state'.⁹¹ She goes on with considerable foresight to identify that recognition would also depend on policy decisions made by state legislatures and state courts:

Although many states have statutes affirming the basic rule, others have statutes prohibiting 'evasion' of state marriage restrictions by domiciliaries leaving the state,

⁸⁶ *Baehr v Lewin*, 852 P.2d 44 (1993).

⁸⁷ Barbara Cox, 'Same-Sex Marriage and Choice-of-Law: If we marry in Hawaii, are we still married when we return home?' (1994) Wis L Rev 1033.

⁸⁸ *ibid*, 1035 and the works Cox refers to at fn10.

⁸⁹ "Thanks to the Hawaii case and the ongoing freedom-to-marry movement it sparked, the idea of gay people getting married has gone from an 'oxymoron' ridiculed by our opponents, or a dream un-discussed by non-gay people (and most gay people, too), to a reality waiting to happen." Evan Wolfson, 'The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality' in Robert Wintemute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships* (Hart 2001), 174.

⁹⁰ For example Joseph W Hovermill, 'A Conflict of Law and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages' (1994) 53 MLR 450.

⁹¹ Cox (n 87), 1041.

marrying in another state, and returning to the pre-marital domicile. States without these statutory mandates turn to choice-of-law theories for guidance in making the policy decision whether to affirm or reject the couple's marriage. A review of these statutes and theories leads the reader to understand that little more than guidance exists. Courts retain significant discretion in deciding whether to recognize their domiciliaries' out-of-state marriages.⁹²

Cox's analysis is limited to what she considers to be the 'most likely scenario' where a same-sex couple, resident and domiciled in a particular US state where same-sex marriage is not available, travels to another state (assumed to be Hawaii) in order to get married before returning to their home state to 'assert their status' as a married couple.⁹³ Although she only looks at one type of cross-border marriage recognition problem (now commonly referred to as 'evasive marriage'), out of at least *four* types of scenarios which have now been identified where cross-border recognition is an issue,⁹⁴ she was correct to highlight this as the most likely scenario.⁹⁵ Cox was also correct in identifying the importance of choice-of-law theories for those states, a majority at the time, which did not have 'statutory mandates' outlawing recognition of evasive marriages.⁹⁶

In a knee-jerk reaction to the possible introduction of same-sex marriages by Hawaii, the US Congress passed the Defense of Marriage Act ("DOMA")⁹⁷ in 1996. The Act had two main provisions. Firstly, in Section 3, it laid down a definition of marriage as being solely between a man and a woman for US federal purposes. In doing so, it purported to grant the US federal government and federal agencies the ability (and duty) to ignore same-sex marriages, namely a case of vertical non-recognition. Secondly, in Section 2, it enshrined a right for individual states not to recognise same-sex marriages performed in other states, in what can be seen as a case of horizontal non-recognition. Section 3 has now been struck out as unconstitutional, and Section

⁹² *ibid.*

⁹³ *ibid.*, 1062, and fn 167.

⁹⁴ See Chapter 1.

⁹⁵ UCLA Law School in March 2009 highlighted that Vermont (which had already introduced civil unions in July 2000 and which then introduced same-sex marriage in September 2009) might expect 997 resident same-sex couples to marry in the first three years, but 8212 out-of-state couples to visit in order to get married. Most of these couples would be from New York where same-sex marriage was not [yet] in place but where the marriage would be recognised: Ramos, Badgett and Sears, 'The Economic Impact of Extending Marriage to Same-Sex Couples in Vermont', The Williams Institute March 2009, < <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Ramos-Seras-VT-Econ-Impact-Mar-2009.pdf> > accessed 14 October 2012

⁹⁶ Cox (n 36).

⁹⁷ Pub L no 104-199, 110 Stat 2419 (1996) codified as 28 USC § 1738C [1996].

2 may soon meet a similar fate. Whilst not directly relevant to the EU, the issues which arise, such as the competence of the federal authorities to act in matters of family law, and the legitimacy of one State refusing to acknowledge a same-sex marriage performed in another, are clearly of interest.

1. Vertical Non-Recognition and Definition of Marriage

Section 3 DOMA provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Despite purporting only to regulate recognition at a federal rather than a State level, this is far-reaching as it nevertheless presumes to set out a definition of marriage. This had previously been within the exclusive jurisdiction and competence of the States themselves. From the start the provision was widely argued to be unconstitutional.⁹⁸ It initially survived numerous legal challenges⁹⁹ but was eventually struck down in 2013.¹⁰⁰ Having inherited a substantial estate from her life-long partner Edith Windsor was liable to federal inheritance tax of \$360,000 and denied the benefit of a spousal exemption which would have provided a total exoneration, because the federal government was not permitted to recognise the couple's 2007 Ontario marriage. The case struck down s3 DOMA as a breach of the Equal Protection provisions under the Fifth Amendment of the US Constitution. Where a particular State had decided to open up access to marriage status for same-sex couples, it was a violation of basic due process and equal protection principles for DOMA to seek to injure a class the State wanted to

⁹⁸ W Sherman Rogers, 'The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive' (2010-2011) 54 Howard L.J. 125. For a contrary (and ultimately unsubstantiated) view see Lynn Wardle, 'Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution' (2010) 58 Drake L. Rev 951.

⁹⁹ Eg *In re Kandu* (315 BR 123) (2004) concerning a refusal to accept a joint bankruptcy filing (under Federal legislation) from a couple previously married in British Columbia.

¹⁰⁰ *US v Windsor*, US Supreme Court 26 June 2013, 133 S Ct 2675 (2013); available at <http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf> accessed 27 October 2014.

protect.¹⁰¹ In this way *US v Windsor* reinforced the individual states' prerogative, under the Tenth Amendment, over matters of marriage.

2. Horizontal Non-Recognition and State Laws Prohibiting Recognition

US v Windsor did not, however, affect Section 2 of the Act, which retains a right for individual states to choose not to recognise other state's same-sex marriages. It provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

As such it relieves states of any obligation (whether under the Full Faith and Credit Clause, comity principles or conflicts of law analysis) to recognise any same-sex marriage registered in other US jurisdictions. It has subsequently been interpreted as applying also to same-sex marriages registered in overseas jurisdictions (despite the wording referring only to 'States' as a defined term referring to each of the United States).¹⁰²

a) Does Non-recognition require a Statute?

DOMA s2 adds little to the prevailing law, given that States are free to invoke the public policy exception to deny recognition in any event. Full Faith and Credit obligations would not by themselves have required a State to recognise another State's marriage if contrary to the forum state's strong public policy. Arguments have been put forward that the Clause serves no purpose.¹⁰³ This is not quite accurate, however, because for many years there was a parallel debate over the extent to which a forum state could invoke public policy in the absence of an explicit statute providing for non-recognition or illegality, or at the very least a clear statement of positive law such as Court of Appeal jurisprudence.

¹⁰¹ *ibid.*

¹⁰² Many of the cases brought in the US concern marriages celebrated in Canada, including *In re Kandu* (n 99).

¹⁰³ W Sherman Rogers, 'The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive' (2010-2011) 54 *Howard LJ* 125, 135, and fn 53: 'Section 2 of DOMA seems to have been completely unnecessary since states can deny recognition to state laws (e.g., marriage statutes) that violate the local public policy of the forum state (at least when the public policy of the state does not violate the United States Constitution)'.

Koppelman claims the public policy exception only ‘trumps’ the recognition principle where it is enshrined in statute, meaning a statutory ban on same-sex marriage would be needed to justify withholding recognition.¹⁰⁴ Hovermill, writing in 1994, argued that statutes should be explicit to express a strong public policy against recognition of an out-of state marriage.¹⁰⁵ Kramer took the opposite view, finding ‘in conflict of laws the phrase ‘public policy’ normally refers to judge-made exceptions to a state's choice-of-law rules and does not include exceptions created by statute.’¹⁰⁶ Wardle acknowledged that a concrete indication of public policy was required, and that the public policy exception would no longer work to deny recognition of same-sex marriage simply based on some notion that it might be ‘deemed contrary to universal justice of natural law’.¹⁰⁷ He claimed, however, that a statute was not needed, and that states which by popular vote had adopted amendments to the state constitutions expressly banning same-sex marriage had shown sufficiently strong public policy to override the general comity rule of marriage recognition.¹⁰⁸ Judicial decisions could also be enough, as long as these were a clear indication of ‘positive law’.¹⁰⁹

This was a topical debate following *Baehr v Lewin* at a time when relatively few states had non-recognition or evasive marriage statutes. Unsurprisingly, at a time when no state had permitted same-sex marriage, there was no American statute preventing recognition either. Most states against same-sex marriage were not prepared to take any risk. Since 1992 forty states, fearful of being required to recognise same-sex marriages within their own borders (particularly evasive marriages concluded between their own domiciliaries) and sufficiently concerned to ensure that their own public policy would be explicit enough to overrule the *lex loci celebrationis* rule, enacted legislation declaring other states’ same-sex marriages to be void or prohibited. Until 2013 these statutes (often referred to as “mini-DOMAs”), were upheld by American courts to preclude recognition in evasion cases¹¹⁰ and also migratory cases, although the constitutionality of these statutes in cases other than evasion has been rightly doubted.¹¹¹

¹⁰⁴ Koppelman (n 5), 106.

¹⁰⁵ Joseph W Hovermill, ‘A Conflict of Law and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages’ (1994) 53 Md L Rev 450.

¹⁰⁶ Kramer (n 45), 1972.

¹⁰⁷ Lynne Wardle, (n 17), 1909.

¹⁰⁸ *ibid*, 1911.

¹⁰⁹ Wardle (n 49), 1916, emphasis added.

¹¹⁰ Koppelman (n 5), 103.

¹¹¹ Mark Strasser, ‘The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel’ (1999-2000) 52 Rutgers LR 553.

Even if a statute is required, it has generally been accepted that states have the right to pass such legislation, at least in relation to their own domiciliaries (i.e. covering evasive marriages).¹¹² That meant that, leaving aside the purposed unconstitutionality of the mini-DOMAs apply to migratory (and even visitor) marriages, the conflicts analysis no longer gets us very far. To that extent things have not moved on far from the situation in some states governing interracial marriages in 1938, where the Alabama Supreme Court held:

The Legislature is fully competent to declare what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who left the state of domicile for the purpose of avoiding its statute.¹¹³

b) The Impact and Constitutionality of Section 2 DOMA

Aside the question whether s2 DOMA adds anything to the powers of the States to refuse to recognise same-sex marriages using public policy, it does have an impact in another way. Even if the marriage itself could escape recognition without DOMA, the Act does ensure that Full Faith and Credit obligations are not applicable to a *judgment* or *court order* of another State based around the recognition of a same-sex marriage in that State. For example, a couple with joint custody of a child might have obtained a court order governing maintenance and support obligations towards each other and towards the child following the break-up of a same-sex relationship. Imagine the child moves with one of its parents to another State, leaving the other parent in the State where the same-sex marriage or civil union had been recognised. Whilst the new State might have reason to decline to recognise the marriage itself under a public policy exception (although arguably less so if the couple are no longer together and only one parent has moved), that State surely has no public policy reason to refuse to acknowledge the support obligations of the remaining parent. In fact the Full Faith and Credit Implementing Statute¹¹⁴ would ordinarily mandate the host State to recognise the judgment awarded in favour of the carer, yet Section 2 DOMA entitles the new host State, if it wishes, to deny the caring parent the benefit of all maintenance and support, on the basis that this benefit

¹¹² Strasser (n 29), 52.

¹¹³ *Osoinach v Watkins*, 180 So. 577, 581 (Ala 1938).

¹¹⁴ Act of May 26, 1790, ch 11, 1 Stat. 122 codified at 28 USC § 1738 (2000).

is ‘...a right or claim arising from... a relationship between persons of the same sex that is treated as a marriage under the laws of [another] State’.¹¹⁵

This then begs the question whether DOMA s2 is itself unconstitutional as being an overreaching of Congress’s legislative authority. The Full Faith and Credit article might not have been extended by Congressional statute to encompass marriages, but Article IV of the US Constitution does purport in general terms to be applicable to ‘public acts and records’ of every other State. It can therefore be argued that the second sentence¹¹⁶ gives Congress the power only to say *how* full faith and credit is to be accorded, not to say *whether* full faith and credit is to be granted, and certainly not to undermine it by purporting to lay down circumstances in which it might not be granted.¹¹⁷

The striking out of Section 3 DOMA on the basis of violation of the equal protection principles means that the equivalent provisions in the mini-DOMAs (i.e. the same-sex marriage bans themselves) were equally circumspect.¹¹⁸ It does not mean, however, that the provisions relating to cross-border non-recognition were automatically unconstitutional. *US v Windsor* confirmed that Congress had overstepped its powers in purporting to give the Federal Government the right to disregard marriages accorded by individual states, but it said nothing about the continued right for the states themselves to disregard each other’s same-sex marriages. One comment even expressly supports their right to do this, where it says ‘...DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary... from one State to the next.’ The implication is that the territorial principle applies, and States are free to decide in respect of all those located within their borders who is and is not married and what benefits and obligations then flow from that status.¹¹⁹

¹¹⁵ Peter Hay, ‘Recognition of Same-Sex Legal Relationships in the United States’ (2006) 54 Am J Comp L 257 discusses recognition of decrees at 272, fn 81: ‘In the last hypothetical case, traditional judgment-recognition law would say that public policy concerns about the underlying cause of action are no longer recognizable in the face of a money judgment rendered by a court with proper jurisdiction: the support decree should be enforced. “[The constitutional command of the Full Faith and Credit Clause] demands recognition of [the money judgment] even though the statute on which the judgment was founded need not be applied in the state of the forum because it conflicts with the laws and policy of that state.” *Magnolia v. Hunt*, 320 U.S. 430, 439 (1943)’.

¹¹⁶ US Constitution Article IV, s1.

¹¹⁷ Yuval Merin, ‘Equality for Same-Sex Couples’ (Chicago 2002), 234. See also Sherman Rogers (n 98), 158-159.

¹¹⁸ As notably pointed out in Scalia’s dissenting opinion in *Windsor v US*.

¹¹⁹ *Windsor v US*, 570___(2013), 18.

However, the recognition provisions did not survive long in those states subject to successful constitutional challenges against that state's same-sex marriage ban itself. Indeed, as a statute expressly enshrining the 'strong public policy' of the host state in question, a state mini-DOMA provision concerning recognition would appear to be consistent with US conflicts of law principles and override the 'valid where celebrated' rule, as discussed below. However, because Section 3 was struck down as a breach of the Due Process or Equal Protection Clause, the marriage bans too were at risk of the same treatment, and it could not be a state's legitimate strong public policy to deny effect to another state's same-sex marriages if that state was allowing same-sex marriages itself. Logically only a state with its own intact same-sex marriage ban would be able to maintain a ban against recognising other state's marriages. By the end of 2014, when 40 states had passed laws or been subject to litigation requiring same-sex marriage bans to be lifted, the recognition of *other* states' same-sex marriages was only an issue in 10 states.

The legal framework surrounding this issue has developed rapidly in recent months. On 6 October 2014 the Supreme Court declined to hear appeals from various Courts of Appeal which had upheld decisions invalidating same-sex marriage bans.¹²⁰ As a result of that decision, same-sex marriage bans in all states within the jurisdiction of the 4th, 7th and 10th Circuit Courts of Appeal fell away, meaning same-sex couples could marry in five more states - Indiana, Oklahoma, Utah, Virginia and Wisconsin. The following day, the 9th U.S. Circuit Court of Appeals also struck down same-sex marriage bans in Nevada and Idaho. However, on 6 November 2014, in appeals against various cases, the Court of Appeal for the 6th Circuit upheld the same-sex marriage ban in the four states within its jurisdiction, namely Kentucky, Michigan, Ohio, and Tennessee¹²¹ The answer to one question considered by the Court is of particular interest to this thesis:

Does the Constitution prohibit a State from denying recognition to same-sex marriages conducted in other States? That is the question presented in the two Ohio cases (*Obergefell* and *Henry*), one of the Kentucky cases (*Bourke*), and the Tennessee case

¹²⁰ 'US supreme court decision paves way for sweeping expansion of gay rights', The Guardian (London) online version, 6 October 2014, available at <<http://www.theguardian.com/us-news/2014/oct/06/gay-rights-supreme-court-same-sex-marriage>> accessed 8 March 2015.

¹²¹ US Court of Appeals for The Sixth Circuit, Opinion filed 6 November 2014 in Cases 14-1341/3057/3464/5291.5297/5818, available from <<http://www.ca6.uscourts.gov/opinions.pdf/14a0275p-06.pdf>> accessed 8 March 2015.

(*Tanco*). Our answer to the first question goes a long way toward answering this one.¹²²

If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries.¹²³

Appeals against these decisions were filed on 17 November 2014.¹²⁴ On 16 January 2015 the Supreme Court decided that it would hear these appeals, and a hearing has been set for 28 April 2015.¹²⁵ The Court is likely to have ruled definitively on the constitutionality of defining marriage as an opposite-sex institution, and the requirement to accord recognition to other states' marriages, by mid-2015.

Some of the issues discussed in this Chapter might then become settled. At the time of writing, however, the debates remains relevant for the ten remaining states prohibiting same-sex marriage, and have become arguably even more important because those ten states are now surrounded by 40 others where same-sex marriage is possible, not only for residents but, usually, for visitors.

VI. Conclusion

Despite learned analysis and debates on the principles of comity and the limits of the public policy exception, it cannot be disputed that in most cases a forum court will not see itself as being obliged to accord recognition to another state's marriage if it really does not want to. In this sense *State v Ross* might be seen as a legalistic exception to the political reality, rather than a widely-followed statement of legal principle.

I have, reluctantly, to agree with Wardle that, historically, in most cases the recognition of controversial foreign domestic relationships lay in determining if local public policy strongly opposed it, and the extent to which giving comity in the particular facts or context of the specific case and the precise issue it raised would undermine that policy: 'the most important factor predicting and controlling recognition of controversial domestic relationships is the

¹²² *ibid*, 38. The first question had concerned the compatibility of same-sex marriage bans with the 14th amendment of the US Constitution, and had been answered in the affirmative.

¹²³ *ibid*.

¹²⁴ <<http://www.freedomtomarry.org/litigation/entry/michigan>> accessed 10 December 2014. See also <<http://www.freedomtomarry.org/pages/marriage-litigation-at-the-6th-circuit>> accessed 8 March 2015.

¹²⁵ US Supreme Court docket 14-571 available at <<http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-571.htm>> accessed 8 March 2015.

strength of the public policy in the forum against the relationship in question...'.¹²⁶ He was also correct that, for all the rhetoric, the public policy exception when applied to same-sex marriage is little more than a political exercise which will require a political solution rather than a conflicts analysis.¹²⁷

Wardle recognises nonetheless that policy is capable of developing over time. Whilst the application of forum statute law may still depend on political will rather than legal doctrine, recognition is still growing: 'as the interracial marriage cases and adult adoption cases show, as the domestic public policy changed in favour of allowing such relationships, courts have shown greater willingness to recognize them from foreign jurisdictions'.¹²⁸

One such pre- *US v Windsor* shift in public policy is exemplified clearly in an Opinion of 23 February 2010 given by the Attorney-General of Maryland to the Maryland senate.¹²⁹ Maryland has a clear law, codified from common law in 1973, that 'Only a marriage between a man and a woman is valid in this State'.¹³⁰ The Attorney-General points out that only six years earlier his Office had given an advice letter stating that out-of-state same-sex marriages would not be recognised under Maryland law. Now, however, the Attorney-General opines that:

While the matter is not free from all doubt, in our view, the Court is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction. In light of Maryland's developing public policy concerning intimate same-sex relationships, the Court would not readily invoke the public policy exception to the usual rule of recognition.¹³¹

Despite this, the development of conflicts law in the US provides few real examples of how cross-border recognition of marriages might be achieved in the EU. In particular the interracial cases do not support many arguments in favour of recognition in Europe. There are two exceptions to this which will be discussed later, as they provide a glimpse of two theories which

¹²⁶ Wardle (n 17), 1904-05.

¹²⁷ *ibid*, 1920.

¹²⁸ *ibid*, 1905.

¹²⁹ Richard Madeleno, 'Marriage –Whether Out-of-State Same-Sex Marriage that is Valid in the State of Celebration may be Recognised in Maryland', Maryland 95 Op Att'y, ("AG Opinion") <<http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>> accessed 29 November 2011.

¹³⁰ Annotated Code of Maryland, Article 62, §1, FL §2-201.

¹³¹ AG Opinion (n 129), 6, and fn 3.

merit a closer inspection, namely attenuated effects in extraterritorial cases, and the potential distinction to be made between the treatment of residents and migrants.

Similarly the history of DOMA and its constitutionality is also only of limited interest to EU matters. However, the issue of competence between States and Federal executives has an interesting resonance in the EU as a system which also appears to reserve exclusive competence in family law matters to the Member States. Leaving DOMA to one side, the question which remains to be answered is the extent to which a particular State can choose to ignore the effects of a marriage entered into in another State. So far a conflicts of law analysis will not serve to override the strong public policy of a forum state in deciding whether to accord recognition to an out-of-state same-sex marriage. This seems to be the case regardless of the approach taken towards conflicts law (eg First Restatement, Second Restatement, Interest Analysis, Incidents Approach). On this basis there is no legal compulsion under US law for a state to have to recognise another state's same-sex marriage which it believes contradicts its own public policy.

However, the forthcoming ruling of the US Supreme Court may well change this in the near future, and the Opinion is to be eagerly awaited for the clarifications it may bring to the Full Faith and Credit principle, the notion of vested rights, or even the constitutional right to same-sex marriage as a matter of federal US law. Whilst the Supreme Court Opinion will of course set no direct precedent for how these matters are seen in Europe, it may well have an indirect influence. The cases may show how arguments of dignity, equality and justice should prevail over public policy exceptions in horizontal recognition cases, in the same way as *US v Windsor* established that these arguments prevailed over the federal ban on recognition in vertical cases. If so, there may yet be scope for some of these arguments to be given greater weight in an EU context.

Chapter 3: Private International Law, Capacity and the Yoke of Nationality

*If a marriage is good by the laws of the country where it is effected, it is good the world over.*¹

I. Introduction

As shown in Chapter 2, public policy exceptions and statutes prohibiting recognition have been used to great effect to override the *lex loci celebrationis* principal which usually applies in the United States. In Europe a more sophisticated system of non-recognition prevails. The development of the concept of personal jurisdiction affecting capacity to marry is one of the key reasons for lack of recognition of same-sex marriages today. If the personal jurisdiction, however determined, does not allow or recognise same-sex marriages, this is seen as a justification to refuse to give effect to married status, even one validly acquired elsewhere. Anyone whose personal law is Italian (on the basis, for example, of Italian nationality or domicile) can find their same-sex marriage, celebrated in Paris, is not recognised in Italy, and possibly not elsewhere, even in the UK. Recognition might still be available, either as a marriage or as converted to a civil partnership, in those jurisdictions which look to the place of celebration to determine the validity of the marriage, but there is no international or European obligation to do this. Recourse to personal law has so far survived both theoretical and practical challenges under EU Law. This chapter sets out the development of the personal jurisdiction doctrine and assesses its implications for same-sex marriages and registered partnerships. I will explore the consequences for same-sex couples of the use of different connecting factors to determine personal capacity, and point out that inconsistent and illogical outcomes arising from personal jurisdiction based on nationality or domicile call into question the credibility of such a system. I advocate that a better approach would be to use habitual residence as a connecting factor, but recognise the negative impact this could have on demographic flows within the EU.

¹ Viscount Dunedin in *Berthiaume v Dastous* [1930] AC 79, 83.

This chapter serves two purposes. First it demonstrates the ‘counterfactual’, the legal situation governed by the law of conflicts which would prevail in the absence of EU Law, and against which compatibility with EU rights needs to be assessed. The public policy exception, which also forms part of this ‘counterfactual’, is treated separately in Chapter 4. This is because it only ‘kicks in’ (where it is applied to deny recognition) where the usual conflicts rules would otherwise require recognition. If, prior to that stage, the conflicts rules themselves lead to a same-sex relationship being denied effect, the public policy exception does not normally need to be invoked.²

A second purpose of this chapter is to highlight the inherent inconsistencies of the national rules on conflicts. The resulting lack of credibility is used to suggest that a particular State’s reliance on conflicts rules to deny recognition of foreign marriages and partnerships is not a mechanism justified by internationally accepted legal principles, but is simply the expression of a unilateral public policy position. Of course, I am aware that a Member State’s public policy position will stand unchallenged in legal terms unless prohibited by a superior rule of EU Law or Human Rights law. However, undermining the credibility of conflicts law might make it easier for the CJEU, when the occasion arises, to focus on the incompatibility with EU rights of the public policy in question.

The structure of this chapter is as follows. First I explain the rise in the notion of personal law affecting capacity to marry, and its relevance for both same-sex marriage and partnerships. I then analyse the various connecting factors used to establish applicable law. This is so as to demonstrate the different approaches used by Member States and the inherent difficulties in seeking to find a common solution. I consider the relative justifications and effects of the use of these factors, so as to set the scene for an assessment of these factors against EU Treaty rights, an analysis which takes place later in Chapter 5. Finally I explore, using a concrete example, how conflicts law and capacity problems have been managed at a national level, independently of any EU initiatives, so as to demonstrate the prevailing legal framework in respect of which any EU requirements would need to be applied.

² The exception is where the forum state now *does* want to recognise a relationship which would otherwise *not* be recognised under conflicts rules.

1. Territoriality versus Personal Jurisdiction

In questions concerning the applicable law when determining the validity of a marriage, states generally seem to have no issue in accepting a principle that the law of the place of celebration governs the formalities around the celebration itself.³ In Britain this has been ‘settled law since 1752’.⁴ These formalities relate to issues such as the form of ceremony, rules as to who may perform the marriage, the wording to be used, the places authorised to host the ceremony, and the number of witnesses required. The result is that courts, in principle, will accept the validity of a marriage lawfully celebrated elsewhere even if the same marriage would have been void had it been celebrated in exactly the same way in the jurisdiction of the forum court - ‘*locus regit actum*’.⁵ By the same token the forum court will generally not recognise a marriage whose formalities do not comply with the requirements applicable in its place of celebration⁶ - even if those formalities would have been sufficient to form a valid marriage in the forum state.⁷ In each case, the forum state effectively relies on the assessment of the place of celebration and will not impose on a foreign state its own notions of what constitutes a valid marriage.

If reliance on rules of the place of celebration were the whole story it would mean a same-sex marriage celebrated, for example, in Belgium in full compliance with local law, should be recognised as a marriage not just throughout the European Union, but throughout the entire world. However, in addition to the public policy exception⁸ there is another qualification to the ‘valid where celebrated’ rule, namely the notion that a ‘personal’ jurisdiction determines the capacity to marry of persons falling under its power. This power may be held by a different jurisdiction from the one where the marriage was performed. Viscount Dunedin’s dictum, despite its wide acceptance in the US, is not then an accurate reflection of the situation under

³ See, for example, Code Civil Article 171-1 which confirms this principle for any marriage conducted outside of France involving a French citizen.

⁴ David McLean and Kisch Beevers, *Morris: The Conflict of Laws* (6th edition, Sweet & Maxwell 2005), 189.

⁵ An extreme application of this principle can be seen by the English Court of Appeal in *McCabe v McCabe* [1994] 1 FLR 410 where it even recognised a foreign “customary” marriage, allowed under local law, which lacked all the elements normally considered essential in England, such as the presence of the bride and groom at the ceremony. The Court was clearly suspicious of the marriage, carried out ostensibly in the Akan tradition under Ghanaian law in a ceremony involving neither of the couple and no proxies, but simply a meeting between the respective families, some money and a bottle of gin, but was at pains to uphold the marriage in the face of contradictory evidence as to whether even these formalities had been met. One can but speculate whether this desire was influenced, against the wishes of the Ghanaian respondent, by the fortuitous fact that upholding the marriage meant the English courts could then also give effect to his wife’s petition for divorce.

⁶ In *Berthiaume v Dastous* it was precisely this question of formal validity at issue – a Roman Catholic church marriage celebrated in Quebec was void as the couple had not complied with the requirements of local (at the time, French) law requiring a civil ceremony as well.

⁷ The exceptions to this under English law are set out in *Morris’ Conflict of Laws* (n 4), 193.

⁸ Discussed further in Chapter 4.

English law. He himself said it was only true ‘...putting aside the question of capacity’.⁹ Therein lays the trouble, as it is precisely the question of capacity which prevents a marriage, ‘good’ in its home state, being good the world over.

There developed in Europe a doctrine of capacity to marry, governed by a personal law which exists independently of the law which applies in the place of celebration. This reflects a broader distinction, in place for many centuries, between systems of law in force within a particular territory and applicable to everyone present in that territory, versus systems which apply the law of a particular state to all that state’s citizens wherever they might be located.¹⁰

Huber (1636-1694) had favoured territorially-based choice of law rules, and was the first to acknowledge that recognising foreign created rights was merely a concession which a state made for convenience and utility, rather than as a duty or obligation.¹¹ His territorialism met challenges in many European countries, with many countries favouring, for at least certain purposes, the competing idea of personal jurisdiction covering the activities of all citizens. This approach had been used by the Roman empire insofar as it had a distinct body of rights applicable only to Roman ‘citizens’ throughout the Empire (as opposed to the lesser rights given to locals or slaves),¹² as well as being the basis for laws which applied to the ‘wandering Jews’ in Egypt and Canaan.¹³ Thus when Savigny in the 19th century sought to promote a ‘seat’ theory, based around finding the most appropriate nexus for the legal relationship using a connecting factor, he explained the notion of personal law had been useful to ‘wandering tribes’ with no fixed territory, but that the territory principle had already taken precedence ‘in course of time, and with the advance of civilisation’. In this way he accuses personal law of already being obsolete, a trend he attributed to the removal of the ‘rougher contrasts of nationalities due to increasing contact between nations and the harmonising influence of the spread of Christianity.’¹⁴ On this basis a personal law system could only be seen as necessary where the differences between the laws of the ‘home state’ and the laws of the place of residence are markedly different. The need decreases as local legal systems become more homogenous.

⁹ *Berthiaume v Dastous* (n 1).

¹⁰ For an overview of the various approaches see Ralf Michaels, ‘The New European Choice-of-Law Revolution’ (2008) 82(5) *Tulane Law Review* 1607; also Mo Zhang, ‘Party Autonomy in Non-Contractual Obligations: Rome II and its Impacts on Choice of Law’ (2009) *Seton Hall Law Review* 861, available at <<http://erepository.law.shu.edu/shlr/vol39/iss3/4>> accessed 3 January 2015.

¹¹ Ernest Lorenzen, ‘Huber’s de Conflictu Legum’ (1919) 13 *Ill LR* 375, 378.

¹² Richard Bellamy, *Citizenship, a Very Brief Introduction* (OUP 2008), Ch 4.

¹³ Carl Friedrich von Savigny, *A treatise on the conflict of laws, and the limits of their operation in respect of place and time* (William Guthrie transl, Edinburgh 1869), §346.

¹⁴ *ibid*, 17.

Nevertheless, in 19th century Europe sensitivities around nationhood must have favoured the application of a personal national law as a means to achieving a national identity, and, for colonial powers, personal law could have been an effective tool to ensure European nationals did not adopt local practices (such as polygamy) in other parts of their empires. The first French Civil Code established as one its first rules¹⁵ that the personal status of French citizens was to be governed by French law even if they lived abroad, and the influence of the Code was such that this idea spread quickly to Spain, the rest of Europe, and other parts of the world.¹⁶ Germany readily accepted the idea of a German law to everyone considered 'German', in whichever country they might be living.¹⁷ Mancini saw a way to combine both a territory principle and personal law, where he favoured personal law as it related to the nation as a whole, rather than signifying a connection to the city or province in which one lived. He saw it inserted into the Italian civil code of 1865 as a means to foster adherence to the newly created Italian nation.¹⁸ Thus, for family law and personal status a personal jurisdiction centred on nationality or domicile came to prevail both in civil law systems¹⁹ and, as will be seen, in Britain.

Nationality is falling out of favour as the basis for personal jurisdiction, partly prompted by former European colonial nations finding ways to cope with immigration encouraged from previous colonies. Once again the protection of territorial values against foreign practices became paramount, as can be seen by the reforms to the German system of private international law in 1986 to reduce the role played by nationality.²⁰ Caselaw has similarly reduced the role of the nationality principle in France.²¹ Perhaps in order to avoid accusations of cultural imperialism various public policy tests have been developed to avoid the application of foreign laws but without abolishing the concept of personal law.²² The effect of this is that

¹⁵ Article 3, Code Civil (1803).

¹⁶ Alegría Borrás and Julio D Gonzáles Campos, 'La Loi Nationale à l'Heure de la Réforme du Droit International Privé Espagnol' in Oliver Barret (ed), *Le Droit International Privé: Esprit et Methodes, Mélange en l'honneur de Paul Lagarde* (2005 Paris, Dalloz), 137.

¹⁷ Jürgen Basedow, 'Das Staatsangehörigkeitsprinzip in der Europäischen Union', (2011) 2 IPrax 109.

¹⁸ Kurt H Nadelman, 'Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality versus Domicile' (1969) 17 Am. J. Comp. L. 418.

¹⁹ Dieter Martiny 'Objectives and Values of (Private) International Law in Family Law'. Chapter 2 in Johan Meeusen, Marta Pertegas, Gert Straetmans, Frederik Swennen (eds), *International Family Law for the European Union* (Intersentia, 2007), 69. See also Bucher, A, *La Famille en Droit International Privé* (Collected Courses of the Hague Academy of International Law, (2000) 283 Recueil des Cours) 9, 25.

²⁰ Basedow (n 17), 111.

²¹ For example, France will no longer recognise a talaq divorce as soon as one of the couple lives in France: Patrick Courbe, 'L'Ordre Public de Proximité', in Oliver Barret (ed), (n 16).

²² John Murphy 'Rationality and Cultural Pluralism in the Non-Recognition of Foreign Marriages' (2000) 49 ICLQ 643.

the recognition of same-sex relationships now depends on a mixture of both capacity rules and public policy exceptions.

2. Civil Partnerships: Capacity-Free?

Unlike the situation for marriages, most jurisdictions which have enacted legislation on the recognition of foreign registered partnerships use the law of the place of registration as being determinative for both the formal and essential elements of validity.²³ This has led to suggestions that non-marital registered partnerships can be distinguished from marriages, where different policy objectives might apply, in order to facilitate the abandonment of a personal law connecting factor. The argument is that, for the treatment of marriage, legal certainty, coherence in the legal category of personal status and a reduction in the problems associated with forum shopping are reasons for the maintenance of a personal law connecting factor. Conversely for civil partnerships, factors that refer to the personal law of the parties do not provide an adequate solution to the problem posed and will inevitably lead to more couples being prevented from entering into such relationships.²⁴ Wautelet points out that the private international law treatment of civil partnerships was for many years an ‘embarrassment’.²⁵ The original short-lived and unconvincing treatment of partnerships as contractual relationships was replaced by acknowledgment that partnerships were family relations, but widespread recognition emerged that specific rules were needed given differences with marriage. This led to a view that access to partnership should be governed by the *lex loci registrationis*.²⁶ Whilst this view would be attractive if it did indeed lead to greater recognition, the qualification of civil partnerships as ‘non-marital’ relationships justifying different treatment from marriages is becoming increasingly difficult to maintain, for reasons I will explain.

States performing registered partnerships originally limited eligibility by imposing strict requirements as to residence or nationality before allowing registrations to take place, thereby minimising forum shopping and avoiding the creation of legal institutions which would not be

²³ Curry-Sumner, I, *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe* (Antwerp, Intersentia 2005), 387.

²⁴ *ibid.*

²⁵ Patrick Wautelet, ‘Private International Law aspects of same-sex marriages and partnerships in Europe – Divided we Stand?’ in K Boele-Woelki and A Fuchs(eds), *Legal Recognition of Same-Sex Relationships in Europe*, (2nd edition, Intersentia, 2012) 143, 153.

²⁶ *ibid.*, 152.

recognised elsewhere.²⁷ Because registered partnerships are not universal, and capacity to enter a partnership was not a commonly-understood concept, states had little choice but to determine their own rules. The validity of the union, both as to formal and essential matters, depended on the *lex loci registrationis*.²⁸ The early Scandinavian, Nordic and Dutch partnerships used a connecting factor in that they required a close connection with the registering state, such as residence or even nationality of the state in question for one or sometimes even both partners.²⁹ Some countries require at least one of the partners to be a citizen or permanent resident before they are allowed to register a partnership. Denmark, the first country to introduce same-sex registered partnerships in 1989, required one of the partners to be a Danish national and permanently resident in Denmark, although the nationality requirement was removed in 1999 as long as both partners had been living in Denmark for two years.³⁰ In the Netherlands registered partnerships were out of bounds to foreigners without a ‘residence entitlement’ until 2001, even if the other partner was Dutch.³¹ France requires a *résidence commune* in France, i.e. a sole or main residence in France, rather than a temporary presence. In each case, whilst the law of the registering state is applied to determine essential validity and ‘capacity to register’, the registering state now imposes its own connecting factors. The variety of connecting factors used by different States is no less varied than it is for marriage, with States using habitual residence,³² nationality,³³ as well as simply the *lex loci registrationis*.³⁴ The effect is that ‘capacity to form a registered partnership’ is still determined in many instances by personal factors such as nationality and domicile, and the long-arm of a ‘personal law’ is still keenly felt.

When it comes to the recognition in a state of partnerships performed elsewhere, states do generally apply the *lex loci registrationis* to determine capacity, relying on that state’s restrictions on allowing foreign residents or nationals to register as a way of minimising conflicts. This is

²⁷ Kenneth McK Norrie ‘Recognition of Foreign Relationships under the Civil Partnership Act 2004’ (2006) 2 J Priv Int L 137; Wautelet (n 25), 155.

²⁸ German law specifically provides that questions of capacity to enter into a *Lebenspartnerschaft* are to be governed by German law: Art 17(b) EGBGB.

²⁹ Merin, Y, *Equality for Same-Sex Couples, The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago 2002), 100 and 118.

³⁰ The Danish Registered Partnership Act, No. 372 (Denmark 1989); repealed 15 June 2012 when replaced with gender-neutral marriage.

³¹ Kees Waaldijk, ‘How the Road to Same-Sex Marriage Got Paved in the Netherlands’, Chapter 23 in Wintemute and Andenaes (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart 2001), 445.

³² France, Netherlands, Belgium.

³³ Slovenia and the Czech Republic require at least one partner to be a citizen.

³⁴ UK, Germany.

the case for the UK (and remains the case for the recognition of overseas partnerships, although not for marriages). However, new legislation has not followed this approach. Possibly because of the increasing recognition that partnerships are far from ‘non-marital’ given their almost identical effects and treatment as marriages in some jurisdictions, the treatment of partnerships is now as complex as marriages and is increasingly explicitly subject to notions of personal capacity. For example, Malta has introduced capacity tests, based on domicile, in its new partnership law.³⁵ These, for example, will restrict the ability of Italians to register partnerships in Malta even if they live there. Maltese law will also only recognise a foreign union if the parties had capacity to form it, again based on prior domicile, whether the union is a marriage³⁶ or a partnership.³⁷ Conversely, Poland has extended notions of capacity in order to deny the ability for Polish nationals to enter registered partnerships abroad, and refuses to grant certificates of no impediment or other documents confirming ‘unmarried’ status for Poles wishing to conclude partnerships in other Member States.³⁸

Therefore it is no longer true that the policy objectives of partnerships are sufficiently different from those of marriage to avoid the issues around personal capacity. Whilst strategically it is still possible to argue for greater recognition of same-sex partnerships on the basis that these do not purport to alter any definition of marriage, and that nobody should lack capacity to enter into a registered partnership whether at home or overseas,³⁹ this argument has not been successful to date. Italy will not accept a foreign civil partnership, whether involving Italians or otherwise, as giving rise to any effects under national law.⁴⁰ The same applies in Poland.⁴¹ As discussed in Chapter 5, the attempts by the European Commission in the Matrimonial Property proposals to treat partnerships as inherently different from marriages (and hence to have their

³⁵ Civil Unions Act 2014 (Malta)

³⁶ *ibid*, section 6(1).

³⁷ *ibid*, section 6(2)(b).

³⁸ European Parliament, Committee on Petitions, Notice to Members 27 November 2012, ‘Petition 0632/2008 by Robert Biedron on the Polish authorities’ unwillingness to issue certificates of civil status to Polish citizens wishing to enter into a registered partnership with a person of the same sex in another Member State’, CM\920578EN.

³⁹ In particular, for pragmatic reasons I supported the ongoing distinction between marriages and civil partnerships in the European Commission’s proposals on Matrimonial Property Regimes, see Stuart Davis, ‘Same-Sex Couples and the Harmonisation of EU Matrimonial Property Regimes: Unjustifiable Discrimination or Missed Opportunities?’ (2013) CFLQ 19.

⁴⁰ There are exceptions under local municipal laws, notably in Rome and Milan: ‘Rome council approves civil union register’ (ANSA 28 January 2015) available at <https://www.ansa.it/english/news/politics/2015/01/28/rome-approves-civil-unions_e95f95aa-42d4-4b33-a937-4ffb8f1015f5.html> accessed 21 March 2015.

⁴¹ Mateusz Pilich, ‘Die Anerkennung der quasi-ehelichen Verhältniss in Polen aus der kollisions- und europarechtlichen Perspektive’ (2002) 8(4) *Zeitschrift für Gemeinschaftsprivatrecht*, 200.

property consequences governed by the place of registration) has given rise to controversy, and in any event has not smoothed the progress of those proposals in the Council. Indeed, a contrary trend is emerging of treating partnerships as marriages. Just as the domestic effects of recently created partnership regimes tend to be equivalent to those of marriage, so there is a growing tendency to assimilate overseas partnerships and give effect to them as equivalent to national partnerships or even marriages.⁴² Meanwhile earlier ‘marriage-lite’ partnership regimes have been reformed to mirror marriage more closely and to intensify the effects on civil status.⁴³ I take from this that partnerships are increasingly recognisable as marriages in all but name. In light of this, it may no longer be appropriate to make distinctions between marriage and civil partnerships under private international law. Such distinctions will no longer improve the prospects for cross-border recognition of partnerships. They also have unintended negative consequences as they suggest that retaining personal law criteria for the validity of marriages is still justified, even where this then limits the recognition of same-sex marriages.

3. Personal Jurisdiction and Connecting Factors

A particular problem with personal jurisdiction is that the criteria for establishing the relevant ‘connecting factor’ itself varies between different legal systems. Unlike formal validity, there is no general rule governing choice of law in this context.⁴⁴ The UK widely uses its own concept of “domicile” as the primary connecting factor,⁴⁵ although even then its suitability is subject to debate,⁴⁶ whilst a French court would traditionally regard nationality as being the only relevant connection. This means a French national domiciled in England would be considered by British courts to be governed by English law insofar as it affects his capacity to marry. He would continue to be regarded by a French court as being subject to French law. This is regardless of the fact that, in establishing an English domicile, he must have moved to England with an intention to settle permanently here.⁴⁷

⁴² UK, Ireland, Malta, Belgium.

⁴³ Marina Wellenhofer, ‘Das neue Recht für eingetragene Lebenspartnerschaften’ (2005) NJW 705; Joelle Godard, ‘Pacs Seven Years on: Is It Moving Towards Marriage?’ (2007) 21 Int J Law Policy Family 310.

⁴⁴ John Murphy, *International Dimensions in Family Law* (Manchester University Press 2005), 53. See also David McLean and Kisch Beevers *Morris: The Conflict of Laws* (6th edn, Sweet & Maxwell 2005), §1-006.

⁴⁵ By caselaw in England, as will be discussed, and by statute in Scotland (with express reference to the public policy exception) in Family Law (Scotland) Act 2006, s36.

⁴⁶ For a discussion on the respective options and the policy drivers which affect their popularity at any particular time see T Hartley, ‘The Policy Basis of the English Conflict of Laws of Marriage’ (1972) 35 MLR 571.

⁴⁷ Lord Westbury in *Udny v Udny* (1869) LR 1 Sc & Div 441, 458.

The scope and application of these rules are complicated by the number of conflicting theoretical approaches, each attempting to accommodate one or more policy objectives.⁴⁸ These policy objectives are themselves not always coherent, usually where a jurisdiction seeks to apply simultaneously a personal law approach towards its own nationals and a territorial approach to foreigners. For example, under French concepts of capacity a French court would not see itself competent to reject a marriage, even a same-sex marriage, validly conducted outside France between two Dutch men.⁴⁹ However, until 2013 France saw itself competent to impose opposite-sex requirements on any marriage as soon as it was either (i) celebrated on French soil, regardless of the nationality of the spouses⁵⁰ or (ii) involved one or more French citizens, regardless of where it was celebrated.⁵¹

This suggests that national notions of connecting factors relating to essential validity are themselves part of an overall framework of public policy, a view which is further reinforced by recent changes in legislation in France, Belgium and the Netherlands which I discuss later in this Chapter. One reaction to the conflicting theoretical approaches is to try to avoid the conflicts arising in the first place by restricting the class of persons (on the basis of nationality or residence) to whom marriage or partnership is made available. However, as an expression of public policy this itself can appear illogical or unfair. It is controversial where it results in the celebration of marriages between foreigners or non-residents being prohibited whilst those between nationals or residents are not (as is the case for same-sex marriages in the Netherlands). Toner criticises the fact that Belgium did not originally allow non-citizens to marry, seeing this as unjustifiable nationality discrimination.⁵² Fulchiron, conversely, was outraged when Belgium changed its law to allow French nationals to celebrate same-sex marriages in Belgium, seeing this as an ‘overly flexible’ application of private international law.⁵³ Kessler agrees with Fulchiron, arguing that marriages and even registered partnerships should not be made available to non-residents as this is a provocation to the conflict rules of the state

⁴⁸ John Murphy, *International Dimensions in Family Law* (Manchester University Press 2005), 53, and the articles he refers to at fn 105.

⁴⁹ Jean-Pierre Stroobants, ‘La France reconnaît le mariage d’un couple d’hommes néerlandais’ *Le Monde* 5 Sept 2008, available from <http://www.lemonde.fr/europe/article/2008/09/05/la-france-reconnait-le-mariage-d-un-couple-d-hommes-neerlandais_1091846_3214.html> accessed 6 October 2013.

⁵⁰ ‘l’arrêt Bègles’, Cass Civ. 1re, 13 March 2007, <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_9963.html> accessed 3 April 2013.

⁵¹ The applicable rules under the Code Civil were revised and updated by the ‘Loi n° 2006-1376 du 14 novembre 2006 relative au contrôle de la validité des mariages’.

⁵² Toner, H, *Partnership Rights, Free Movement and EU Law* (Hart 2004), 260.

⁵³ Hugues Fulchiron, ‘Mariage et Partenariats Homosexuels en Droit International Privé Français’ (2006) RIDC 409, 422.

of nationality.⁵⁴ Yet the conflicts are not thereby avoided in any event, as those able to marry only in their home state still have the right to acquire property or buy services in other Member States. The question of which law is applicable to determine the validity of a marriage or same-sex partnership cannot be avoided. It might be thought that this makes the question too complicated to consider. As McK Norrie puts it:

It is tempting as an alternative approach, but ultimately not possible, to classify marriage out of existence in international private law terms by holding that each issue has its own conflict of laws rule which exists independently of marriage (e.g. spousal succession rights are a matter of succession rather than marriage, spousal inheritance tax exemptions a matter of tax law, spousal privilege in evidence a matter of procedure etc). However, there are various other issues in which the question of the existence of a marriage simply cannot be avoided and needs to be tackled before the consequences can be dealt with.⁵⁵

This is recognised also by the European Commission, whose 2010 Green Paper consultation on civil status suggests the following solution:

Harmonisation of the conflict-of-law rules might be another possible way of allowing citizens to exercise fully their right to freedom of movement while providing them with greater legal certainty in relation to civil status situations created in another Member State. A body of common rules developed in the European Union would enshrine the right which would be applicable to a crossborder situation when a civil status event takes place.⁵⁶

Greater legal certainty does not, however, necessarily equate to greater recognition. A harmonised system might well provide that one's marriage or partnership, applying this envisaged body of common rules, is not valid outside its original state. The rest of this Chapter explores the complexities of the current system to show why reaching a common solution which provides for greater recognition, as well as legal certainty, may not be as straightforward

⁵⁴ Guillaume Kessler, *Les Partenariats Enregistrés en Droit International Privé* (LGDT, Paris 2005).

⁵⁵ Kenneth McK Norrie, 'Would Scots Law Recognise a Dutch Same-Sex Marriage?' (2003) *Edinburgh LR* 147, 150.

⁵⁶ European Commission Green Paper, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' Brussels 4.12.2010, COM(2010) 747 final, para 4.3(c).

as the Commission implies. The difficulties have now become starkly apparent to the Commission through its experience with the Registered Partnership Property proposals, a topic I return to in Chapter 5.

II. Connecting Factors and Same-Sex Relationships

1. Nationality

Nationality or citizenship was for many years seen in Europe as the obvious solution in choice of law questions, given that the role of the connecting factor is to ensure the applicable law is the one perceived to be the one to which the party in question ‘belongs’, wherever the citizen may happen to be located at any particular time.⁵⁷ Indeed, the German word for nationality, *Staatsangehörigkeit*, means precisely ‘state belonging’. This may help to explain why Germany finds it difficult to justify someone belonging to a system of law based on anything other than nationality.⁵⁸

The use of nationality is often favoured by its proponents as resulting in inherent stability and certainty.⁵⁹ Given the relative difficulties of being able to change nationality (which, nearly always, requires a lengthy prior period of habitual residence in the country in question), a ‘personal status’ based on nationality will prove difficult to modify and will remain attached regardless of any changes of habitual residence or domicile. One difficulty of this intransigence, as with domicile, is that it leads to discrepancies regarding the state with the greatest interest in the outcome of the proceedings. That is, nationality is frequently retained long after the party involved has lost any practical connection to the jurisdiction in question.⁶⁰

The biggest problem with nationality for same-sex couples is that it then becomes largely impossible to escape from a prohibition on same-sex marriage. Italians and Poles, for example, thereby become unable to marry or assert recognition of a same-sex marriage in *any* jurisdiction which refers to nationality to determine capacity, even if that state might permit or recognise the same-sex marriages or registered partnerships of other couples. This again raises questions

⁵⁷ TC Hartley, ‘The Policy Basis of the English Conflict of Laws of Marriage’ (1972) 35 MLR 571.

⁵⁸ A view shared by the German Federal Constitutional Court: Heinz-Peter Mansel, ‘The Impact of the European Union’s Prohibition of Discrimination and the Right of Free Movement of Persons on the Private International Law Rules of Member States’ in Boele-Woelki, K, Einhorn, T et al (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siebr* (Eleven International, 2010), 291, 297.

⁵⁹ Curry-Sumner (n 23), 379.

⁶⁰ Adrian Briggs, *The Conflict of Laws* (2nd edition, OUP 2008), 27.

as to discrimination on grounds of nationality. It is one thing for Italy to say it will not recognise same-sex marriages involving Italian citizens, and this might not amount to discrimination if Italy treats foreigners the same way. An alternative scenario, where the forum state judges the validity of foreigners' marriages purely on the basis of their nationality, seems harder to justify.⁶¹ That country might then allow, or recognise, same-sex marriages for nationals of the UK, France, Netherlands, Belgium, Spain etc, but not for Italian citizens. In such a case the incapacity imposed by nationality proves impossible to remove by marrying elsewhere. Is it unjustifiable discrimination by the Dutch authorities to refuse Italian citizens the benefit of Dutch law? Even if Italy can choose to retain nationality as a connecting factor for its own citizens, should the Netherlands be permitted to do the same for anyone *other* than its own citizens?

Many states where same-sex marriage is performed have specifically legislated to override the incapacity conferred on one or both of the couple. This allows the marriage to be celebrated in a particular jurisdiction and be valid there regardless of the nationality of the spouse. It does not mean it will be regarded as valid elsewhere, even in states which themselves permit same-sex marriage for their own nationals. Those third states might still look to the nationality of the couple to determine capacity, rather than the law of the *lex loci celebrationis*, in which case the marriage could be found void for lack of capacity. If nationality takes precedence over habitual residence, for example, then the forum state will not recognise the marriage unless both parties have capacity under their national law. This is so even where the couple have moved permanently elsewhere in order to avoid the prohibitions of their 'home' state.

This already starts to show that the Commission's idea of a body of common rules may be difficult and requires Member States to be able to identify, and then agree on, one or more relevant connecting factors. This is a complex area and one best explained using concrete examples. Later in this Chapter I show how both nationality and domicile are inappropriate connecting factors for same-sex marriage, using the example of the marriage celebrated in Canada between Celia Wilkinson and Sue Kitzinger. Before doing so, however, I discuss the other connecting factors which might be used, to see which, if any, provide any greater justification for being adopted more widely.

⁶¹ As was the case for the Netherlands and France, for example.

2. *Lex Loci Celebrationis*

The original English law approach to the validity of marriages celebrated abroad was simply to determine if the marriage in question had been properly constituted according to the laws applicable in its place of celebration, the *lex loci celebrationis*. On this basis, if Denmark allowed an English man to marry his deceased wife's sister and the marriage took place in Denmark, Danish law would apply and render the marriage valid both in Denmark and England, even if concluding such a marriage was prohibited in England.⁶² This did not mean ignoring questions of capacity to marry, such as whether the parties were of age or within restricted categories of consanguinity. What it meant was that those questions would be determined solely according to the law where the marriage took place, rather than *also* applying another set of capacity requirements based on the personal law of the spouses. In reality the situation was not quite as simple - as already seen in relation to US marriages, the public policy exception was used instead to deny effect to 'repugnant' marriages such as those involving polygamy or incest. Nevertheless, this principle did mean that the marriage was likely to be found valid unless very strong reasons existed to find otherwise.

Such an approach has its merits. In the example given, particularly if the couple had been resident in Denmark, or intended to remain in Denmark after the marriage, it is difficult to see why the couple should not be permitted to marry given that they were respecting the rules in place in Denmark at the time. For an English court to apply English rules to hold the marriage invalid appears patronising and chauvinistic, whilst for a Danish court to apply English rules to the same end appears somewhat ridiculous. It also appears illogical for either an English or a Danish court (or a court elsewhere, for that matter) to deny the couple recognition of a marriage which they had already celebrated lawfully, simply because one of the couple had English nationality or had up to that point been domiciled in England.

The solution still prevails theoretically in the US, despite the conflicts revolution of the 1950s giving greater weight to the view of the state where the couple live, and despite the doctrine being subject to the significant proviso of the state not having to accept evasive marriages.⁶³

⁶² This particular affinity restriction remained in place until legalised by the Deceased Wife's Sisters Marriage Act 1907. Marriages between a woman and her deceased husband's brother were not legalised until the Deceased Brother's Widow's Marriage Act 1921.

⁶³ Martha Bailey, 'Same Sex Relationships Across Borders' (2004) 49 McGill LJ 1005, 1009.

However, as shown in Chapter 2, the principle has not withstood the application of the public policy exception or local statutes prohibiting recognition.

Outside the US the 1978 Hague Convention also ostensibly uses *lex loci celebrationis*.⁶⁴ The Convention has not proven popular, perhaps for this reason, and has only been ratified by Australia, Luxembourg and the Netherlands. Importantly, however, under Article 3 the Convention capacity rules are determined by the state of celebration only as long as one of the couple is a national or habitual resident of that jurisdiction. Hence there is still a connection with habitual residence or nationality, in order to prevent purely evasive marriages.⁶⁵ This proviso is sometimes overlooked by those who advocate wider adoption of the Convention as a potential solution.⁶⁶ Whilst based on *lex loci celebrationis*, the effect of Article 3 is effectively to apply the law of habitual residence or nationality, meaning these are being used as a connecting factor, albeit indirectly. One difference between this and the traditional English or French model is that the marriage is governed by the *lex loci celebrationis* whenever *one* of the couple has the nationality or domicile of that jurisdiction. Compared to the traditional nationality rule this effectively reverses the burden of presumption. The marriage is likely to be valid if one of the couple has the ‘right’ nationality, even if the other one does not, whilst under the traditional French regime, for example, *both* spouses needed to have capacity to marry each other.

Notwithstanding the subtleties of the Hague Convention, *lex loci celebrationis* can be an attractive connecting factor as it enables marriages to be validly celebrated even if *neither* of the couple have capacity under their national jurisdiction. As such it might be of interest for states seeking to encourage marriage tourism, or those jurisdictions seeking to establish a territorial authority over and above the personal jurisdiction imposed by other states.

For recognition elsewhere, however, this lack of connection with anything other than the law of the place of celebration does not bode well. Whilst the couple’s past residence or national heritage may not be a convincing connection, replacing it with the laws of the place of marriage if the couple have no connection there is doctrinally similarly problematic, as its inherent

⁶⁴ 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages, available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=88> accessed 14 September 2013.

⁶⁵ *ibid*, Article 3.

⁶⁶ Jan-Jakob Bornheim barely restrains his criticism of Brenda Cossman in failing to take sufficient account of this proviso when considering the Hague Convention approach as a *lex loci celebrationis* solution for Canadian law: Jan-Jakob Bornheim, ‘Same-Sex Marriages in Canadian Private International Law’ (2013) 51 Alberta LR 77, 96.

territorial bias (*locus regit actum*) will simply result in other states taking the same territorial approach towards denying the marriage any effect. The lack of connection with the locus is exacerbated where, as is the case with most common-law countries, the place of celebration imposes no requirements as to residence or nationality in order to perform the ceremony. In such cases the couple may be under a mistaken impression that their marriage will be valid elsewhere. There are at least two ways to view this. The jurisdiction performing the marriage might be seen as under a moral duty to refrain from marrying couples who would lack capacity under their homeland laws or the laws of their residence, either by imposing qualifications as to who is permitted to marry (as does the Netherlands) or by asking foreigners to prove their capacity in advance. This view is vividly encapsulated by Bornheim who sees a failure to take this step as a ‘dishonest exploitation... to further the wedding industry business’, claiming it is... ‘hypocritical to give hopeful same-sex partners who are resident and domiciled abroad the impression that they will be able to enter a marriage that has any meaningful legal effect.’⁶⁷ The same view has been expressed in relation to registered partnerships, where it has been seen as duplicitous for jurisdictions to allow non-residents or non-nationals to enter into such arrangements.⁶⁸

A better view in my opinion is that as long as the place of jurisdiction treats the marriage as valid notwithstanding any lack of capacity under the law of domicile or nationality, then it should not have to trouble itself with what other jurisdictions might think, or to grapple with trying to identify where the couple are domiciled or what their national law says. The couple may intend not to return to their homeland, or indeed may intend to live in a third state which recognises their marriage, which would provide another reason for validity based on the intended matrimonial home test discussed below. In any event the *lex loci* solution means that issues such as these should not preoccupy the celebrating state. For any *ex ante* assessment the capacity of the parties to marry can only realistically be judged in accordance with the law of the place of celebration.

Thus, even if the home state of the couple or one of the spouses does not allow same-sex marriages, the couple do not ‘lack capacity’ under this solution by choosing to marry elsewhere. Of course, if they immediately return home and seek to claim married status they could be denied suit on the basis that it was an evasive marriage. Doctrinally this would be a legitimate

⁶⁷ *ibid*, 91.

⁶⁸ Kessler (n 54), 148.

reaction regardless of the rights and wrongs of the home state's same-sex marriage prohibition. If, however, it is not an evasive marriage and the couple make their new home elsewhere, the interest of the home state in denying the marriage all effects is far from clear. The couple are not living 'as a married couple' in the recalcitrant home state, so cannot be said to be detracting from any home state notions over the sanctity of marriage or its definition as an opposite-sex institution.

In any event it may not matter to the couple that the marriage is not recognised at home. Marriage tourism to Canada, particularly British Columbia and Ontario, from parts of the US cannot have been conducted entirely in ignorance of the (non)-effects of the marriage in the couple's home state at the time, but would have been chosen for symbolic or other personal reasons, or in expectation of future changes in law, and the fact that it was available as an option for same-sex couples may have been sufficient incentive to take it up.⁶⁹ Whilst such action might undermine or ignore the aims of this thesis, for some couples the chance to celebrate a marriage in front of friends and family is more important than the legal effects elsewhere. For those couples, as long as they realise their true situation, the opportunity to marry is not 'dishonest exploitation' but a genuine opportunity to make a public commitment and celebrate their life together. An Italian couple marrying in Canada can then still say "we are married" regardless of the fact that Italian law might disagree. It is only when the marriage in question might not even be valid in the place where it is celebrated (as explained below was the case in Canada and is currently the case for England) that the jurisdiction can be said to be failing in any duties it might have towards the celebrants. This is because now the reasonable expectations of the couple in being able to enter into a valid marriage are not being met.

Lex loci celebrationis has proven a popular choice in the case of civil partnerships. As mentioned, these traditionally carried no associations of capacity, or, if they did, they were based on qualifying the relationship as a contract, meaning the conditions for registration depended solely on the place of registration rather than any personal law. Provided the local requirements were met, this facilitated recognition in the state of registration. Unlike same-sex marriages, there have been no cases where one of the partners has claimed the partnership to be void through lack of capacity. However, this has not achieved greater cross-border recognition. If anything, the categorisation under private international law of the partnership as a contractual relationship rather than a civil status has made it harder for other states to deal with, even those

⁶⁹ See generally Choudry, S (ed), *The Migration of Constitutional Ideas* (Cambridge 2006).

generally favourable to same-sex relationships. Some such states make specific statutory provision to govern the recognition and effects of foreign relationships.⁷⁰ Others, such as France, did not originally do so, leaving foreign relationships unrecognised for many years. Yet others, such as Spain, rely on administrative practice with a corresponding lack of legal certainty for the couples involved.⁷¹

Conversely those states opposed to same-sex relationships rely on general or explicit public policy exception provisions. Capacity is again based on personal jurisdiction but is only ever seen in a negative sense (i.e. to deny the effects of a partnership involving those who lacked capacity to enter it, as in Poland)⁷² rather than accepting the *lex loci registrationis* as having authority to determine that capacity exists. Therefore, whilst *lex loci celebrationis* has attractions for partnerships as it does for same-sex marriages, it is marred by the same disadvantages and constraints when it comes to establishing a claim for recognition of the created status in other states. It may be time to acknowledge that personal capacity now plays as much a role in partnerships as it does in same-sex marriages, and that the problems, and hence solutions, need to be the same.

If so, *lex loci celebrationis* could provide a simple and flexible connecting factor of great use to same-sex couples. Frequently, it ignores incapacities resulting from prior domicile or nationality. It also puts aside any incapacities which might exist if the connecting factor were future domicile or residence, and also avoids the need to establish the intention of the parties. Its major limitation, however, is that, whilst it will normally ensure the validity of the marriage at least in the jurisdiction which performed it, it has the weakest claim to recognition of status in other jurisdictions. There is because there is no obvious connection with any other state. Further, this liberal attitude towards personal law in capacity issues may not lead to a universal recognition of foreign-celebrated same-sex marriages or partnerships. Instead it is likely to provoke an even greater reliance on the public policy exception, as has been the case in the US. Such a system does at least place scrutiny on unwilling home states. This is because, where a state's refusal to recognise another state's lawful marriage depends solely on the application of a public policy exception, rather than being based on a purported justification under a connecting

⁷⁰ eg UK, Switzerland.

⁷¹ Loeber und Steinmetz, 'Behandlung eingetragener Lebenspartnerschaften nach spanischem Erb- und Erbschaftsteuerrecht' (September 2014) available at <<http://www.loeber-steinmetz.de/beitraege/behandlung-eingetragener-lebenspartnerschaften-nach-spanischem-erb-und-erbschaftsteuerrecht>> accessed 3 January 2015.

⁷² Pillich (n 41).

factor such as nationality, the reasons for that refusal remain under constant scrutiny. The policy is at risk of falling away as soon as the reasons start to crumble. Examples of this can already be seen of course in the US, based on US constitutional freedoms, but attempts to limit its use in EU legislation, discussed further in Chapter 5, have met with varying results.

3. Antenuptial Domicile

Nationality did not take off as a connecting factor in Britain, which therefore initially retained the *lex loci celebrationis*. Things might have been otherwise, were it not for the historical reason that nationality in the British Empire could not of itself determine the applicable connection with any one of a number of legal jurisdictions, whether within the UK or the colonies. Even today the use of nationality would be difficult as a connecting factor, given the three different legal jurisdictions which make up the UK.⁷³

Things started to change, with the move away from *lex loci celebrationis* in England prompted by Lord Lyndhurst's Marriage Act 1835. Marriages within the prohibited degrees of consanguinity or affinity were no longer simply voidable, but void *ab initio*. This nullity only applied, however, to marriages governed by English law, leading to a practice developing of couples going abroad on short visits to marry in jurisdictions where the affinity rules were less proscriptive.⁷⁴ Faced with blatant attempts to evade the home prohibition, the doctrine that marriages were valid everywhere if valid where celebrated was starting to feel strained. English courts would perhaps only have an opportunity to hear cases on the effects of the marriage many years after the event, if indeed such an opportunity arose at all, by which time the couple would have been living together for many years in England, probably with children.

The problem could have been solved, as in the US, by imposing special rules on 'evasionary cases', or by invoking the French concept of 'abuse of rights'. Instead, the House of Lords in *Brook v Brook*⁷⁵ imposed a new principle in which it 'finally established that a distinction must be drawn between the formalities of marriage, governed by the law of the place of celebration, and capacity to marry, governed by the law of each party's antenuptial domicile'.⁷⁶ This represented a major shift in the way foreign marriages were to be treated under English law. The judgment

⁷³ Law Commission 'Private International Law: Choice of Law Rules in Marriage' (Law Com No. 165, HMSO July 1987).

⁷⁴ *Morris: The Conflict of Laws* (6th edition 2005), 201.

⁷⁵ *Brook v Brook* (1861) 9 H L Cas 193.

⁷⁶ *Morris* (n 74), 202.

tries to give the impression that it is the embodiment of a purported longstanding and widely recognised international system of conflicts of law. However, a closer look reveals it to be nothing more than an expedient expression of the public policy exception. In fact, the case provides a clear example of how forum state courts manipulate so-called principles of conflicts law in order to reach desired outcomes, and leads to a suspicion that ultimately conflicts law can be little more than an attempt to add international credibility to public policy considerations.

Brook v Brook

Brook had two children from his first wife by the time she died. After her death, he and his deceased wife's sister travelled temporarily to Denmark for the sole purpose of marrying each other and evading a prohibition on being married in England. Together they had three more children. They later died, as did one of these children, of cholera. The House of Lords held that, despite the will made by Mr Brook on the day of his death, the three children were illegitimate and the dead child's share could not be inherited by his natural brothers and sisters but instead passed to the crown as *bona vacantia*.

The court should have based the nullity solely on fraudulent evasion. Indeed, the Crown argued that 'the parties cannot be allowed to evade the law of their domicile by fraudulently going into another country to do that which the law of their own country has forbidden.'⁷⁷

Lord Campbell recognises this as being at the heart of the main problem:

If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognised as lawful.⁷⁸

The House of Lords then went much further, possibly inadvertently, in laying down a broader and general proposition. It saw marriage very much in terms of a contract, and sought to apply private international law principles relevant to contracts. Rather than simply invoking fraud or abuse or public policy, it established a distinction between the formalities of entering into a

⁷⁷ *Morris* (n 74) 204.

⁷⁸ (1861) 9 HL Cas 193, 220.

marriage and the rules governing essential validity or capacity to marry. 'These rules of capacity were said to 'depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.'⁷⁹

This is already a conflation of what are now regarded as two different connecting factors, domicile and intended matrimonial home, but the House of Lords' reasoning was flawed for other reasons. The court paid close attention to a work by Joseph Story where he discusses earlier works by Huber and others.⁸⁰ The judges referred primarily to Story's summary of the position in relation to *contracts*, which was indeed that capacity is a personal matter governed by the law of a person's domicile and which follows him throughout the world.⁸¹ They seemed not to take on board Story's later analysis in the same work in relation to marriages, where he cites Huber's assertion that the *lex loci celebrationis* applies.⁸² That personal capacity should apply to marriages in the same way as other contracts was not a popular view, and Story himself explained that 'in regard to questions of... competency or incompetency to marry...the law of the domicil of birth, or the law of any other acquired and fixed domicil, is not generally to govern; but *the lex loci contractus aut actus*, the law of the place where the contract is made, or the act done.'⁸³

The court's decision to change this, and treat marriage as being subject to the same rules as other contracts at the time, was simply a way to implement one of the already recognised exceptions to the usual principle of *lex loci contractus*⁸⁴ in marriage cases, namely the case of fraudulent evasion:

Bouhier (as we have seen) holds to the doctrine, that the capacity and incapacity by the law of the domicil extends to every other place; but yet he is manifestly startled when it is applied to the case of marriages. He admits, that in such cases it is commonly held, that the law of the place where the marriage is celebrated ought to prevail. But he insists that such a rule ought not to be adopted in regard to persons who are both subjects of

⁷⁹ Lord Campbell LC in *Brook v Brook* (1861) 9 HL Cas 193, at 207.

⁸⁰ Joseph Story, *Commentaries on the Conflict of Laws, foreign and domestic, in regard to contracts, rights and remedies, and especially in regard to marriages, divorces, will, successions and judgments* (2nd edition, Maxwell 1841), available from <www.googlebooks.com> last accessed 24 February 2013, section 50 ff.

⁸¹ *ibid*, section 51(a).

⁸² *ibid*, section 85, referring to Huber, *De Conflictu Legum*, Lib. 1, tit. 3, § 8; Post, 122, as translated by Story.

⁸³ *ibid*, section 103.

⁸⁴ *ibid*, section 87.

the same country, who designedly go to a foreign country and contract marriage there, in order to evade the law of the country of their own domicil.⁸⁵

Contrary to the impression given, the House of Lords was far from enshrining in English law a principle already welcomed or acknowledged internationally. Yet both the creation of a separate rule of capacity, and the use of antenuptial domicile to determine that capacity, have come to be seen as being of general application.⁸⁶ Any ongoing debate is limited to considering which connecting factor is most suited to determine the applicable law. With one exception,⁸⁷ domicile at the time immediately prior to the marriage is still seen as being the most relevant connecting factor in English law.⁸⁸

Where does this lead us? Had the House of Lords continued to apply the general historical rule rather than inventing a new one, this would have led to issues of personal capacity being determined solely by the law of the place of celebration. There might well have been a greater reliance on the public policy exception by the forum state to set aside objectionable marriages resulting from unconscionable ‘forum shopping’. Ultimately this may have been preferable. Judges would no doubt have welcomed the additional flexibility and discretion provided by the public policy doctrine,⁸⁹ with the added advantage that the doctrine is flexible enough to find ‘undesirable’ marriages invalid only for certain purposes whilst not for others. It would no doubt have resulted in a greater body of jurisprudence concerning the use of the public policy exception and its limits. Instead, there developed an acknowledged ‘inconclusive’⁹⁰ and therefore confusing and often inconsistent body of law concerning capacity to marry.

The Law Commission, when it examined the subject, concluded that legislation was not needed to change or restate on a statutory basis the existing choice of law rules.⁹¹ Had it done so, it is likely that it would have enshrined the position taken in its initial report,⁹² that ‘all issues of legal capacity should be referred to the law of the ante-nuptial domicile,’ a position which was felt to

⁸⁵ *ibid*, section 84.

⁸⁶ PM North and JJ Fawcett, *Cheshire and North’s Private International Law* (13th edition, Butterworths 1999), 721-735; Rule 74 in *Collins, Dicey, Morris and Collins on The Conflict of Laws* (15th edition, Sweet & Maxwell, 2012), 939.

⁸⁷ *Radwan v Radwan* (No.2) [1973] Fam. 35 is taken as authority that the intended matrimonial home test may still be used to determine a wife’s capacity to conclude a polygamous marriage.

⁸⁸ See cases listed in Dicey, Morris and Collins, (n 86), 939, fn 178.

⁸⁹ Richard Fentiman, ‘The Validity of Marriage and the Proper Law’ (1985) 44 CLJ 256, 258.

⁹⁰ *Cheshire and North* (n 86), 724.

⁹¹ Richard Fentiman, ‘Activity in the Law of Status: Domicile, Marriage and the Law Commission’ *Oxford Journal of Legal Studies*, Vol. 6, No. 3 (Winter, 1986) 353.

⁹² Law Commission Working Paper No.89.

reflect current law and which enjoyed substantial support at the time. Fortunately it explicitly recognised in its final report that ‘firm rules in statutory form would exclude the possibility of development of other rules to meet circumstances as yet not envisaged’.⁹³ The development of same-sex relationships is one such set of circumstances, where moving away from antenuptial domicile as a connecting factor and back to *lex loci celebrationis* would not be difficult. Indeed it has already been adopted in relation to civil partnerships. Adopting the same solution for marriage would enable UK same-sex marriages to stand a greater chance of enjoying recognition, not only in Britain, but also elsewhere in any situation where *renvoi* back to English or Scottish law is required.

4. Intended Matrimonial Home

One particular difficulty with the domicile concept is that, in order to establish a new domicile different from the domicile of origin, it is necessary to show an intention to settle permanently in the new country.⁹⁴ For someone coming from outside the UK an intention to remain in the UK even ‘until the death of one’s spouse’ may still not be sufficient to form a new domicile of choice.⁹⁵ This has significant implications in the context of EU free movement provisions, as an intention to remain in the UK (and hence ostensibly forego one’s right to live elsewhere in the EU) may become determinative of the validity of one’s marriage. Take for example a Maltese man, Pietru, seeking to marry his Dutch boyfriend Jan. Pietru lacks capacity to marry under the law of his domicile. The couple met in London, a city they have made their home, but plan to retire one day to Italy or Spain. The lack of intention to settle ‘permanently’ means neither of the couple is UK domiciled, even if they have been here for many years and have no immediate or even medium-term intention of living anywhere else. If they marry in England they lack capacity under the law of antenuptial domicile. As shown below, this anomaly is not corrected in the new legislation. To the extent they give the matter any thought, they are in the ridiculous position that if they want to enjoy the best chances of asserting their marriage they either need to establish a permanent intention to remain in the UK, or are otherwise better off marrying in the Netherlands.

In light of this, the alternative connecting factor of intended matrimonial home may indeed be more appropriate. This doctrine, supported particularly by Cheshire in earlier editions of his

⁹³ *ibid*, para. 2.6.

⁹⁴ *Udny v Udny* (n 47).

⁹⁵ *Inland Revenue Commissioners v Bullock* [1976] 1 WLR 1178 (CA).

work, submits the question of capacity to the law of the intended matrimonial home, providing the couple do in fact establish their home in that jurisdiction within a reasonable time.⁹⁶ This is on the not unreasonable basis that the recognition or otherwise of a marriage is a question that ‘pre-eminently, if not exclusively, affects the community in which the parties live together’.⁹⁷ As a doctrine this has the advantage of corresponding most closely with the reasonable expectations of the couple themselves. In *Radwan v Radwan (No 2)*⁹⁸ it was held that the intended matrimonial home test applied already to cases in cases of capacity to enter into a polygamous marriage (thereby upholding the polygamous marriage of an English-domiciled woman to an Egyptian domiciliary where the intended matrimonial home at the time of the marriage was Egypt). That case showed that the dual domicile test was not always assumed to take precedence.⁹⁹ However, it did not replace the dual domicile test for all purposes, as Cumming-Bruce J explicitly ruled out the application of the intended matrimonial home test in relation to the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter into a monogamous marriage.¹⁰⁰

The test has not proven popular because of its disadvantage that it may not be possible to deduce at the time of the marriage the jurisdiction in which the couple intended to make their matrimonial home. In addition, the requirement that the couple do in fact move means that the determination of applicable law cannot be made at the time of marriage, but only later. Otherwise, for example, a couple domiciled in England with a *bona fide* intention to move to Russia, who then legitimately change their minds and do not move at all, would still find their English-celebrated marriage governed by Russian law.

These difficulties in establishing the original intention, and the need to then verify it through subsequent actions, are felt to lead to unacceptable levels of uncertainty. However, I would submit that the question needs to be revisited, particularly given the significant numbers of immigrants who might take advantage of the opportunity to marry in Britain. If the validity of those marriages can only be assured by the establishment of a UK antenuptial domicile, and this involves establishing a permanent intention to settle (for life) in advance of the wedding, then that is an even higher hurdle than establishing an intended matrimonial home. The

⁹⁶ GC Cheshire, *Cheshire's Private International Law* (7th edition, Butterworths 1965), 278.

⁹⁷ *ibid.*

⁹⁸ *Radwan v Radwan (No 2)* [1973] Fam 35.

⁹⁹ See also Richard Fentiman, ‘Activity in the Law of Status: Domicile, Marriage and the Law Commission’ (1986) *Oxford Journal of Legal Studies*, Vol. 6, No. 3, 353-367.

¹⁰⁰ *Radwan v Radwan* (n 98), 54.

requirement of a permanent intention to stay in Britain also appears inconsistent generally with the exercise of free movement rights.

The doctrine does have the disadvantage that the couple are perhaps likely to move again, and the problem then arises that logically the *new* matrimonial jurisdiction now has the closest connection and greatest claim to determine the parties' capacity to enter into the marriage, which by that time may have lasted many years. If so, the validity of the marriage may vary as the couple move between jurisdictions, leading to limping relationships.¹⁰¹ One might argue that subsequent matrimonial jurisdictions do not have an interest in determining the validity of a marriage celebrated some years ago. This is consistent with the US Second Restatement position, where only a state with a greater interest *at the time of the marriage* than the *lex loci celebrationis* is entitled to usurp the normal rules.¹⁰² It means, however, that the marriage remains governed by the laws of a state with which the couple may only have had a temporary or transient connection. Even so, if the connection was always intended to be temporary or transient then the forum state could claim it was an evasive marriage, and of course the recourse to the public policy exception would always be available if the effects of the marriage were felt too keenly in the new home state. As such, this solution appears to represent the fairest solution in striking a balance between the interests of the couple, who have done everything they can to base themselves in a jurisdiction welcoming of their status, and the interests of third party jurisdictions or subsequent home states.

5. Real and Substantial Connection

In addition to domicile and intended matrimonial home a third test, based on the proper law test in contract, has been propounded from time to time. This is the 'real and substantial connection theory' that capacity should be governed by the proper law of the contract to marry, determinable as the law of the country with which the contract had the most real connection. First proposed in 1955, this test allows consideration of multiple relevant factors, including domicile, nationality, residence, intention and the place of celebration.¹⁰³ It was based on the English common law test for foreign divorce recognition which had been established in *Indyka*

¹⁰¹ "Of course, nobody seriously suggests that the validity of a marriage should be reassessed every time the parties change their domicile: that would be unjust as well as quite impracticable" McClean and Beevers, *Morris: The Conflict of Laws* (6th edn, Sweet and Maxwell 2005), 199.

¹⁰² *Restatement (Second) Conflict of Laws* (1971), s283(2), see Chapter 2.

¹⁰³ Edward Sykes 'The Essential Validity of Marriage' (1955) 4 ICLQ 159, 168.

*v Indyka*¹⁰⁴ (abolished by the Recognition of Divorces and Legal Separations Act 1971). It enjoyed a brief respite in certain cases¹⁰⁵ and academic support¹⁰⁶ in the 1980s but was roundly rejected by the Law Commission as:

an inherently vague and unpredictable test which would introduce an unacceptable degree of uncertainty into the law. It is a test which is difficult to apply other than through the courtroom process and it is therefore unsuitable in an area where the law's function is essentially prospective, i.e. a yardstick for future planning.¹⁰⁷

What the third test does show, however, is that it is not impossible to envisage a system where different aspects of capacity are governed by different rules.¹⁰⁸ In *Lawrence v Lawrence*¹⁰⁹, the Court of Appeal declined to follow the traditional English conflicts-of-law approach. The usual approach would have been that a Brazilian woman's capacity to remarry following a divorce obtained in Nevada was to be governed by the law of her ante-nuptial domicile. Nevada treated her as immediately resident in Nevada and therefore as having capacity to remarry there. English law would normally have treated her as domiciled in Brazil. Brazilian law, which did not permit or recognise divorce at that time, would have found her lacking capacity to remarry because of her previous marriage. The English court focussed instead on the recognition under English law of the divorce itself, rather than the capacity of the divorcee to remarry.¹¹⁰ In this way it was able to uphold the validity of her second marriage, to an English domiciliary, which had likewise taken place in Nevada.¹¹¹ Commenting on the case, Downes argues that questions as to capacity to marry encompass up to seven different issues, namely consanguinity and affinity, lack of age, lack of parental consent, previous marriage and physical incapacity, plus, perhaps, consent of the parties and capacity to enter a polygamous marriage.¹¹² In light of this he challenges the assumption that for each category of issues there is a single connecting factor which identifies the country whose law is applicable to decide the issue raised. Instead, he

¹⁰⁴ *Indyka v Indyka* [1969] 1 AC 33

¹⁰⁵ *Vervaeke v Smith* [1983] AC 145, 166 (HL 1982); *Lawrence v Lawrence* [1985] Fam 106, 115.

¹⁰⁶ Trevor Hartley, 'The Policy Basis of the English Conflict of Laws of Marriage' (1972) 35 MLR 571; Richard Fentiman, 'The Validity of Marriage and the Proper Law' (1985) 44 Cambridge LJ 256.

¹⁰⁷ Law Commission Working Paper 89 (1985) para 3-20.

¹⁰⁸ Alan Reed 'Essential Validity of Marriage: The Application of Interest Analysis and Depeçage to Anglo-American Choice of Law Rules' (2000) 20 NYL Sch J Int and Comp L 387; Richard Fentiman, 'The Validity of Marriage and the Proper Law' (1985) 44 CLJ 256.

¹⁰⁹ *Lawrence v Lawrence* [1985] Fam. 106 (CA (Civ Div)).

¹¹⁰ A similar approach to the one adopted in *Perrini v Perrini* [1979] Fam 84, 92.

¹¹¹ Had the second marriage taken place in England it would have been valid, notwithstanding any lack of capacity of the wife, on the basis of the rule in *Sottomayer v De Barros* (No 2) (1879) 5 PD 94.

¹¹² T Antony Downes, 'Recognition of Divorce and Capacity to Remarry' (1986) 35 ICLQ 170, 174.

argues that some issues could be governed by one choice of law rule whilst others are governed by another, as some issues affect the country where the parties will live whilst others are more the concern of where the party in question was brought up.¹¹³ I could add capacity to enter into a same-sex union as an eighth question of essential validity. Agreeing with Reed that different rules could apply for different capacities,¹¹⁴ I suggest that, for a same-sex couple, the closest law of real and substantial connection is not the previous domicile or country of nationality. Instead, the jurisdiction with the closest connection, and therefore the one with the greatest claim to apply using an interest analysis, is that of the jurisdiction where the parties will live. It would not lead to unacceptable levels of uncertainty to conclude that ‘capacity to marry someone of the same sex’ is governed by the law of intended matrimonial home, or habitual residence, notwithstanding other questions of capacity could be governed by another applicable law such as nationality. This is the effect of the legislative changes introduced over the last decade in many of the countries which have introduced same-sex marriage, as discussed below.

6. Habitual Residence

Habitual residence is seen as an increasingly important connecting factor, and has been suggested as a suitable connection for registered partnerships, rather than the law of registration.¹¹⁵ It is often held up as the factor most likely to constitute the genuinely closest connection.¹¹⁶ It has become the predominant or major criterion in a large number of family law acts, becoming the guiding principle both in jurisdiction and applicable law in divorce, maintenance, and succession.¹¹⁷ It also plays a significant role in the proposed Matrimonial Property Regulation (although not the Registered Partnerships Property Regulation).¹¹⁸

Its popularity in these instruments can be attributed to its flexibility, and also because it provides an equitable balance between party autonomy (given that parties can choose where to live) whilst avoiding gratuitous forum shopping. It also intuitively provides the closest match

¹¹³ *ibid.*

¹¹⁴ Reed (n 108).

¹¹⁵ Paul Lagarde, ‘Développements futurs du droit international privé dans une Europe en voie d’unification : quelques conjectures’, (2004) 68 *RabelsZ* 225, 235.

¹¹⁶ Richard Fentiman, ‘The Validity of Marriage and the Proper Law’ (1985) 44 *CLJ* 256; Peter Stone ‘The Concept of Habitual Residence in Private International Law’ (2000) 29 *Anglo-American Law Review* 342.

¹¹⁷ Katherina Hilbig-Lugani, ‘Habitual Residence’ in European Family Law’, in K Boele-Woelki and N Dethloff (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Intersentia 2014), 249, and the measures listed at 250 and 251.

¹¹⁸ See Chapter 5 and further Stuart Davis, ‘Same-Sex Couples and the Harmonisation of EU Matrimonial Property Regimes: Unjustifiable Discrimination or Missed Opportunities?’ (2013) *CFLQ* 19.

to the free movement principles of the Treaties. That is, live where you like and, once there, enjoy equal treatment with other residents, freed of any restrictions imposed by the law of your domicile or nationality, provided you adhere to the laws of your new home.

One problem with the concept is that it is felt not to represent a permanent enough connection, particularly as it is so easy to change and the time limits needed to establish habitual residence are not harmonised, varying from state to state and dependent on the purpose for which it is needed.¹¹⁹ For non-nationals, three months residency is required in order to be able to marry in Belgium, and an undetermined but probably longer period in the Netherlands. In France a marriage can take place in principle after a continuous presence of only one month,¹²⁰ and even this can be shortened using a flexible interpretation.¹²¹ Meanwhile in *Swaddling v Adjudication Officer*¹²² the CJEU allowed habitual residence to be granted immediately, albeit for other reasons. It is not always clear where habitual residence lies. If someone works in one Member State and lives in another, as occurs in various border areas in Europe, or if a couple have separated temporarily or permanently and live either side of a border, perhaps sharing the children between them, then habitual residence can be difficult to establish. Even outside border areas people can have complex domestic arrangements, perhaps living apart due to career choices or other reasons, or spending some periods a year in one residence some in another, again for career or other reasons.¹²³ Such unfettered exercise of free movement freedoms sits uncomfortably with the ongoing, if outdated, requirement for family law to be anchored to one and only one Member State's laws. The mobility of habitual residence makes it difficult to equate to a notion of 'belonging'.¹²⁴

On the other hand, these are factual matters which a court should be able to apply relatively easily in order to find the answer, and in complex domestic circumstances may be no more difficult than establishing domicile.¹²⁵ Nationality is easier to determine, but in complex circumstances is more likely to result in the application of a law which bears no real connection to the couple. The use of 'habitual residence' could be improved in Community matters by

¹¹⁹ Hilbig-Lugani (n 117), 257.

¹²⁰ Code Civil (France) Article 74.

¹²¹ Fulchiron (n 53) para 9.

¹²² Case C-90/97 *Swaddling* [1999] ECR I-1075.

¹²³ In *Ikimi v Ikimi* [2001] 2 FCR 385 the Court of Appeal found the existence of two marital homes meant it was possible to have two habitual residences simultaneously.

¹²⁴ See further Ruth Lamont 'Habitual Residence and Brussels II *bis*: Developing Concepts for European Private International Family Law, (2007) 3 J Priv Int L 261.

¹²⁵ Fentiman (n 91), 278.

according it an explicit definition. The scope for individual Member States to have divergent views without a common definition tends to undermine the harmonising effect of the measures which use it.¹²⁶ The CJEU has given a definition to the term in other contexts, namely ‘the place where the person had established, on a fixed basis, his permanent or habitual centre of interests with all the relevant facts being taken into account for the purposes of determining such evidence’.¹²⁷ This could perhaps be expanded or finessed to make the concept more workable as a connecting factor for conflicts purposes.

To conclude this section, it will be seen that the complexity and the variety of connecting factors makes it difficult to identify any one connecting factor whose use might be promoted as being likely to lead to greater cross-border recognition. I have also shown how connecting factors can be used as a means to implement public policy. This means that the European Union, if it seeks to promote mutual recognition, will have to address the use of the various connecting factors and to assess this use against Treaty rights or human rights requirements. It will also need to take into account the use of the public policy exception itself, although this is considered further in the next Chapter. Before moving on to that topic, it is appropriate first to show in more detail how connecting factors and personal capacity affect same-sex couples in the EU, and how these issues have been managed by Member States which do seek to provide recognition for same-sex relationships. This further demonstrate the complexities of seeking to provide a coherent regime applicable throughout the EU.

III. Wilkinson and Kitinger and the Vagaries of Private International Law

This Section looks specifically at the situation concerning one marriage, that of Wilkinson and Kitinger.¹²⁸ Their case is still cited as supporting the dual domicile approach,¹²⁹ which is surprising for various reasons. Although not ostensibly decided around capacity, the case shows how capacity doctrines affect the recognition of same-sex marriages, particularly given subsequent legislative developments of which the couple may not even have been aware. It originated as a human rights case and relates to the application of Canadian law in England, and

¹²⁶ Peter Stone ‘The Developing EC Private International Law on Family Matters’, Chapter 17 in Alan Dashwood et al (eds) *Cambridge Yearbook of European Legal Studies* (2001) 373.

¹²⁷ *ibid*, 387, citing The Borrás Report, [1998] OJ C221/27, para 32.

¹²⁸ *Wilkinson v Kitinger and another* (No. 2.) [2006] EWHC 2022 (Fam), [2007] 1 FCR 183.

¹²⁹ Collins and others, *Dicey, Morris and Collins on The Conflict of Laws* (15th edn, Sweet & Maxwell 2012), 939, fn 178.

is not at first sight relevant to recognition between EU Member States. However, it provides an excellent example of how conflicts laws and public policy are used by different jurisdictions, and again serves to illustrate a ‘counterfactual’ against which any EU Treaty implications must be considered.¹³⁰

The effect of *Brook v Brook* for same-sex couples where one spouse was domiciled in England is that, until 2014, they lacked capacity to conclude a valid same-sex marriage overseas in any jurisdiction (usually common law) which uses antenuptial domicile to determine capacity, such as British Columbia or New York State. That did not stop such marriages taking place, as common law jurisdictions do not normally require the couple to prove capacity prior to the ceremony. Once married, there is a rebuttable presumption in the jurisdiction of celebration that the marriage is valid and the issue of capacity might not arise unless there is a contested divorce, or in a dispute over succession many years later. In cross-border contexts the situation is rather different, and I show here how the marriage was treated in Canada and England before moving on to look at how it might have been regarded in other EU Member States.

1. Canada and England

a) Civil Partnership Act 2004

Celia Kitzinger and Sue Wilkinson, both UK citizens domiciled in the UK, married in British Columbia, Canada in 2003 (after 13 years of living as a couple and shortly before the introduction of civil partnerships in the UK). Wilkinson was working in Vancouver at the time, and Kitzinger was a regular visitor during her partner’s expatriate assignment. Marriage apparently provided substantial improvements to the couple’s treatment by the authorities, and they described finding it galling to lose their status when Wilkinson returned to the UK.¹³¹ They brought an action to try to ensure that their marriage, ‘lawfully celebrated in Canada’, should be recognised as a marriage in the UK. They argued¹³² that the ‘consolation prize’ of a

¹³⁰ Although it appears the couple did not bring cases outside England, Wilkinson’s witness statement referred to in para 5 of the judgment shows that the couple were seeking to obtain recognition of their marriage ‘in Britain and elsewhere’ so it is not inappropriate to speculate how the marriage would have been treated in other EU Member States.

¹³¹ Celia Kitzinger & Sue Wilkinson, ‘The Re-branding of Marriage: Why we Got Married Instead of Registering a Civil Partnership’ (2004) 14(1) *Fem. & Psychol.* 127; Rosemary Auchmuty, ‘What’s so special about Marriage? The Impact of *Wilkinson v Kitzinger*’ [2008] *CFLQ* 475.

¹³² *Wilkinson v Kitzinger* (n 128), [5].

civil partnership status would not be sufficient recognition of the married status granted to them in Canada, which they considered superior to that of a civil partnership.¹³³

The civil partnership consolation prize occurred largely by accident. In-between the couple's return to the UK and their case reaching court, the coming into force of the Civil Partnership Act 2004 ("CPA") meant that, if an overseas same-sex relationship (whether a partnership or marriage)¹³⁴ was legal in the jurisdiction where it was formed, English law would now also regard it as being legal, but would convert it to a civil partnership rather than accepting it as a marriage. The English court focussed on these statutory provisions to confirm the couple's status under English law as civil partners, finding no breach of human rights in converting the marriage into a civil partnership.

One factor not considered by the court is that CPA s215((1)(a) provides that such an overseas relationship will only be recognised in this way if, among other factors, the parties had capacity to enter into it. On a strict application of English conflicts rules the validity of an overseas marriage depends not only on "formal validity", i.e. adherence to the *lex loci celebrationis*, but also on the "essential validity" of capacity as determined by the personal law of the individuals involved.¹³⁵ As English law did not allow same-sex marriage, and the couple were UK-domiciled at the time of their marriage, the court could have held that the couple lacked capacity to enter into a same-sex marriage, and that the Canadian marriage was not then valid in the UK. Speculation as to this outcome arose even before the case was heard.¹³⁶ Such a finding would have meant that the marriage, not being valid, was incapable of being translated into a civil partnership under the CPA. Kitzinger and Wilkinson would have found themselves not only unmarried in UK law, but also not even legally partnered.

The saving grace might have been that CPA s215 modifies the normal choice of law rules, whereby capacity to enter into the relationship is to be determined according to the 'relevant law' as defined in s.212(2), namely 'the law of the country or territory where the relationship is registered (including its rules of private international law)'. The actual finding of the English court, based on 'expert evidence', that the Canadian marriage was valid, contains an implicit

¹³³ Celia Kitzinger & Sue Wilkinson, 'The Re-branding of Marriage: Why we Got Married Instead of Registering a Civil Partnership' (2004) 14(1) Fem. & Psychol. 127.

¹³⁴ Overseas same-sex marriages were included by virtue of s212 CPA 2004 in the version in force at the time.

¹³⁵ Collins and others,(n 129), 939, Rule 74.

¹³⁶ Katie Rainscourt, 'The limitations of the Civil Partnership Act 2004: an analysis of cross-border recognition of same sex marriage' (2006) 25 CJQ 150.

assumption that the couple had capacity to marry, if not under English law, then under the law of British Columbia. However, a closer analysis reveals this is not correct. Although the CPA meant that Canadian rules on capacity were to apply, Canada, like England, also looks to the antenuptial domicile of both parties to determine capacity, applying *Brooke v Brooke*.¹³⁷ In other words, the fact that Canada allowed non-residents to marry was not enough to confer capacity to marry on foreign couples. Wilkinson and Kitzinger lacked capacity to marry even under Canadian law. Applying CPA s.212, the English court should have applied Canadian rules of private international law, then applied *renvoi* to English law as the law of their antenuptial domicile to determine their capacity to marry.¹³⁸

This question was not considered by the English court, which focussed instead on the statutory provisions converting a valid overseas marriage into a civil partnership without enquiring too closely whether the Canadian marriage was itself valid. Had it done this, Wilkinson might have argued that she was domiciled in Canada, but she would have needed to show an intention to settle permanently there.¹³⁹ With a Canadian domicile, the ‘anomalous’ rule in *Sottomayer v De Barros (No 2)*¹⁴⁰ could have been used. The incapacity of one party (Kitzinger) will be ignored if the other party (Wilkinson) is domiciled in the forum state and the marriage takes place there.¹⁴¹ Assuming *Sottomayer* is good law in Canada, this means a marriage celebrated in Canada involving at least one Canadian domiciliary will ignore any incapacity of the other party (in this case, Kitzinger’s incapacity under English law). The couple might even have persuaded the court to confer capacity under Canadian law by applying the alternative connecting factor of an intended Canadian matrimonial home. Importantly, however, neither of these scenarios accords with the fact that the couple did not intend to remain permanently in Canada.

¹³⁷ Martha Bailey, ‘Same Sex Relationships Across Borders’ (2004) 49 McGill LJ 1005, 1010.

¹³⁸ Katie Rainscourt, (n 136). I leave to one side any debate about whether CPA s212(2) might have required *renvoi total* to apply, by virtue of which the application of English law by a Canadian court would have entailed being referred back to the law of British Columbia, as I take the view that CPA s212(2) is specific to determining the question of which foreign marriages were eligible to be treated as civil partnerships, rather than conferring capacity to marry on English domiciliaries abroad. Even if I am wrong, a referral back to BC law would then yet again encounter a need to determine capacity the law of antenuptial domicile (i.e. English), creating something of an infinite loop. For a fuller explanation and discussion of the relative merits of various approaches to *renvoi* see Briggs, *The Conflict of Laws* (3rd edition, OUP, Oxford 2013), 20. Note also that the Law Commission has supported the application of *renvoi* to capacity to marry: Working Paper 89 (1985) para 3.39 and Law Com No 165 (1987) [2.6].

¹³⁹ *Bell v Kennedy* (1868) LR 1 Sc & Div 307.

¹⁴⁰ (1879) 5 PD 94.

¹⁴¹ ‘Capacity must be tested by the law of the domicil of each party, but, when one of them has an English domicil, a foreign incapacity affecting the other and unknown to English law must be utterly disregarded if the marriage takes place in England’, P North and J Fawcett, *Cheshire and North’s Private International Law* (13th edition, Butterworths 1999), 731.

Had a *Canadian* court been given the opportunity to consider the validity of their marriage it might also have found it void through lack of capacity.¹⁴² However, given the political support which had brought to fruition the campaign for Canadian same-sex marriage at the time, a Canadian court was perhaps unlikely to have wanted to deny its effects to non-domiciliaries. This would have created negative publicity, particularly amongst US couples potentially seeking to marry in Canada. One could speculate that the Canadian court might have applied its residual discretion under the ‘public policy exception’ to *uphold* the marriage despite normal Canadian conflicts rules. This would then have raised an interesting conundrum for the English court – should it recognise a foreign marriage void through lack of capacity under the normal conflicts law of the place of celebration, as required by CPA s212, or is the marriage to be found valid on the basis that ‘the law of British Columbia (including its private international law rules)’ includes any validation of the marriage by application of the public policy exception whose effect is to ignore those rules? Had Canadian caselaw suggested that the public policy exception should apply in favour of validation then the latter approach would have been appropriate.¹⁴³ However, without any evidence as to how a Canadian court would have applied its conflicts rules in such a case it seems the English court in *Wilkinson v Kitzinger* may have incorrectly applied Canadian law in finding the marriage valid.

This is not the end of the story as subsequent Canadian developments took place which assured the validity of the marriage. Yet more recent English developments once again call this into doubt. In January 2012 a Canadian court refused to grant a divorce to an unnamed lesbian couple who had married in Canada in 2005 but who now lived in the UK and Florida, on the basis that neither met the one-year residency requirement needed to petition for divorce. The Attorney-General then created ‘panic’ when he (rightly) suggested that submissions would not be needed as the marriage, as discussed above, was invalid under Canadian law in any event, through lack of capacity of the parties to enter a same-sex marriage.¹⁴⁴ The ultimate result was a legislative amendment to Canada’s Civil Marriage Act 2005 which not only introduced a *forum necessitas* provision enabling Canadian courts to grant divorces to non-residents, but also ensured that any same-sex marriages celebrated in Canada, whether now or in the past, would

¹⁴² Applying the view of the Attorney-General as described by Janet Walker (n 144 below).

¹⁴³ Perhaps on the basis of the later case of *Hincks v Gallardo*, decided in January 2013 and upheld by the Ontario Court of Appeal in 2014, in which an Ontario family judge went against the opinion of the Canadian Attorney-General and applied the public policy exception to find that a UK civil partnership should be treated in Canada as a marriage: *Hincks v Gallardo* [2014] ONCA 494 (CanLII).

¹⁴⁴ Janet Walker, Legislative Comment ‘Same-sex divorce tourism comes to Canada’ (2012) LQR 344.

not be invalid through any lack of capacity of the spouses under the law of their respective state or domicile.¹⁴⁵ In effect since August 2013, this at first sight assures the validity of Wilkinson and Kitzinger's Canadian marriage under Canadian law and hence the validity of their civil partnership under English law.

b) Marriage (Same Sex Couples) Act 2013

The assurance provided by the Canadian legislation was short lived, however, since England also introduced same-sex marriages with effect from March 2014.¹⁴⁶ Wilkinson and Kitzinger were naturally reported to be delighted at the recognition of their marriage in England.¹⁴⁷ The couple, and others in a similar situation, may not realise how complex and precarious that recognition is, at least as a matter of private international law. The Marriage (Same Sex Couples) Act now *removes* overseas marriages from the category of 'overseas relationships', with the desired effect of no longer converting them into civil partnerships but leaving them as marriages. Whilst a foreign same-sex *civil union* will continue to be treated as a valid civil partnership, section 10(1)(b) of Act now provides, somewhat obliquely, simply that *a marriage* under the law of any country outside the UK 'is not prevented from being recognised' under English law only because it is the marriage of a same-sex couple.¹⁴⁸ However, crucially the Act also removes the requirement to determine the validity of the overseas marriage using the capacity rules of the place of celebration, meaning that the usual English rules of conflicts will once again apply.¹⁴⁹ Thus the Canadian 2013 amendment ensuring the validity of Canadian marriages to spouses otherwise lacking capacity to marry is no longer applicable. Instead, the essential validity of any Canadian marriage between English domiciliaries again needs to be determined under English conflicts rules rather than Canadian ones. A couple, lacking capacity at the time to marry under the law of their antenuptial domicile (England), could enter into an evasive marriage in another country (Canada) which is only expressly valid under Canadian law by virtue of a subsequent statutory amendment to normal Canadian conflicts rules. The marriage is treated (possibly erroneously until the time of said statutory amendment) as a valid

¹⁴⁵ Civil Marriage of Non-Residents Act (Canada) S.C. 2013, c. 30, s3.

¹⁴⁶ Marriage (Same Sex Couples) Act 2013 (c. 30).

¹⁴⁷ Caroline Davies, 'Gay couple who wed overseas celebrate in UK as same-sex marriage law arrives', The Guardian, 13 March 2014, available at <<http://www.theguardian.com/society/2014/mar/13/gay-couple-wed-overseas-same-sex-marriages-england>> accessed 31 December 2014.

¹⁴⁸ Marriage (Same Sex Couples) Act 2013 s10(1)(b).

¹⁴⁹ Marriage (Same Sex Couples) Act 2013 Schedule 2, s5(2).

civil partnership in the UK, but in March 2014 reverts to being treated as a marriage whose essential validity is now to be determined once again by English law.

A solution to this could have been explicitly provided for in the Act, a suggestion I made in vain in a written submission to the House of Commons Public Bill Committee whilst they were debating the passage of the Bill.¹⁵⁰ In the absence of an express statutory solution, the issue, were it to arise, would raise interesting arguments. Ultimately one likely result could be that the public policy exception would be applied *in favour* of recognition, regardless of the answer provided using private international law.

The same fall-back to a public policy exception may also be needed in the case of *English* marriages involving foreign domiciliaries from countries which do not permit same-sex marriage. Given that England, like Canada, does not impose requirements as to residence or nationality in order to perform a marriage, numerous same-sex marriages could take place in England between foreign residents or visitors who are not domiciled here. As mentioned above, where one of the couple *is* domiciled in England, *Sottomayer v De Barros (No 2)*¹⁵¹ will be relevant, since ‘the validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by an incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England’.¹⁵² Suppose, however, neither of the couple is domiciled in England. If an Italian and a Spaniard marry in London then Section 10(1)(b) and its instruction that the marriage is ‘not prevented from being recognised’ is of no use as this only applies to marriages outside the UK, and the equivalent provision in Section 10(1)(a) only applies to UK marriages outside England and Wales. Will the marriage be defective through lack of capacity of the Italian? A later dispute between the couple could find one of them arguing in an English court that they were not married at all.

¹⁵⁰ Stuart Davis, Associated Memorandum number 11 to House of Commons Public Bill Committee on the Marriage (Same Sex Couples) Bill 2012-13 (February 2013), available from <<http://www.publications.parliament.uk/pa/cm201213/cmpublic/marriage/memo/m11.htm>> accessed 4 September 2013.

¹⁵¹ (1879) 5 PD 94

¹⁵² North, PM and Fawcett JJ, *Cheshire and North's Private International Law* (13th edition, Butterworths, London 1999), 731, fn 18, citing Collins and others, *Dicey and Morris, The Conflict of Laws* (12th edition, 1993), 679.

2. Recognition in other Member States

The Wilkinson and Kitzinger scenario highlights the issues which arise for any jurisdiction when cross-border relationships are at stake, particularly where the couple do not both come from a jurisdiction permitting same-sex marriage. The legislative changes brought about both in Canada and England in an attempt to ensure recognition of foreign relationships find many equivalents on the continent. European jurisdictions which have introduced same-sex marriage have also normally introduced provisions to ensure that marriages celebrated on their own territory are not rendered void by virtue of the nationality or domicile of one or other of the couple. Usually these provisions ensure the validity of marriages where at least one of the couple is a resident or national of the country in question. They also enable the country performing the marriage to avoid imposing a discriminatory ban on its own citizens to the effect that they can only marry certain foreigners and not others. However, as is the case with the patchwork of civil partnership regimes,¹⁵³ European solutions are neither complementary nor homogeneous, meaning that problems can be expected to arise even between Member States who do wish to accord cross-border recognition.

a) Netherlands

In 2001 the Netherlands became the first country to introduce same-sex marriage. Yet it would have been unable to ensure that the Wilkinson and Kitzinger marriage enjoyed recognition under Dutch law, at least until the Canadian reforms of 2013. Dutch law sets aside any lack of capacity under personal law for those wanting to marry in the Netherlands but does so by relying on provisions which refer questions of essential validity to Dutch law where one of the future spouses is Dutch or habitually resident in the Netherlands.¹⁵⁴ These mirror Article 3(1) of the 1978 Hague Convention.¹⁵⁵ These provisions apply only to marriages which take place in the Netherlands.¹⁵⁶ For foreign marriages, Dutch law also mirrors the Convention in stating

¹⁵³ Ian Curry-Sumner, 'A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe' in K Boele-Woelki and A Fuchs (eds) *Legal Recognition of Same-Sex Relationships in Europe* (2nd edition, Intersentia 2012), 71.

¹⁵⁴ Article 2(a) Wet Conflictenrecht Huwelikj 7 Sept 1989, Stb. 1989, 392, discussed and explained in Ian Curry-Sumner, *Private International Law Aspects of Homosexual Couples: The Netherlands Report* (May 2007) vol. 11.1 *Electronic Journal of Comparative Law*, available at <<http://www.ejcl.org/111/art111-8.pdf>> accessed 4 September 2013, now replaced in the same form by Article 10:28 Dutch Civil Code.

¹⁵⁵ 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages (n 64). Note that only Netherlands, Australia and Luxembourg have ratified the Convention.

¹⁵⁶ There is some debate as to whether the Convention was intended to apply to same sex marriages: Ian Curry-Sumner, (n 154), but there is nothing in the wording of the Convention itself to suggest otherwise.

that validity depends on the law of the place of celebration.¹⁵⁷ This means it is able to recognise same-sex marriages validly conducted elsewhere, such as Belgium, even if the couple do not have capacity under their national law (eg an Italian and a Pole). However, the reference to the foreign law includes its private international law rules.¹⁵⁸ That means that, unless personal incapacity is set aside by the law of the place of celebration (as seen below in the case of Belgium) there is an explicit acceptance of *renvoi*. This means that the capacity of English domiciliaries to enter into a Canadian marriage would have required reference back to English law to determine capacity to marry. Putting the pieces together, Wilkinson and Kitzinger would *not* have been recognised at the time as being married under Dutch law due to a prevailing incapacity under English law. This situation would only have changed by applying the Canadian 2013 amendment.

b) Belgium

A similar situation arises in Belgium, which did not originally modify its private international law rules when it introduced same-sex marriage in 2003. Capacity to marry was governed by the nationality of the parties. This meant effectively that Belgians at the time could only marry each other or Dutch nationals. To rectify this, in 2004 Belgium introduced a specific exception in Article 46(2) Belgian Code of Private International Law.¹⁵⁹ Since then, whilst capacity to marry is still primarily governed by personal law based on nationality, any incapacity to enter into a same-sex marriage will be disregarded if *one* of the couple has the nationality of a jurisdiction permitting same-sex marriage, or has his habitual residence in such a jurisdiction.

This change must be intended to apply to marriages conducted outside of Belgium, as Belgian law in any event requires one of the couple to be Belgian or a Belgian resident in order to marry in Belgium. Thus the change goes further than simply applying the *lex loci celebrationis* to determine capacity. Instead it disregards incapacities to marry a same-sex partner irrespective of whether the marriage takes place in Belgium, or the place of habitual residence of one or both of the couple, or anywhere else where same-sex marriage is permitted. A same-sex marriage between two Italians celebrated in New York will be recognised under Belgian law if either one of the Italians in question is resident in New York, or Belgium, or Spain at the time

¹⁵⁷ Article 10:31 Dutch Civil Code.

¹⁵⁸ *ibid*, Article 10:31(3).

¹⁵⁹ Loi 16 juillet 2004 portant le Code de droit international privé, Moniteur Belge 27 July.2004. See Aude Fiorini, 'The codification of private international law: the Belgian experience' (2005) 54 ICLQ 499.

of the marriage. Strictly speaking, however, that marriage would not be recognised if both of those Italians were still resident in Italy, or in Poland.

Whether this would have helped Wilkinson and Kitzinger in the period prior to England permitting same-sex marriage in 2014 depends upon whether Wilkinson was habitually resident in Canada despite her English domicile. Assuming she was not, the Belgian reforms would still not have resulted in their marriage enjoying recognition in Belgium. This is an unfortunate result. Had they chosen to enter a UK civil partnership rather than a Canadian marriage, their relationship would then indeed have been treated as a marriage under Belgian law.¹⁶⁰

The Belgian reform was seen as far-reaching. It meant that not only could couples validly marry against the wishes of their 'home' state if they were resident in Belgium, but also that individuals not living in Belgium could similarly by-pass their home state restrictions if they were marrying someone living in Belgium. French citizens living in Belgium could enter into a same-sex marriage there when this was still prohibited in France. A French citizen could marry a same-sex Belgian even if both were living in France, and a French citizen still living in France could marry someone of any nationality as long as the latter was habitually resident in Belgium.

Another interesting factor of the Belgian amendment is that it requires only one half of a same-sex couple to have capacity, rather than English law which requires both spouses to have capacity.¹⁶¹ This moves the goalposts – rather than a marriage failing where one spouse lacks capacity, the marriage will succeed where one spouse has capacity. Such a test would be impossible if looking at consanguinity or minimum age requirements, and clearly shows the public policy aspects of supposed choice of law rules. It has the ironic consequence that a London marriage between an Italian and a Spaniard, at risk of invalidity through the Italian's lack of capacity unless one of them is domiciled in the UK, will nevertheless be treated as valid in Belgium, where the capacity of the Spanish spouse will override any incapacity of the Italian.¹⁶²

¹⁶⁰ Circular C-2007/09513 of the Belgian Minister of Justice 29 May 2007 "Circulaire tot wijziging van de circulaire van 23 september 2004 betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht die betrekking hebben op het personeelstatuut", Belgisch Staatsblad (Official Journal) 31 May 2007, no. 160, 29469.

¹⁶¹ Rule 74 in *Collins, Dacey, Morris and Collins on The Conflict of Laws* (15th edition, Sweet & Maxwell, 2012), 939.

¹⁶² See further Stuart Davis, 'New Approaches to Same-Sex Marriage: the End of Nationality as a Connecting Factor in Private International Law?' in K Boele-Woelki and N Dethloff (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Antwerp, Intersentia 2014), 263.

Understandably, both the Dutch and Belgian solutions triggered a negative reaction in France from those who saw these private international rules as unnecessarily ‘flexible’.¹⁶³ It might have been seen as an unwarranted extension of sovereignty. After all, why should Belgian law purport to determine the capacity of a French citizen to marry, particularly one still living in France rather than in Belgium?¹⁶⁴ This shows the inherent dilemma in choosing residence rather than nationality as the main connecting factor to determine applicable law. If the couple are resident in Belgium then arguably Belgian law has the greater claim to decide who should marry, even if non-Belgian nationals are involved. However, a consistent use of this reasoning would then mean that Belgians resident in Italy, for example, would not be able to conclude a same-sex marriage (even if they wanted to return home to Belgium to do so) unless, suddenly, nationality was once again to take precedence over residence.¹⁶⁵ The Belgian and Dutch solution of ‘double-dipping’, whereby *either* nationality or residence prevails, depending on which gives the most favourable solution, might be welcomed in terms of the rights it provides for same-sex couples. However, it shows the problems in maintaining a coherent, neutral system of conflicts. To this extent it can rightly be criticised as it imposes what is really a ‘public policy’ solution to a conflicts problem.¹⁶⁶

To highlight the problems with the Belgian approach one need only take the example of a ‘hostile’ jurisdiction enacting legislation in the opposite sense. Poland, for example, currently claims not to recognise same-sex marriages involving Poles on the basis that Polish law applies to govern the capacity of the Pole. It cannot currently use the same argument when looking at an English marriage between a French man and a Spaniard, both of whom enjoy capacity under their personal law regardless of where they live. In this case Poland needs to rely on a public policy exception. If Poland were to adopt a conflicts rule denying same-sex marriage if *either* of the couple had the nationality *or residence* of a jurisdiction which did not allow same-sex marriage (whichever gave the least favourable result) it would be seen as wrongly seeking to expand the scope of the public policy exception into a more general conflicts rule. However, it would have done nothing different from Belgium. In each case, it will be seen that not only has nationality

¹⁶³ Hugues Fulchiron, (n 53), 409, 425.

¹⁶⁴ It did not mean, of course, that the Belgian marriage in question would necessarily be recognised or given any effect in France, so to this extent French sovereignty is unaffected, but there is a question mark over why Belgian law should have the greater claim to determine the validity of a marriage between a French .

¹⁶⁵ See also Ruth Lamont ‘Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law’, (2007) 3 J Priv Int L 261; Paul Lagarde, ‘Développements futurs du droit international privé dans une Europe en voie d’unification : quelques conjectures’, (2004) 68 RabelsZ, 225; Myriam Hunter-Henin, ‘Droit des personnes et droits de l’homme : Combinaison ou confrontation?’ (2006) Rev. Crit DIP, 743.

¹⁶⁶ Fulchiron (n 53).

become a ‘suspect criterion’ for determining applicable law, but even that the whole system of conflicts rules is slowly being eradicated by public policy considerations.

c) Spain

Spain was faced with a similar issue shortly after its law on same-sex marriage came into effect on 3 July 2005, when a Spanish man was refused the right to marry his Indian boyfriend on the grounds that the Indian lacked capacity under his personal law. The case resulted in an opinion being issued by Justice Ministry in the Spanish Official Bulletin confirming that

a marriage between a Spaniard and a foreigner, or between foreigners of the same sex resident in Spain, shall be valid as a result of applying Spanish material law, even if the foreigner's national legislation does not allow or recognize the validity of such marriages.¹⁶⁷

This is then an amendment to Spain's adherence to nationality as a connecting factor, a trend which had already been regarded as necessary and was starting to be implemented in order to ensure justice and flexibility of solutions.¹⁶⁸ It is not entirely clear, however, how Spanish courts would treat an overseas same-sex marriage, particularly if that marriage was valid under the law of the place of celebration but not under the personal law of the celebrants. That would be the case, for example, for a same-sex marriage between two Italians concluded in Belgium where one of the couple had been habitually resident in Belgium. It is thought, however, that courts would look to the *lex loci celebrationis* to determine the rules relating to capacity, and thereby find the marriage valid.¹⁶⁹

d) France

Until 2013, the French approach towards recognition of same-sex marriages concluded in other countries reflected ‘classic’ private international law, with essential validity being governed by the law of the nationality of the parties. Any same-sex marriage involving a French citizen

¹⁶⁷ IPS, ‘Matrimonio gay se internacionaliza’ 25 July 2005 available at

<<http://www.ipsnoticias.net/2005/07/espana-matrimonio-gay-se-internacionaliza>> accessed 21 March 2015.

¹⁶⁸ Alegria Borrás and Julio D Gónzales Campos, ‘La Loi Nationale à l’Heure de la Réforme du Droit International Privé Espagnol’ in (n 16), 137, 153.

¹⁶⁹ Discussion with Professor Christina Gonzales-Beilfuss at the fifth conference of the Commission on European Family Law, Bonn, 30 August 2013.

would not be valid under French law, even one lawfully celebrated elsewhere.¹⁷⁰ Conversely, a foreign marriage would be valid under French law and be allowed to produce such effects in France as were not contrary to French public policy (such as the filing of joint tax returns to take advantage of shared allowances for married couples),¹⁷¹ as long as both parties had capacity to marry under their personal law. This proviso means a marriage such as Wilkinson and Kitzynger's would not have been recognised in France.

Whilst conceptually coherent, this approach would have resulted in some surprising results had it been allowed to reach its logical conclusions. Marriages involving American nationals, for example, whose domicile does not restrict their ability to marry elsewhere if another state allows it, could have expected a variety of treatments as French law struggled to identify the state, as opposed to federal, "nationality" of the citizen in question. A marriage in Massachusetts between a Dutch woman and her New York partner might well have been recognised in France, as would a marriage between a Dutch man and a Portuguese man celebrated in New York, but a New York marriage between a Dutch man and his Texan partner should then have been void in France for lack of capacity of the Texan.¹⁷²

A strict application of the rule denying effect to marriages involving French citizens, wherever celebrated, would also cause certain anomalies, particularly when looking at the effects of the rule on the spouse rather than the French citizen himself. Under the former regime, a French man married to a Spaniard in Spain would still have been regarded as single under French law, logically to the extent of then being at liberty to marry (a woman) in France, resulting (bigamy aside) in him being married to one person under Spanish law, and a different person under French law.¹⁷³ The Spanish husband would have had far fewer problems under French law had he instead married a Belgian, as in that case many incidents of his marriage would have been recognised in France. For the French man, a denial of his married status might be regarded as

¹⁷⁰ Réponse ministérielle, n886; J.O. Sénat, Q 24 janvier 2008, 161, note E. Fongaro, *Droit Famille* 2008, n° 6, chron. n° 16, 14.

¹⁷¹ Jean-Pierre Stroobants, 'La France reconnaît le mariage d'un couple d'hommes néerlandais' *Le Monde* 5 Sept 2008, available from <http://www.lemonde.fr/europe/article/2008/09/05/la-france-reconnait-le-mariage-d-un-couple-d-hommes-neerlandais_1091846_3214.html> accessed 6 October 2013.

¹⁷² The treatment of marriages abroad not involving French citizens might have given rise to an opportunity to make use of the French doctrine of attenuated effects even if one of the couple lacked capacity under his own personal law, but public policy might well still have prevented recognition if the couple in question were living in France. See further Hugues Fulchiron, 'Le Droit Français et les mariages homosexuels étrangers' *D.* 2006, 1253.

¹⁷³ In practice the French authorities might have avoided the risk of such a limping relationship by recognising the Spanish marriage for the purposes of denying the Frenchman the right to marry again, even though they would not have permitted that marriage to have any effect in France, see further Kenneth Mck Norrie, 'Would Scots Law Recognise a Dutch Same-Sex Marriage?' (2003) 7 *Edinburgh LR* 147.

justifiable on the basis that he had attempted a fraud on French law in seeking deliberately to evade a prohibition under his personal law. For the Spaniard, however, the fact that French law recognises his marriage to a Belgian but not to a French man could be regarded as unacceptable discrimination on grounds of nationality.¹⁷⁴

France moved on and made marriage available to same-sex couples in May 2013.¹⁷⁵ The new law adopts the same solution used in Belgium, namely incapacity to conclude a same-sex marriage is ignored where at least one of the couple has the nationality or residence of a jurisdiction permitting same-sex marriage.¹⁷⁶ Wilkinson and Kitzinger's Canadian marriage will now be recognised in France on the basis that from March 2014 England now permits same-sex marriage. However, the situation would have been less clear had England not taken that step. Had the new French law been in place from the time of their marriage, it might have been recognised from the outset on the basis of Kitzinger's 'residence' in British Columbia, but that is not free from doubt as the definition of residence is not clear in this context and the couple were probably still habitually resident in the UK.

The wording finally adopted was the one found in an *avant-projet* (an early draft of the proposed legislation).¹⁷⁷ However, it was not the text originally presented for consideration to the French legislature in November 2012, which envisaged a solution along the Dutch lines of judging the validity of a marriage according to the laws of the place of celebration.¹⁷⁸ Had that version been adopted instead, Kitzinger and Wilkinson's marriage might have been valid in France on the basis that the law of British Columbia 'permitted' the marriage. This again is not free from doubt, though, as it is not clear whether the reference to the *lex loci celebrationis* was to include

¹⁷⁴ See Chapter 6.

¹⁷⁵ Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

¹⁷⁶ Art.202-1 : 'Les qualités et conditions requises pour pouvoir contracter mariage sont régies, pour chacun des époux, par sa loi personnelle. Toutefois, deux personnes de même sexe peuvent contracter mariage lorsque pour l'une d'entre elles soit sa loi personnelle, soit la loi de l'Etat sur le territoire duquel elle a son domicile ou sa résidence, le permet.'

Translation: The attributes and conditions required for entering into a marriage are governed for each of the spouses by his or her personal law. However, two persons of the same sex may enter into marriage when one of them is permitted to do so, either by his or her personal law or by the law of the State on whose territory he or she is domiciled or resident.

¹⁷⁷ Hugues Fulchiron, 'Le « mariage pour tous » en droit international privé : le législateur français a la peine... ', *Droit de la Famille*, no 1, janvier 2013, dossier 9.

¹⁷⁸ 'Projet de loi ouvrant le mariage aux couples de personnes de même sexe', JUSC1236338L, 7 Nov 2012 <www.legifrance.gouv.fr> accessed 3 Feb 2013, includes the following provisions:

'La loi personnelle d'un époux est écartée, sous réserve des engagements internationaux de la France, en tant qu'elle fait obstacle au mariage de deux personnes de même sexe, lorsque la loi de l'Etat sur le territoire duquel est célébré le mariage le permet.' Translation: 'A spouse's personal law will be set aside, subject [only] to France's international engagements, insofar as it prevents the marriage of two persons of the same sex, where the law of the State on whose territory the marriage is celebrated permits the marriage in question.'

the conflicts rules of that jurisdiction or not. If it was, then arguably the couple's lack of capacity even under BC law could mean it would not have been valid in France until after Canada's 2013 amendments. In either case, however, validity would have depended solely on BC's law, rather than, as was the case, being dependent on England introducing same-sex marriage in 2014.

Had the couple instead chosen a civil partnership in the UK, their relationship would have been recognised in France after the amendments to the Civil Code of 2009, with the effects devolving from it to be determined in accordance with the law of the state of registration (in this case, UK).¹⁷⁹ However, these provisions do not explicitly apply to foreign marriages, so for the period from their marriage until 2014 they would have enjoyed fewer rights in France under their Canadian marriage than had they entered a civil partnership. It was argued that there is scope under French law for these marriages to be 'recategorised' as a partnership and then treated as such.¹⁸⁰ However, this view was never accepted by the French government, which maintains that an overseas same-sex marriage cannot be assimilated to a PACS.¹⁸¹

The new reforms mean that nationality is no longer a barrier to the recognition of same-sex marriages in France, whether the marriages were concluded by French nationals or foreigners living in France, or foreigners living abroad. For a while there was one exception to this. The problem of "international engagements" mentioned in the *avant-projet* had not gone away. Although not now expressly set out in the law, the French government took the view that it could not override incapacities imposed by a personal law deemed applicable by virtue of conventions concluded with other countries.¹⁸² This concerned nationals of eleven jurisdictions, mostly former French colonies and the former Yugoslavian republics. The status of these conventions following the introduction of the new law was called into question when in September 2013 a public prosecutor prevented a same-sex marriage between a Moroccan and a

¹⁷⁹ Article 515-7-1 Code Civil inserted by Loi 2009-526 of 12 May 2009.

¹⁸⁰ H Fulchiron, 'Same-Sex Marriage in French Law: Rejection and/or Recognition?', the French National Report to the 18th Annual Congress of International Academy of Comparative Law, Washington DC, July 2010, published as *American Journal of Gender, Social Policy & the Law*, Vol 19 (2011), 123, 139.

¹⁸¹ Réponse Ministérielle no 1127S, JO Sénat 19 janvier 2011, 138, discussed by Maryline Bruggeman, 'Droit International Privé : de quelques difficultés nées de la légalisation du mariage entre personnes de même sexe à l'étranger' *Droit de la Famille* 3 (mars 2011) alerte 19.

¹⁸² 'Circulaire du 20 mai 2013 de présentation de la loi ouvrant le mariage aux couples de personnes de même sexe (dispositions du Code civil)' Bulletin Officiel du Ministère de la Justice du 31 mai 2013, JUSC1312445C, available at <http://www.textes.justice.gouv.fr/art_pix/JUSC1312445C.pdf> accessed 27 September 2013.

French man on the basis that it contravened the Franco-Marrocan convention.¹⁸³ The TGI Chambéry then lifted the restriction in a judgment on 11 October 2013, stating that the new law had implicitly modified French international public policy (*ordre public international français*). The matter was finally resolved by a judgment of the French Cour de Cassation on 28 January 2015. Following the previous approach used in relation to talaq divorces or muslim adoption cases, the Court ruled that the new law reflects international French public policy and takes precedence over the conventions.¹⁸⁴

In addition to questions of compatibility with French public policy, another interesting point here is was that the restriction purported to apply to two other EU Member States, Poland and Slovenia, whose nationals continued to be denied the ability to marry in France and whose same-sex marriages conducted elsewhere might also have been denied recognition under French law. A clearer case of discrimination on grounds of nationality is difficult to envisage. Under the former French rules there was already a largely incomprehensible and unjust incongruity in that a French court could tell a Spanish man his marriage to a French man (or a German, or a Texan) was non-existent, whilst it would have upheld a marriage as giving rise to legally enforceable obligations had the same man married a Belgian (or a New Yorker, or a Swede). Under the new rules, prior to the Cour de Cassation's judgment, a French court could have told a Spanish woman that her marriage to a Polish woman, celebrated in the Netherlands whilst both were resident there, was not recognisable in France.

IV. Conclusion

The classic conflicts of law approach towards foreign relationship statuses has both advantages and disadvantages for same-sex couples. The advantage of retaining a concept of personal jurisdiction for family law matters is ostensibly that a person's civil status remains unaltered as he moves across borders, rather than being at risk of modification under local law. The disadvantage for gays and lesbians, however, is that the use of personal capacity is as likely to be used in a negative sense, to try to prevent same-sex relationships, as it is to be used in a positive

¹⁸³ Shahzad Abdul, 'Un tribunal autorise le mariage gay d'un Marocain et d'un Français', Le Monde 12 October 2013, available at <http://www.lemonde.fr/societe/article/2013/10/12/un-tribunal-autorise-le-mariage-gay-d-un-marocain-et-d-un-francais_3494690_3224.html> accessed 1 January 2015.

¹⁸⁴ Cour de Cassation, 'Communiqué relatif à l'arrêt dit du « mariage franco-marocain entre personnes de même sexe du 28 janvier 2015' available from <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_dit_30975.html> accessed 20 February 2015.

sense of providing a basis to acknowledge them. This approach is exemplified today by Poland, whose notions of personal capacity are used to purport to deny its own nationals the right to form same-sex partnerships and marriages abroad.¹⁸⁵ The second part of the notion, that if personal law applies then a personal law permitting same-sex marriage or partnership should be respected even by states which do not allow the same status to their own citizens has, with a very few exceptions, never been accepted. This is due to the use of the public policy exception, discussed already in Chapter 2 and further in Chapter 4.

Hence the application of a single choice of law regime with consistent application throughout Europe would present a dilemma, even if the use of the public policy exception could be restricted. The choice of the appropriate connecting factor would itself have implications. Couples from permissive states such as the Netherlands, France, England, or Spain will want to be governed by nationality if that enables them to achieve more recognition in prohibitive states such as Poland or Greece. Greek and Polish couples who married whilst resident in London or Paris and wanting to invoke spousal rights in their home countries or elsewhere will be arguing in favour of using the law of residence or domicile at the time of marriage. Meanwhile the best argument for those who married ‘evasively’ (eg in London or New York but whose nationality did not accord them capacity and who were not living in a permissive state at the time) may be to use *lex loci celebrationis*, i.e. effectively abandoning the notion of personal law entirely.

Lex loci celebrationis is problematic for the reasons given above – it confers no claim for recognition given its loose connection with any other state. The policy differences between the Member States do not facilitate recognition but instead lead to great reliance on the public policy exception.

Nationality and domicile are also inappropriate choices for a universal rule. Those who do wish to accord recognition find nationality a constraint, and have taken steps to replace it with habitual residence or *lex loci domicilii*. Those who oppose recognition maintain nationality as a link for their own nationals so as to deny them capacity, but then use public policy to refuse to accept the capacity which other nationalities enjoy under their own personal laws. One might argue that nationality (or domicile) could continue to be the main connecting factor if close

¹⁸⁵ Ulrich Ernst, ‘Das polnische IPR-Gesetz von 2011’, (2012) 76(3) *RabelsZ*, 597.

control was kept on the exercise of public policy exceptions where these are used to set aside a governing law favourable to same-sex couples. This would at least allow the growing number of nationals from 'gay-friendly' states to enjoy recognition at home and in each other's states/ For certain purposes they would enjoy recognition in gay-hostile states too, as long as they did not trigger the public policy exception by living there. The growing understanding of national authorities mean that, as between gay-friendly states, issues such as France not recognising a civil partnership or Finland not recognising a French PACS will gradually disappear. For the majority of EU citizens this would be an improvement.¹⁸⁶ It would mean however, that nationals from Cyprus, Poland, Italy, Romania etc would then be denied the ability to form same-sex unions with each other *in any Member State*. If applied consistently, the resulting incapacity would even extend to marriages celebrated in London and Paris between those nationals. Politically such a stark division might help sharpen the debate in the remaining hostile state. If Italy has to recognise incoming Dutch or French married couples but not Italian ones then it highlights a reverse discrimination it may not want to maintain. However, whilst this shows that a political solution is needed to rectify the anomalies caused by a generalised application of conflicts law, it does so by exacerbating the inequalities present in the current system.

An alternative system based on intended matrimonial home or habitual residence might be fairer, and if a single connecting factor could be chosen I suggest this would be the most appropriate. It has the distinct advantage of allowing citizens of hostile states greater freedom to marry or form partnerships elsewhere, and could ensure that those unions are valid throughout the EU, even in the homeland or other hostile states, given that the public policy justifications for refusing effect are largely absent once the couple themselves are no longer present. Consistently applied it would mean that all Member States would have to recognise same-sex unions, whatever nationality the spouses or partners, as long as the couple lived (and, for the habitual residence test, continued to live) in a state where it was legal. The problem, however, is that for nationals of hostile states, it amounts to an invitation to leave the country. The home state effectively says 'we will recognise the effects of your same-sex marriage as long as you live somewhere else', whilst other states, applying the law of residence, would say 'we will not recognise your marriage whilst you continue to live in a 'non-recognition' jurisdiction.

¹⁸⁶ Based on my own calculations and population statistics provided by Eurostat
http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_and_population_change_statistics
 accessed 14 March 2015.

Those who choose to continue to live in a county which does not currently recognise same-sex relationships will not enjoy recognition elsewhere if the law of residence applies. This incitement to migrate could be seen as the expulsion of ‘undesirables’.¹⁸⁷ It might be popular in certain Member States, but is hardly consistent with free movement or citizenship rights where the right to move elsewhere must surely also include a right to stay at home.

There is, therefore, no single choice-of-law regime which can be adopted to solve all problems of cross-border recognition. It might be otherwise if every Member State either allowed same-sex marriage or had a form of civil partnership, as then one could rightly claim that the choice of law regime was just that – a neutral value-blind system to establish the most appropriate applicable law. However, the policy divergences between the Member States are so great that ultimately this is not really a choice-of-law question, but a choice-of-policy question, namely whether to recognise same-sex partnerships or not.

¹⁸⁷ See further Zvi Triger, ‘Fear of the Wandering Gay: some reflections on citizenship, nationalism and recognition in same-sex relationships’ (2002) 8 *Int J Law in Context*, 268.

Chapter 4: Public Policy and *Ordre Public*

I. Introduction

In this Chapter I revisit the scope of the public policy exception and its use in conflicts situations. I argue that its use is neither legitimate nor proportional when used to deny effect to marriages and partnerships which would otherwise be valid under ‘normal’ conflicts rules. This should mean that states performing same-sex marriages and partnerships in full ‘compliance’ with conflicts law (i.e. unions not involving those lacking capacity if domiciled or nationals elsewhere) should not be reticent about asserting the validity of these statuses in other Member States. In particular, they should not be ready to accept the host state’s arguments that its public policy would be infringed in doing so.

Chapter 2 has already provided an opportunity to explain the public policy exception in an American context. Its use is equally problematic in the EU and represents the second limb of the ‘counterfactual’ in respect of which EU Law and human rights requirements must be applied. To recap the conclusions from Chapter 3, conflicts law appears to allow a state such as Poland or Romania the ‘right’ to ignore any same-sex marriage or partnership status accorded elsewhere to one of its own nationals. This will continue for so long as EU Law allows nationality or domicile to be acceptable connecting factors to govern capacity. A consistent application of the same reasoning should, however, require all states to recognise marriages and partnerships validly concluded between foreigners whose capacity to do so is not at issue, such as a marriage between a Dutch woman and a French woman celebrated in London. Alternatively, if the connecting factor of nationality is replaced with habitual residence, Polish residents of any nationality would not be able to have a same-sex marriage anywhere, but French residents of any nationality (including Poles) should then in principle enjoy recognition of their French same-sex marriage both in France and elsewhere. Whichever connecting factor is appropriate, there would be some same-sex couples (depending on either nationality or residence) whose marriage is recognised everywhere.

This recognition is thwarted, however, by the application of ‘public policy’ or ‘*ordre public*’, which confers a wide residual discretion and is enjoyed apparently without apparent objection from other states. This discretion enables jurisdictions to deny recognition to a marriage which, whilst fulfilling both requirements as to form and essential validity, is regarded as being so

offensive to the forum state's notions of public decency that the courts there will nevertheless refuse to give effect to it. This applies in the case of same-sex marriages, albeit in a diminishing number of Member States. It also applies, arguably with even less justification, to partnerships. Notions of essential and formal validity are still developing in relation to partnerships, but public policy is also gaining ground as a central factor in the refusal to recognise their effects. This is shown again by the example of Poland, where both the 1965 and 2011 Polish Private International Law Acts use nationality as the key connecting factor to determine personal law. The normal consequence of this would be that a London Franco-Dutch same-sex marriage would be governed as to its formalities by English law and as to its essential validity by French and Dutch law. Therefore, it would be valid and effective in Poland. However, the Polish law adds: 'Foreign law shall not apply, should the effects of its application be contrary to the fundamental principles of the legal system of the [Peoples'] Republic of Poland.'¹ This apparently leaves open the possibility for Polish courts to deny any recognition to foreign same-sex marriages on the basis of a conflict with Article 18 of the Polish Constitution, which provides that 'Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.'² The same applies to Poland's treatment of foreign registered partnerships. Indeed, a suggestion that this might not be the case, and that same-sex partnerships might somehow slip under the net of the public policy exception as not constituting an attack on Poland's conception of marriage, was a particular concern in the debates leading to the implementation of the 2011 law.³

Similar attitudes towards public policy, often entrenched in legislation or combined with constitutional amendments purporting to protect marriage as an opposite-sex institution, are in place in other Eastern European countries including Romania and Lithuania.⁴ Again the same

¹ Jerzy Rajski, *The New Polish Private International Law 1965*, (1966) ICLQ 15(2), 457. Polish Private International Law Act 4 Feb 2011, (O.J. (Poland) 2011 No. 80, item 432, see Ulrich Ernst, 'Das polnische IPR-Gesetz von 2011', (2012) *RabelsZ* 76(3), 597. The reference to the 'Peoples' Republic' is, of course, from the 1965 version.

² Constitution of the Republic of Poland of 2 April 1997, *Dziennik Ustaw* No. 78, item 483, available at <<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>> accessed 28 October 2013.

³ Mateusz Pilich, 'Die Anerkennung der quasi-ehelichen Verhältniss in Polen aus der kollisions- und europarechtlichen Perspektive' (2002) *Zeitschrift für Gemeinschaftsprivatrecht*. 8(4), 200, available at SSRN (in German only) under the title 'The [Polish] Recognition of Quasi-Marital Unions from the Perspective of the Private International Law and the European Law' <<http://ssrn.com/abstract=1779289>> accessed 7 December 2013.

⁴ Monika Jagielska, 'Eastern European Countries: From Penalisation to Cohabitation or Further?' in K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe* (2nd edition, Intersentia 2012). See further Carl Stychin, 'We Want to Joint Europe, not Sodom: Sexuality and EU Accession in Romania', Chapter 6 in Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart 2003), 116.

treatment is extended to registered partnerships. The Romanian Senate's Reasoned Opinion against the Commission's 2011 proposals for the Registered Partnerships Property Regulation⁵ invoked Romanian legislation⁶ to the effect that registered partnerships enjoy no recognition in Romania whether involving Romanian citizens or foreigners. It claimed, amongst others, 'public order' principles as a reason not to be subject to the proposed Regulation which would require recognition of the property consequences of registered partnerships.

Public policy therefore provides a broad and all-encompassing power. The exercise of the discretion does not depend upon showing any connection with the couple other than the connection already used to establish the forum court's jurisdiction. *Cheni v Cheni*, for example, concerned a marriage, valid under Jewish religious law, between an uncle and his niece.⁷ Both spouses were French and living in France at the time of the marriage, which took place in Egypt. Despite having no connecting factors with English law at all, an English court still considered it had a power to exercise its public policy discretion to find the marriage void and without effect in England. Although the court ultimately found the marriage valid, the relative ease of recourse to a public policy argument shows it to be a dangerous tool easily capable of abuse.

II. National Public Policy and Same-Sex Relationships

An English court looking into the validity of a marriage will consider all the circumstances of the case in exercising its discretion. If, in a case such as *Cheni v Cheni*,⁸ a couple come to the UK, and the niece petitions for divorce and financial relief, the court might decide it would be an injustice not to recognise the marriage in order to grant her request. Similarly, if the uncle has died, the niece finds herself in England and the case concerns her right to inherit under intestacy, the courts might again not find it against public decency to uphold the marriage. The couple are, evidently, no longer able to cause offence through living together or otherwise be engaged in sexual (and criminal) activity.⁹ The fact that a court will consider these factors shows that, in order to offend 'public decency', it is not enough for the marriage in question to

⁵ Romanian Senate Reasoned Opinion 30 May 2011, Bucharest, available at <<http://www.ipex.eu/IPEXL-WEB/scrutiny/CNS20110060/rosen.do>> accessed 8 January 2015.

⁶ Law 287/2009, Civil Code Article 277(3) (Romania).

⁷ *Cheni v Cheni* [1965] P 85, [1962] 3 All ER 873. .

⁸ *ibid.*

⁹ If governed by English law the marriage would normally be considered incestuous under Sexual Offences Act 2003, s64.

be of a kind that does not exist in the forum state. It is not even sufficient for the marriage in question to be linked to behaviour considered illegal in that state (in this example, incest) where the behaviour in question does not in fact take place in that state. Instead the public decency test, as understood under English law, is that the marriage in question must give rise to a behaviour or status which is both prohibited and justifiably unacceptable under forum state law.

Turning to same-sex relationships, I would submit that the test of offensiveness to public decency was only ever met in certain limited respects, even prior to the introduction of civil partnerships or same-sex marriages. Refusing to allow same-sex marriage does not affect the lawfulness, or inclination of any particular same-sex couple to live together, sleep together or, possibly, even to have children. The LGBT campaign for same-sex marriage is based, rightly or wrongly, on a desire for social acceptance and equal treatment. Nevertheless, I dispute the suggestion that allowing same-sex marriage encourages homosexual behaviour.¹⁰ Gay couples in the EU today, like nearly all opposite-sex couples in Britain,¹¹ are unlikely to be particularly in awe of the institution of marriage. They certainly could not be expected demurely and politely to decline to conduct a relationship outside of it.

The same futility in denying effect to a family status is even truer where the couple in question have already celebrated a marriage or formed a partnership elsewhere, or are already raising children. Failing to recognise their marriage or family relations in the forum state will make no difference whatsoever to how that couple behaves (other than perhaps to discourage them from moving to that state if they do not already live there). Hence it cannot be the 'behaviour' itself which offends the public order test. Even if the idea of a same-sex couple is anathema to the forum state, any perceived attack 'on 'public decency' made by the existence of same-sex relationships is not remedied by failing to recognise the couple's legal status acquired elsewhere, and in any event the 'undesirable' behaviour itself does not change. Even if there were a so-called 'fundamental principle', as Poland appears to claim, restricting marriage to opposite-sex couples, the extent to which that fundamental principle is actually protected by not recognising foreign marriages is far from clear. I submit that Polish public policy is not protected by denying, for example, the Dutch survivor of a Polish-Dutch same-sex marriage the right to

¹⁰ John Finnis, 'Law, Morality and Sexual Orientation' (1993-94) 69 *Notre Dame Law Review* 1049.

¹¹ Park, A, Bryson, C, Clery, E, Curtice, J and Phillips, M (eds.) (2013), *British Social Attitudes: the 30th Report*, London: NatCen Social Research, available online at <www.bsa-30.natcen.ac.uk> accessed 17 September 2013. Public opinion survey in EU from Chapter 1.

inherit a half share of jointly-owned property in Poland after his husband's death, at least not if there is no prior Polish spouse or children in Poland.¹² As shown later in this Chapter, the more developed systems of private international law recognise that public policy should focus solely on the effects of recognition in the forum state. Where the effects are few, such as where the couple are not (or are no longer) living together, there should be no affront to any principles of the forum state preventing the effects (succession, maintenance) of the former relationship playing their normal role.

Public policy can also be used in the opposite way, namely to support the recognition of same-sex relationships in a particular format, when 'normal' private international law rules would either lead to their recognition in a different format, or lead to no recognition at all. This can occur in judge-made law, as, for example when Belgium recognises a UK civil partnership and assimilates it to a Belgian same-sex marriage (if only, as often the case to start with, for the purposes of granting a divorce).¹³ Normal Belgian conflict rules would suggest that a civil partnership, not being a marriage, does not give rise to the ability to grant a divorce under Belgian law. It can also operate under statute, such as the UK technique under the Civil Partnership Act of treating both a Belgian marriage and a Belgian *cohabitation légale/wettelijke samenwoning* as civil partnerships. This is notwithstanding the fact that in Belgium those couples choosing one status over another would have had very different intentions and expectations as to the legal rights and obligations stemming from their particular choice of relationship.¹⁴ More recently an explicit form of 'public policy of recognition' has emerged in the various private international law amendments discussed in Chapter 3, such as those introduced by Netherlands, Belgium, France, or England, which specifically disregard various incapacities normally applicable under personal law.¹⁵

¹² In a similar vein, in *Kozak v Poland* [2010] ECHR 280 the ECtHR found an infringement of Articles 8 and 14 ECHR where the inheritance of a tenancy right was denied to a same-sex de facto couple whilst it would have been granted to an unmarried heterosexual couple.

¹³ Circular C-2007/09513 of the Belgian Minister of Justice 29 May 2007 "Circulaire tot wijziging van de circulaire van 23 september 2004 betreffende de aspecten van de wet van 16 juli 2004 houdende het Wetboek van Internationaal Privaatrecht die betrekking hebben op het personeelstatuut", Belgisch Staatsblad (Official Journal Belgium) 31 May 2007, no. 160, 29469.

¹⁴ Under the Couples (Same-Sex Marriage) Act 2013 the marriage will now be treated as a marriage whilst the cohabitation légale will continue to be treated as a civil partnership (unless it is opposite-sex).

¹⁵ Stuart Davis, 'New Approaches to Same-Sex Marriage: the End of Nationality as a Connecting Factor in Private International Law?' in K Boele-Woelki and N Dethloff (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Intersentia 2014).

This poses a dilemma. Public policy might be ‘overused’ in relation to the denial of foreign same-sex relationships, or could be viewed as an abuse of the normal protections intended to be afforded under international conflicts rules. If so, however, then the same abuse arguably also occurs whenever public policy is applied to accord recognition to a situation which would not normally be recognised. The ‘public policy’ of Belgium ignoring the *incapacity* of Polish nationals to marry someone of the same-sex under their personal law can be seen as no less a misapplication of Belgian conflicts law than the failure of Poland under Polish conflicts law to recognise a marriage between two Belgians who do have capacity under their personal law.¹⁶

The use of public policy in this way is not limited to same-sex marriage recognition, but occurs already in a wide variety of family law instances and has done so for many years. English courts have shown themselves ready to deny recognition to various incapacities imposed by the law of domicile. These include a general incapacity of a monk or nun to marry anybody at all¹⁷, or a purported incapacity to marry outside one’s faith, caste or race.¹⁸ The same approach has been adopted by French courts. Moroccan law prohibits a Moroccan woman from marrying a non-Muslim, but France will not uphold this lack of capacity under the applicable Moroccan personal law.¹⁹ The Paris Court of Appeal viewed this as discrimination on grounds of sex or religion contrary to French public policy, and decided that obstacles of a religious nature could not be allowed to impinge on matrimonial liberty.

For same-sex marriages and partnerships, the law of the place of celebration or registration has, doctrinally, a greater claim to be applied elsewhere (and hence to widen the scope of recognition of the relationship in other jurisdictions) if the marriage or partnership is valid without doubt under both the substantive and conflicts rules of the place in question. For example, Poland might want to reject an English marriage between two Poles on the basis that this is an evasive marriage and the spouses lack capacity under their law of nationality, using Polish conflicts rules. But England uses domicile, not nationality as a connecting factor, and the marriage is therefore valid under English law if the Poles are domiciled in England. If the conflicts rules of the law of the forum are applied it is not an evasive marriage under English

¹⁶ Hugues Fulchiron, ‘Mariage et Partenariats Homosexuels en Droit International Privé Français’ (2006) RIDC 409.

¹⁷ *Sottomayer v De Barros* (No 2) (1879) 5 PD 94, 104.

¹⁸ See cases cited by PM North and JJ Fawcett, *Cheshire & North’s Private International Law* (13th ed, Butterworths 1999), 734, fn 7 to 9.

¹⁹ Paris (Court of Appeal), 9 June 1995, D. 1996 som 171, referred to by Sylvaine Poillot Peruzzeto ‘The Exception of Public Policy in Family Law within the European Legal System’, Chapter 8 p.279 in Meeusen, Petegas and others (eds), *International Family Law for the European Union*, (Intersentia 2007) 282, fn21.

law. Applying the interest analysis already discussed in Chapter 2, Poland has few grounds for claiming jurisdiction over two Poles who have moved to England in order to marry, and should recognise the marriage.

This argument depends, however, on a scrupulous respect for classic conflicts rules by the state performing the marriage. Fulchiron's claim that Belgium has distorted the normal rules (in widening its conflicts rules specifically to enable those without capacity to enter into Belgian same-sex marriages) can now be understood as meaning that these marriages are consequently less deserving of recognition.²⁰ For example, the grounds for expecting recognition are missing if an English same-sex marriage comprises two spouses who even under English conflicts rules would normally not enjoy capacity to marry, such as between a Pole and an Italian domiciled in Poland or Italy.

On balance, I believe the positive use of public policy in this way should not be seen as a distortion or abuse simply because it creates rights which do not exist in the state of origin. If the Netherlands, as was the case, wishes to change its conflicts rules to allow residents, and not just nationals, to marry, then the right to same-sex marriage is extended to Italian residents living in the Netherlands. There should also not be an issue if Dutch law gives a Dutch woman the right to marry an Italian woman, even if the latter is not resident in the Netherlands. In either case the marriage is still valid under the (modified) conflicts rules of the place of celebration and should therefore enjoy recognition elsewhere.

However, if conflicts laws have been overridden by 'positive public policy' the state creating that situation cannot expect another state to accept it when creating the situation itself entailed disregarding the celebratory state's own conflicts rules. A distortion occurs where England (as it does) allows two Poles to marry even if they are still domiciled in Poland. Strictly speaking the Poles lack capacity under the law of both their nationality and domicile. The same distortion would occur if the Poles were domiciled in England but the UK used nationality, rather than domicile, to determine capacity, but then applied a public policy exception to ignore the incapacity and allow the Poles to marry anyway.²¹ Whether or not this was an 'evasive' marriage (the Poles might have moved to the UK permanently), it is then harder to justify why

²⁰ Hugues Fulchiron, 'Same-Sex Marriage in French Law: Rejection and/or Recognition?', the French National Report to the 18th Annual Congress of International Academy of Comparative Law, Washington DC, July 2010, published in (2011) 19 *American Journal of Gender, Social Policy & The Law*, 123.

²¹ This is essentially the situation in Canada under the 2013 law.

Poland would have to accept this situation given that it did not even conform even to the usual English conflicts rules.

III. Public Policy, Religion and Morals

The public policy exception can take many guises, and the exact nature of its scope and ambit can be difficult to pin down. Poland, as shown above, equates *ordre public* with the ‘fundamental principles of the Polish legal system’, but little other clarification is available as to the basis of those principles. Similar attitudes are found in some other, mainly Catholic, countries, such as Italy, where public policy is described as being linked to ‘... the forum State’s most basic notions of morality and justice’.²² This reduces the public policy test to a question of the political policy of the forum state, whereby forum state law is likely to take precedence over *any* conflicting legal norm as soon as questions of morality or cultural practice are involved. Yet systems of conflicts of law, as discussed in Chapter 3, are supposedly neutral as to the substantive content of the laws in question. Under those systems, recourse to the public policy exception (which, by, definition, is not neutral as to the substance of the law in question) is supposedly only to be taken in exceptional circumstances. It is not ostensibly to be used in every case where the forum state disagrees with the content of the foreign law. Yet an example of such an overly broad interpretation of public policy can be seen in the various responses given by EU Member States in a working group set up specifically to consider the implications of the then recently-introduced institution of same-sex marriage in Belgium and the Netherlands. The EU Network of Independent Experts on Fundamental Rights (CFR-CDR) considered the extent to which Belgian and Dutch same-sex marriages might be recognised in other EU Member States. The study, carried out at the request of the European Commission and whose results were published in an Opinion on 30 June 2003, specifically considered the implications of the public policy exception under the private international law rules of the participating Member States.²³ This highlights some typical misunderstandings as to the role of the public policy exception. The Maltese contingent to the CFR Opinion, for example, were at pains to stress that a homosexual union would not be recognized as a marriage, taking account

²² Luigi Famagalli, ‘EC Private International Law and the Public Policy Exception: Modern Features of a Traditional Concept’ in P Sarcevic et al (eds), *Yearbook of Private International Law*, Vol 6 (2004) (Sellier 2005) 171.

²³ ‘Avis sur la possibilité de la reconnaissance, par chaque Etat membre, du mariage homosexuel ouvert aux Pays-Bas et en Belgique et le rôle de l’exception d’ordre public international du droit international privé de chaque Etat membre’, CFR-CDF avis2-2003, 30 June 2003 : ‘the CFR Opinion’, available from <http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_avis2_2003_fr.pdf> accessed 5 June 2013.

of “the definition of a marriage in Malta” as “a Christian marriage”. It equated the public policy exception to government policy, and drew on a statement made by a minister to the Maltese parliament that there was no intention to recognise this type of marriage in Malta as it was ‘incompatible’ with the Maltese Marriage Act.²⁴ Similarly, the Italian delegation felt a foreign same-sex marriage could never be recognised in Italy, considering the difference in sexes for marriage to be a fundamental principle of the Italian legal system.²⁵ The Greek contingent equated the principle with the consensus principle seen in human rights developments, under which the acceptance or otherwise of homosexual unions depended on the evolving social mentality and the gradual emergence of a European consensus.²⁶

These broad interpretations of the role of public policy expand the notion beyond its original function. Traditionally the role of public policy is not to insist on the imposition of local morality over foreign laws, and care is needed not to confuse fundamental legal principles with moral beliefs, however deeply held.²⁷ It has been argued that:

‘Public policy’ is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice of law rule.²⁸

This rather generous interpretation suggests that the forum state is ambivalent as to the content of the foreign law. However, whilst this may be the purported approach, often the forum court is seeking to avoid the application of its own conflicts rules (so as to be able to apply its own substantive law) precisely in order to circumvent such content. Using the public policy exception in any case overrides not only the domestic conflicts rules which would normally apply a foreign law, but of course overrides the foreign law itself. The danger here is that the public policy exception is effectively used primarily to favour one moral choice over another. Such an interpretation leads to an automatic rejection of any foreign law which does not accord

²⁴ CFR Opinion, 20.

²⁵ *ibid.*, 19.

²⁶ *ibid.*

²⁷ Monrad Paulsen & Michael Sovern, “Public Policy” in the Conflict of Laws’ (1956) 56 Colum L Rev 969.

²⁸ *ibid.*

with the forum state's values – effectively sweeping aside the entire concept of private international law in favour of the simple application of the law of the forum.²⁹

It might be possible, therefore, to achieve greater recognition of same-sex relationships if greater focus is given to the real nature of the public policy exception. Member States should not expect to be able to cite public policy as grounds for a blanket refusal of recognition, and a greater awareness of the limitations on the legitimate use of the exception might encourage some Member States to reconsider the circumstances in which the exception is applied. Attempts have been made to enshrine this approach in the Matrimonial Property Proposals, discussed in Chapter 5, but it is helpful first to discuss the example of the development of the exception under English law to show how its use has come to be constrained.

English conflicts law has a long history of dealing with opposing moral choices, perhaps due to the wide variety of religions and cultures prevalent for many centuries. The test is not moral choice but simply whether giving effect to the capacity or incapacity under the foreign law would be 'unconscionable'.³⁰ This supposes, of course, that 'public policy' is something which can be recognised. It implies a universal, yet unstated notion which represents some sort of accepted dominant ideology, an ideology which in a pluralistic society may well be difficult to pin down. Murphy argues that in a pluralistic Britain today significant minorities would find little problem accepting proxy marriages, arranged marriages or polygamy. This does not mean, however (and neither does Murphy suggest this), that every foreign marriage should be recognised simply because some people in Britain think it acceptable.³¹ There is still a need to identify the dominant ideology, even if it is now harder to find. In the past the dominant ideology was probably Christian morality. The public policy exception was then used as a discretionary veto to uphold 'Christian' conceptions of marriage in the face of 'revolting' foreign practices such as polygamy or arranged marriage.³² Yet Christianity today is no longer the sole authority to dictate public policy generally. This has arguably been the case for fifty

²⁹ This is quite possibly the attitude of various recent Polish governments: in its Treaty of Accession Poland was permitted to make a declaration that "The Government of ... Poland understands that nothing in [the Treaties] prevents the Polish State in regulating questions of moral significance..." see Chris Hilson, 'The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National and European Identity', (2008) Eur LJ 14(2) 186, 194.

²⁹ Paulsen and Sovern (n 27), 981.

³⁰ PM North and JJ Fawcett, *Cheshire & North's Private International Law* (13th ed, Butterworths 1999), 733.

³¹ John Murphy 'Rationality and Cultural Pluralism in the Non-Recognition of Foreign Marriages' (2000) 49 ICLQ 643, at 648.

³² As shown in *Warrender v Warrender* (1835) 2 Cl & Fin 488, 532 and *Hyde v Hyde* (1866) LR 1 P&D 130, 136 per Lord Penzance.

years, since Simon P found in *Cheni v Cheni* in 1965 that... ‘it is now clear that English courts will recognise for most purposes the validity of polygamous marriages, notwithstanding that they are prohibited by Christianity.’³³

That case marks an important milestone in that it shows that the grounds for invoking public policy under common law were no longer linked to upholding morality or religious ideology. The case, as mentioned, concerned a marriage under Jewish law celebrated in Egypt between an uncle and his niece at a time when both parties were domiciled in Egypt. Looking at both the potentially polygamous nature of the marriage, and the question of whether it was incestuous, Simon P specifically rejected the argument, based around the authority of Joseph Story,³⁴ that English law... ‘will not recognise the validity of a marriage which, even though valid by its proper law, is incestuous by the general consent of all Christendom, or... by the general consent of civilised nations or by English public policy.’³⁵ Instead, he goes to some length to explain why the ‘general consent of all Christendom’ is a myth, given varying interpretations to the question by Catholics, Lutherans and Calvinists (including Anglicans) and instead formulates the public policy test as follows:

What I believe to be the true test [is] whether the marriage is so offensive to the conscience of the English court that it should refuse to recognize and give effect to the proper foreign law. In deciding that question, the court will seek to exercise common sense, good manners and a reasonable tolerance.³⁶

This nebulous concept simply replaces the court’s own notions of ‘public policy’ with the court’s own notions of ‘common sense’. It provides no greater clarity or delineation to the scope or extent of the veto, although it does suggest that the ‘offensiveness’ of the foreign marriage is no longer to be determined in light of religious ideals. Simon P further considered that, even if the test were to be based on ‘the general consent of civilised nations’, it was not a matter of finding a consensus view. He adds: ‘I do not think that the matter can be resolved by, so to speak, taking a card-vote of the United Nations and disregarding the views of the many civilised countries by whose law these marriages are permissible’.³⁷ Again, this is an important recognition that the plurality of views on morality in the developed ‘civilised’ world is

³³ *Cheni v Cheni* [1965] P 85, 93.

³⁴ J Story, *Conflict of Laws*, 8th ed. (1883), 188.

³⁵ *Cheni v Cheni* [1965] P 85, 93.

³⁶ *Cheni v Cheni* [1965] P 85, 98-99.

³⁷ *ibid*, 99.

such that public policy cannot legitimately be based on religious precepts or even a prevailing view of the international community. In addition, public policy can be used to invalidate a marriage otherwise valid by the normal choice of law rules only ... 'where the validation of the marriage would outrage the English court's sense of justice or morality to such an extent that the judicial conscience precludes recognition of the marriage'.³⁸ In other words, a view that the marriage is immoral or unjust is not sufficient to invalidate it. Rather, it must also be the case that, on the facts of the case in question, its recognition would cause unacceptable consequences for the integrity of the forum state law.

Identifying Cheshire and North's 'repugnance to public policy' is then indeed difficult in a pluralistic society, but the factors on which such repugnance is based must still be identified. Otherwise every foreign status, judgment or act would be applied indiscriminately simply on the basis that it was valid where formed. If Christian morality no longer prevails, other factors now need to be taken into account. It is not that new justifications need to be invented, simply that the reasons need to be elucidated in terms other than Christian or other religious doctrine. Murphy again argues that in Britain the 'thin veil of public policy' in fact masks a series of recognized concerns, such as the preservation of monogamy, genuine consent, the protection of minors, and proper solemnity.³⁹ For example, the developing attitude of the English courts towards overseas polygamous marriages shows that the reasons for non-recognition, if they apply at all, are today only considered justifiable if based on reasons *other* than religious precepts, such as the control of immigration, the protection of the women concerned or the equitable allocation of social or fiscal privileges.⁴⁰ Under this interpretation, public policy is not to be used indiscriminately, but can only be used to set aside or uphold a particular incapacity (non-age, affinity, polygamy, proxy marriage etc) where this incapacity is primarily designed to *protect* a particular imperative of the forum state (eg monogamy of marriage, protection of minors against sexual abuse, free and genuine consent to marry).⁴¹

³⁸ A J E Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 MLR 38.

³⁹ John Murphy, 'The recognition of same-sex families in Britain – the role of private international law' (2002) 16 Int J Law Policy and the Family 181, 186.

⁴⁰ John Murphy, *International Dimensions in Family Law* (Manchester University Press 2005), 105.

⁴¹ John Murphy (n 39), 186.

This change of emphasis towards the protection of an imperative of the forum state shows a welcome move away from using religion as a benchmark.⁴² Other ‘imperatives’ could be considered, and in France for example the protection of human rights has gained popularity as a positive public policy exception, as discussed below.⁴³ However, in the absence of any internationally-mandated test of relevant imperative, it is difficult to produce a definitive argument that ‘the protection of marriage as an opposite-sex institution’ should not also be such an imperative.

Where a court does take the view that marriage is a protected opposite-sex institution, and uses this basis to invoke the public policy exception, the political arguments against this approach are essentially the same as those used to lobby in favour of the creation of same-sex marriage. For example, marriage does not need protecting in this way; removing the gender requirements will not endanger the institution; alternatively the creation or recognition of civil partnerships does not in any event pose a threat to marriage; and the status of marriage can be preserved by converting any foreign marriage into a civil partnership. There is little English judicial consideration of these arguments. By the time an English court had an opportunity to consider public policy in relation to a same-sex marriage, in *Wilkinson v Kitzinger*, the matter was already governed by the provisions of the Civil Partnership Act.⁴⁴ The court focussed instead on the Act and the provision then in force that a marriage under English law is void unless between a man and a woman.⁴⁵ Had the public policy exception been considered in more detail, the question would have arisen as to the particular imperative which is ostensibly being protected. At first sight it appears that none of the existing concerns previously used to judge foreign marriages were under threat.

Of course the court in *Wilkinson v Kitzinger* could also have created and then examined a new imperative arising from s.11 Matrimonial Causes Act, namely the ‘sanctity’ or special status of marriage as an opposite-sex institution. Such a development may not have been likely. It was not the path taken for example, by the Maryland (US) Court of Appeal in 2012 when it

⁴² Whilst this is still good law in England, I acknowledge those who assert that morality continues to be determined by religion, and that other jurisdictions may still see religion as playing a more significant role: Herman, D., *The Antigay Agenda: Orthodox Vision and the Christian Right* (University of Chicago Press 1997); see also David B. Oppenheimer, Alvaro Oliveira, and Aaron Blumenthal, ‘Religiosity and Same-Sex Marriage in the United States and Europe’, (2014), 32 Berkeley J. Int L. 195 <<http://scholarship.law.berkeley.edu/facpubs/2331>> accessed 22 February 2015.

⁴³ Myriam Hunter-Henin, ‘Droit des personnes et droits de l’homme: Combinaison ou confrontation’ (2006) Rev Crit DIP 743.

⁴⁴ *Wilkinson v Kitzinger and another* (No. 2) [2006] EWHC 2022 (Fam), [2007] 1 FCR 183.

⁴⁵ Matrimonial Causes Act 1973, s11(c).

decided⁴⁶ (for the purposes of granting a divorce) that a same-sex marriage previously celebrated in California would be treated as valid, notwithstanding Maryland's very clear laws that '[o]nly a marriage between a man and a woman is valid in this State.'⁴⁷ The Court found the marriage in question was far from 'repugnant' for the purposes of comity. Maryland had already introduced a domestic partner status, conferring inheritance tax exemptions and next-of-kin rights in medical matters, as well as various anti-discrimination laws on grounds of sexual orientation.⁴⁸ A bill had been passed, pending a referendum on the issue, specifically to allow same-sex marriage. The Court revealed that the Maryland legislature had failed eight times to amend its Family Code, as other states had done, to make explicitly clear that out-of-state same-sex marriages, even if valid where celebrated, would *not* be given effect in Maryland. The Court concluded that the legislature thereby intended normal rules of comity to apply. The issue of the specific protection of marriage as an opposite-sex institution was not discussed.

In short, the developments in the UK, France and parts of the US show that a simplistic, religiously-motivated moral approach to the public policy exception is not always needed. These changes could be used as an example to others in trying to persuade them to take a similarly nuanced approach. However, they do not in themselves provide any overriding reason why other countries should not maintain their existing stance. Persuading other countries to take a different view may not be easy. There is scope, however, to clarify what is meant by the expression, whenever the public policy exception is mentioned in Community legislation. In international discussions a better knowledge of the history and role of the exception might also enable participants more easily to challenge and question policy statements such as those made at the CFR-CDR conference. Namely, the public policy exception is more sophisticated than many of those delegates chose to admit, and is not simply a question of upholding religious or moral principles.

IV. Effects Doctrine

A further helpful development in English law is the focus on the effects of the purported capacity or incapacity as the target of the public policy exception, rather than the relationship itself. Similar to the French debates on attenuated effects, English courts will only oppose a

⁴⁶ *Jessica Port v. Virginia Anne Cowan*, No. 69, September Term, 2011, Opinion 18 May 2012.

⁴⁷ Annotated Code of Maryland (1973) Article 62 § 1; Family Law Article §2-201.

⁴⁸ *Port v Cowan* (n 46), 16.

foreign marriage where it causes effects in England deemed to be unconscionable. The courts therefore retain a certain flexibility to allow recognition for certain purposes whilst not for others.⁴⁹ It is not ‘unconscionable’, for example, to recognise a polygamous marriage as having existed between a recently deceased man and his two wives in order to give effect to the inheritance rights of the widows.⁵⁰ For this reason it was suspected, even prior to the existence of same-sex marriage or registered partnerships in the UK, in the period between the introduction of same-sex marriage in the Netherlands and Belgium and the enactment of the Civil Partnership Act, that the public policy exception would not be used in a UK court to deny recognition to valid overseas same-sex marriages. Had the Civil Partnership Act not been in place, a Canadian marriage such as Wilkinson and Kitzinger’s might well have enjoyed at least some recognition in the UK as a marriage. This prospect would have been more likely had the capacity of the couple to enter into the marriage not been questionable, such as if it had been a marriage between two Canadians rather than between two UK residents.

Thus the UK contribution to the study by the EU Network of Independent Experts on Fundamental Rights (CFR-CDR) on the extent to which Belgian and Dutch same-sex marriages might be recognised in other EU Member States considered that

The invocation of the public policy exception will not be permitted simply because the foreign rule is different to that in the United Kingdom; it would need to be shown that it was inconsistent with the fundamental public policy of the country and the courts in applying this would look particularly at the effects of its recognition within the United Kingdom.⁵¹

This results in a finding by the UK delegation that ‘[i]t cannot be anticipated that the public policy exception under the United Kingdom’s approach to private international law is likely to be an obstacle to the recognition of same-sex marriages.’⁵² Murphy concludes there was no

⁴⁹ Lord Greence MR in *Baindail v Baindail* [1942] P 122, 127.

⁵⁰ *Cheang Thye Phin v Tan Al Loy* [1920] AC 369, PC.

⁵¹ EU Network of Independent Experts on Fundamental Rights, ‘Avis sur la possibilité de la reconnaissance, par chaque Etat membre, du mariage homosexuel ouvert aux Pays-Bas et en Belgique et le rôle de l’exception d’ordre public international du droit international privé de chaque Etat membre’, CFR-CDR avis2-2003, (June 2003), <http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_avis2_2003_fr.pdf>, 11.

⁵² *ibid*, 12.

policy basis on which recognition could legitimately be denied.⁵³ McK Norrie reached the same conclusion in relation to Scots law.⁵⁴

The response of the UK delegation again shows the view is that it is no longer acceptable for the forum court simply to claim to be the arbiter of public morality or standards. Although perhaps once the case, courts should no longer simply refuse to apply a foreign law which they consider to be unjust or immoral.⁵⁵ In the UK, in order to avoid allegations of ‘cultural imperialism’⁵⁶, greater accountability and clarity is called for as to the basis for refusing to give effect to foreign cultural values and the consequent imposition of the forum state’s own notions. That imposition can no longer be justified except in exceptional circumstances. Even where the imposition is permitted, the public policy exception requires a selective use to control and limit the repugnant ‘effects’ of the offensive relationship, rather than denying its existence for all purposes.

Other states should be encouraged to take the same nuanced approach, rather than opting for blanket denials of same-sex relationships. A focus on effects would broaden the circumstances in which foreign same sex relationships might enjoy recognition. Developments in France and England have highlighted the distinction to be drawn between behaviours taking place abroad, with limited connection to the forum state, as opposed to instances where the forum state has a greater interest in applying its own law in order to regulate situations taking place within its territory.⁵⁷ If the same logic were adopted throughout Europe, this might well result in the *effects* of foreign same-sex marriages and partnerships, such the right to inherit, or a right to receive maintenance after a dissolution or divorce, being recognised and enforced throughout the Union, even if living together ‘as husband and husband’ was only recognised as a legal situation in certain Member States.

If we return now to the Maltese contribution to the CFR Opinion, it is possible to assert that an equally appropriate response, more consistent with the public policy exception under common law (which continues to have influence in Malta since independence in 1964) would have been that any historical recourse to Christian ethics had been replaced by ‘common sense,

⁵³ Murphy, ‘Recognition of Same-Sex Families’ (n 39), 188.

⁵⁴ Kenneth McK Norrie, ‘Would Scots Law Recognise a Dutch Same-Sex Marriage?’ (2003) 7 Edinburgh LR 147

⁵⁵ TC Hartley, ‘The Policy Basis of the English Conflict of Laws of Marriage’ (1972) 35 MLR 571.

⁵⁶ John Murphy, *International Dimensions in Family Law* (Manchester University Press 2005), 100, 104.

⁵⁷ See below “Attenuated Effects” and n 68 and n 69.

good manners and the ordered system of tolerance on which the Empire is based.”⁵⁸ I am not of course suggesting that such a test, with its inherent subjectivity and ambiguity, provides a universal solution, but I mention it to show that public policy need not be equated with religion. In any event the Maltese position fails to take account of the effects of the capacity in question. It could have considered the effects which would result from according recognition, the harm to be avoided by refusing to accord recognition to those effects, and considered whether a refusal to recognise a Dutch or Belgian marriage would be an appropriate means to reduce that harm. Having carried out such an analysis, I submit that a Maltese court might not find it unconscionable, for example, to give effect to the succession rights of a widower of a Belgian same-sex marriage, even if the idea of two people of the same sex living together in Malta as a married couple was still a step too far.

V. Proximity and Attenuated Effects – a French Solution?

1. Attenuated Effects for Situations Abroad

French rules on conflicts provide an example of how foreign same sex marriages and partnerships might be given effect in a particular state even where that state does not permit same-sex marriages. France has now introduced its own same sex marriages,⁵⁹ and French statute now explicitly recognises overseas same-sex marriages providing they were formed lawfully in the place of celebration.⁶⁰ It is worth considering, however, whether its former, largely doctrinally-based approach might serve as an appropriate model for other Member States. That is, to use a coherent system of conflicts which enables Member States to assuage their moral consciences whilst still recognising same-sex marriages.

This former approach drew on what is known as the ‘theory of attenuated effects’, which makes a distinction between the creation of a situation in France and the acknowledgment under French law of a situation that has been validly created elsewhere in accordance with applicable laws and without fraudulent intent.⁶¹ In the latter case, the French public policy exception is ‘attenuated’, in that only those effects that are manifestly inconsistent with the

⁵⁸ *Srinivasan v Srinivasan* [1946] P 67, 70 per Barnard J.

⁵⁹ Loi 2013-404 of 17 May 2013 opening marriage to couples of persons of the same sex, Journal Officiel (France) n°0114, 18 May 2013, 8253.

⁶⁰ *ibid*, Article 1.

⁶¹ Hugues Fulchiron, (n 20), 123, 144.

French state's fundamental principles are rejected. The doctrine was approved by the French Cour de Cassation in the leading French case *Rivière*⁶² to recognise a divorce granted in 1936 to a French citizen from her Russian husband whilst both were living in Ecuador, even though French law did not at the time provide for divorce. On the facts of the case, the divorcée had subsequently remarried but was now seeking a divorce of that second marriage (divorce in the meantime having become legal). The second husband claimed he had never been married to the petitioner because her prior marriage had not been validly brought to an end. The French Court accepted that recognising the earlier divorce was not against French public policy, and this was to be distinguished from a provision permitting a divorce to take place on French soil.⁶³

Although not binding outside France, the principle established by the case demonstrates that the *ordre public* exception can tolerate the application of foreign law principles diametrically opposed to those which exist in the forum state. As such it provides a mechanism and a strong argument that a civil status validly acquired abroad can be recognised and given effect in the forum state regardless of the political attitude in the forum state towards that status.

Unfortunately, however, the doctrine itself has always been subject to two major limitations. The first severely limits its application, whilst the second makes it difficult to turn it into a general principle of international application.

The first limitation is that the doctrine only applies where the marriage is 'legally' performed (here, as understood by French conflicts rules). In the *Rivière* case itself, these rules provided that Ecuador law was to govern the status of the couple. Having no common nationality, the law of the couple's habitual residence was applicable. Had both partners been French then French conflicts rules would have applied French law, whereupon, regardless of whether Ecuador law would have granted a divorce to its residents or not, the divorce might then not

⁶²Cass Civ 1er. 17 April 1953.

⁶³ «Attendu que l'objection soulevée par le pourvoi, d'atteinte à l'ordre public français, doit être appréciée de façon différente suivant que le divorce litigieux a été ou non acquis à l'étranger par application de la loi compétente en vertu du règlement français des conflits ; qu'en effet, la réaction à l'encontre d'une disposition contraire à l'ordre public n'est pas la même suivant qu'elle met obstacle à l'acquisition d'un droit en France ou suivant qu'il s'agit de laisser se produire en France les effets d'un droit acquis, sans fraude, à l'étranger et en conformité de la loi ayant compétence en vertu du droit international privé français.» '[The Court] holds that the objection raised in the appeal concerning a breach of French public policy must be regarded differently depending on whether or not the contested divorce was acquired abroad through the application of the law deemed competent by French conflicts rules; i.e. that the reaction towards a provision contrary to public policy varies depending on whether it prevents the acquisition of a right in France or whether it is a case of allowing effects to be produced in France of a right acquired abroad, without fraud, and in compliance with the applicable law according to French private international law' (own translation).

have been recognised in France. Therefore applying the doctrine to a same sex marriage celebrated in the Netherlands between a Dutch man and a French man would *not* have led to recognition of the status validly created abroad under the old regime. The lack of capacity of the Frenchman would have prevented this even though the marriage was valid in the Netherlands. This, as discussed, targets an ‘evasive marriage’, in that French law would regard it as a ‘fraud on the law’ if the couple lived in France and married in the Netherlands specifically to evade the prohibition under French law. But the same barrier also existed where there was no ‘fraudulent intent’, such as where the French man had become permanently resident with his partner in the Netherlands. Under the old regime the ‘yoke of citizenship’ imposed by French law, previously discussed in Chapter 3, followed its citizens around the EU (and the rest of the world) and prevented their same sex marriages being recognised in France even though they enjoyed recognition in an increasing number of countries. In this respect the system can be distinguished from the ‘vested rights’ and ‘recognition theories’ discussed in Chapter 6.

The doctrine did, however, help those couples who were entitled to marry under their respective personal laws and enabled them to assert the effects of their marriage in France. The possibility of this occurring was recognised in a response to a ministerial question in the French Parliament in 2005,⁶⁴ and in 2008 the French tax authorities started allowing married same-sex couples to file joint tax returns.⁶⁵ Thus, provided the marriage was permitted by the personal law of the parties involved, it would be recognised and given some effect by French law. One might therefore propound the principle of attenuated effects as a general principle of conflicts rules to further modify the intransigence created by personal law. This would ensure the portability of same-sex marriages for those who, without any form of ‘evasion’ and in full accordance with their personal law, seek to give effect to those marriages in another country. At the same time, it provides a legally coherent justification for that country, the forum state, to accord justice to the foreign couple whilst retaining its discretion not to accord such treatment to couples involving its own citizens.

A second limitation further restricts the doctrine. This concerns the link retained with ‘fundamental principles’, as the doctrine will permit only those effects which do not conflict

⁶⁴ Min Resp 41533 of 2 June 2005, Journal Officiel (France) 26 July 2005, 7437.

⁶⁵ « Bercy reconnaît un mariage d'homosexuels néerlandais », Le Figaro 5 Sept 2008, available at <<http://www.lefigaro.fr/actualite-france/2008/09/05/01016-20080905ARTFIG00525-bercy-reconnait-un-mariage-d-homosexuels-neerlandais-.php>> accessed 16 July 2013.

with those principles. This takes us back to the Italian or Polish approach to the public policy exception, as discussed above, and the same controversy as to whether fundamental principles of morality or religion are valid exceptions. These considerations were not applicable in France. Under the classic conflicts approach used before 2013 France could be said to have adopted a principle of controlling the activities of its citizens, but was far more liberal towards the status of foreigners living on its soil, a distinction described as '*l'ordre public du statut personnel des Français*'.⁶⁶ Even so, having already instituted the PACS, France evidently had few grounds to claim that recognising a valid union between a same-sex couple contravened national principles. In this respect, there are similarities with the position enjoyed for a while in Maryland, US, as set out above.

However, the same is not true, even today, for countries such as Poland, Romania and Italy, where 'fundamental principles' might still be invoked even in the context of the doctrine of attenuated effects. In short, the doctrine might still be a useful argument in certain Member States which already have alternative forms of relationship recognition, such as Germany. It might be used to persuade them to recognise foreign marriages more effectively rather than converting them into lesser forms of recognition. It would not, however compel or persuade other jurisdictions with no form of same-sex relationship recognition, such as Italy, to give effect to foreign same-sex marriages.

Even so, some effects might still be considered consistent with fundamental principles without going so far as to expect the forum state to treat same sex married couples as being married in every respect. For example, a deeply conservative and ostensibly religiously motivated society might consider it a breach of fundamental principles to allow a same-sex couple the same tax or welfare advantages as it allows its own opposite sex married couples. For so long as that state does not allow such advantages to heterosexual unmarried couples then a deliberate bias towards married heterosexual couples might still be justified under existing law.⁶⁷ However, just as cases in both France⁶⁸ and England⁶⁹ show that it is not a breach of public policy to recognise the inheritance rights of spouses to a polygamous marriage, it is not necessarily a breach of fundamental principles to give effect to a same-sex marriage for similar purposes,

⁶⁶ Pierre Mayer, 'Les Méthodes de Reconnaissance en Droit International Privé', in Olivier Barret (ed) *Le Droit International Privé : esprit et méthodes, Mélanges en l'honneur de Paul Lagarde* (Paris, Dalloz 2005), 547, 571.

⁶⁷ But only where marriage is the preferred status – if fiscal advantages are accorded to de facto heterosexual couples then *Reed* requires the same advantages to be made available all de facto couples including same sex ones.

⁶⁸ "*Beneddouché*", Cass, civ, 1re, 3 January 1980.

⁶⁹ *Cheang Thye Phin v Tan A/Loy* [1920] AC 369, PC.

such as succession. This might even be the case where it includes giving fiscal advantages (such as exemptions from inheritance tax) which might normally only be available to opposite-sex married couples.

2. Attenuated effects replaced by proximity principle?

The attenuated policy doctrine of *Riviere* has been criticised, because it assumes that statuses acquired abroad have few links with the French legal order, whereas in reality the ‘quasi-ubiquity’ of the individual means most statuses acquired abroad by those with a connection to France will make their effects felt in France.⁷⁰ In recent years it has been eclipsed by an increased tendency to favour a territorial notion of public policy or what has been termed the ‘public order of proximity’.⁷¹ This shows an increased determination to monitor and control the role played by personal status, and a corresponding willingness to apply the law of the forum to protect the interests of French residents, ensuring that the status of French residents is governed by French law regardless of their original nationality. This return to the territorial principle can also be seen in statute, in the new French marriage law, where it sets aside the incapacity of spouses under their personal law where one of them is resident in France, which effectively allows all residents to enter into a same-sex marriage regardless of nationality.

The proximity doctrine corresponds broadly with the German notion of *Inlandbeziehung* and bases the application of the forum state law on the extent to which the case in question presents links with the forum state.⁷² The doctrine is seen as complementary to the attenuated effects doctrine, the ‘completion of the diptych’.⁷³ This is because it is generally regarded as a further constraint on the application of the public policy exception by the forum state. Not only will public policy be limited to producing attenuated effects where the foreign law in question only engenders incidental effects on the forum territory, but the forum territory will

⁷⁰ Patrick Courbe, ‘L’Ordre Public de Proximité’, in Olivier Barret (ed), *Le Droit International Privé: Esprit et Méthodes, Mélanges en l’honneur de Paul Lagarde* (Paris, Dalloz 2005), 227, 236.

⁷¹ Jacques Foyer, Note on Cass Civ. 1re, 10 February 1993, (1993) Rev Crit DIP 620.

⁷² See generally Paul Lagarde, *Le principe de proximité dans le droit international privé contemporain: Cours général de droit international privé* (Collected Courses of the Hague Academy of International Law), 196 (1986, 9-238).

⁷³ Patrick Courbe, ‘L’Ordre Public de Proximité’ (n 70), 227.

have to show a material effect on its home turf in order for public policy to produce its full effects.⁷⁴

The first case where the French Court of Cassation made use of this doctrine was not until 20 years after Lagarde had expounded his new ideas.⁷⁵ The case again concerned divorce, but this time it was French law which allowed divorce whilst Spanish law, designated applicable by French conflicts rules, did not. The Court upheld the divorce of a French woman, now resident in France, from her Spanish husband, on the basis that applying Spanish law would be ‘contrary to the current French conception of international public policy which mandates the availability of a divorce to a French citizen resident in France’.⁷⁶ Two years earlier the same Court had held that it was not contrary to public policy to deny a divorce to a French/Belgian couple resident in Spain.⁷⁷ This shows that nationality alone, without being resident in France, was insufficient to trigger the proximity exception.⁷⁸ The doctrine has now been used by French courts in a number of other areas, including polygamous marriages,⁷⁹ adoption law,⁸⁰ paternity suits⁸¹ and, finally, talaq repudiations,⁸² all of which cases were framed in terms of granting protections to French residents against foreign law. Notably it has also been used in the Cour de Cassation decision of January 2015 relating to international conventions concerning capacity to marry.⁸³ This judgment sets aside Conventions between France and certain other states, including Poland, under which same-sex marriages involving citizens of those states would not

⁷⁴ Jacques Foyer, ‘Remarques sur l’Evolution de l’Exception d’Ordre Public International depuis la Thèse de Paul Lagarde’, in Olivier Barret (ed), *Le Droit International Privé: Esprit et Méthodes, Mélanges en l’honneur de Paul Lagarde* (Paris, Dalloz 2005), 287, 297 ; Haris Meidanis, ‘Public policy and ordre public in the private international law of the EU: traditional positions and modern trends’ (2005) *ELRev* 95, 98.

⁷⁵ ‘De Pedro’, *Cass Civ 1^{re}*, 1 April 1981.

⁷⁶ Own translation.

⁷⁷ *Civ 1^{re}*, 10 juillet 1979, Van der Plassche, *Rev. crit. DIP* 1980, 91, note H Guademet-Tallon.

⁷⁸ Courbe, (n 70), 229.

⁷⁹ In ‘Baaziz’, *Cass Civ 1^{re}* 6 July 1988, *Rev Crit DIP* 1989, 71, note Y Lequette the Cour de Cassation used the doctrine to deny effect to a polygamous marriage so as to ensure that the first wife, a French citizen, did not have to share her widow’s pension with a second wife.

⁸⁰ Where the principle is now enshrined in law: since the Law of 6 February 2001 the adoption of a foreign child is prohibited if this is contrary to the child’s personal law (eg Algerian or Moroccan) but an exception is provided in Article 370-3 al 2 Code Civil if that child was born and is habitually resident in France.

⁸¹ In *Cass Civ 1^{re}* 10 February 1993. *Rev Crit DIP* 1993, 620, note J Foyer, a case brought by a Tunisian woman against her former Algerian de facto partner for maintenance for their child, the Cour de Cassation found that personal laws which denied paternity claims were a breach of French public policy insofar as they affected children who were French nationals ‘or habitually resident in France’, thereby extending the proximity exception to foreigners resident on French territory.

⁸² *Cass Civ 1^{re}* 17 February 2004, D. 2004, 824, discussed further in Patrick Courbe ‘Le rejet des répudiations musulmanes’, D. 2004, 815.

⁸³ *Cass* 25 Jan 2015, see ‘Communiqué relatif à l’arrêt dit du « mariage franco-marocain entre personnes de même sexe » du 28 janvier 2015’ available at <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_dit_30975.html> accessed 1 March 2015.

be permitted to take place. The key criterion for disapplying these Conventions is that the couple concerned show a sufficient connection to France, such as being resident in France. This again supports a broader view that residence is now seen, even in France, as a more appropriate connecting factor than nationality.⁸⁴

However, although sometimes presented as a constraint on the application of the public policy doctrine, in reality it should be seen as the antithesis, rather than the compliment, to the doctrine of attenuated effects. Rather than an effect on the forum state being seen as a necessary condition, it is now regarded as a sufficient condition, namely that if the foreign law produces undesired material effects it will be set aside. In practice, rather than finding a way to allow for the application of a foreign law which might normally breach local public policy (on the basis that the action in question took place abroad) the courts use the doctrine of proximity to justify, still on the basis of local public policy, the application of forum law to govern situations arising within the forum state. The effect of the two doctrines, for all the academic debate, may simply be that, in France as elsewhere, the most appropriate governing law is the state with the 'closest connection'. This may no longer be the state of the nationality of the parties involved.

For same sex couples, the implications of these developments are mixed. As they simply reinforce the protection of the fundamental principles of the forum state, the application of the two doctrines can be either advantageous or disadvantageous for same sex couples, depending on whether the forum state favours same-sex relationships or opposes them. The proximity principle could be used to ensure at least that, in states supportive of same sex relationship recognition, a relationship will be recognised (or even be celebrated or registered) notwithstanding any incapacity under personal law. But the French developments in this sense can be seen as little more than a means to ensure the application of French law to French residents from abroad. Conversely, where the forum state remains opposed to same-sex marriage, it can use the proximity principle to deny giving effect to a relationship which might be valid under normal conflicts rules. Fulchiron points out that applying the proximity

⁸⁴ Stuart Davis, 'New Approaches to Same-Sex Marriage: the End of Nationality as a Connecting Factor in Private International Law?' in K Boele-Woelki and N Dethloff (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Intersentia 2014), 263, 271.

principle to foreign same sex marriages would have resulted in such marriages being denied recognition in France.⁸⁵

Another important factor is that, in applying territorial law, French courts, particularly the Paris Court of Appeal,⁸⁶ often claim to be protecting the applicants against infringements of their human rights and hence do not need to take account of their personal law. This approach has been criticised.⁸⁷ But this is an important justification, as human rights protections should prevail over any formal application of conflicts rules. In practice, of course, the forum court has great discretion in deciding when such an infringement might be present. A French court might decide today that not allowing a Pole to marry infringed his rights under the ECHR (even though a Polish court would not have taken that view), but it would not have decided that way two years ago. If it had done so, it should also have said it was a breach of human rights for a French national not to have the right to marry when prohibited under *his* personal law, an unlikely scenario.

In short, the French solutions provide further theoretical justifications for policy decisions concerning the application or otherwise of foreign law. The forum state, whether it chooses to apply foreign or domestic law, has a raft of additional legal reasons it can use to justify its decision. Those reasons can be used to support the court's decision, whichever law it decides to apply. As such, the doctrines of attenuated effects and proximity neither point to a particular solution, nor resolve the dichotomy between personal and territorial law. Their use as arguments in favour of portability of status are limited.

VI. Conclusion

This Chapter has shown public policy to be grounds for a flexible, but nebulous exception to the application of conflicts rules. Some jurisdictions, such as England and France, have developed nuanced and sophisticated approaches to its application. These entail ignoring religious or moral sentiment in favour of alternative justifications such as human rights. Such an approach may prove an encouraging template compared to Eastern European countries

⁸⁵ Hugues Fulchiron, (n 20), 123, 145.

⁸⁶ Myriam Hunter-Henin, 'Droit des personnes et droits de l'homme: Combinaison or confrontation?' (2006) 95(4) Rev Crit DIP 743.

⁸⁷ Petra Hammje, 'Droits fondamentaux et ordre public' (1997) 86(1) Rev Crit DIP 1, 11.

where religion is still the prevailing reason against recognition. However, attempts to limit the use of the exception in cases of moral controversy have not been successful.

France and the US State of Maryland accepted in principle other states' same-sex marriages as long as these did not involve their own citizens, but even then France and Maryland had already introduced same-sex partnerships and were debating the introduction of same-sex marriages. In these circumstances the conflict with domestic policy was not particularly marked. Where the differences are significant, the forum state will invariably invoke the public policy exception to refuse statuses which would have been legitimate under the relevant personal law. This applies not just to states hostile to same-sex marriages, but is also used (more understandably perhaps) by liberal states as a way to avoid accepting practices considered lawful by other states, such as polygamy, child marriages, forced marriages, talaq divorces or the stigmatisation of illegitimate children. Whether seen as a question of personal capacity or public policy, the forum state generally still ensures its own morality takes precedence in its own territory, suggesting that a territorial principle is inevitable.

Chapter 5: EU Treaties and Private International Law

Previous Chapters have shown the ‘counterfactual’, the current system of conflicts, personal law and public policy exceptions which, together, make up the framework of recognition and non-recognition of same-sex marriages and partnerships in the EU. Chapter 3 showed how differences between Member States’ conceptions of private international law, and the use of nationality as a connecting factor, is a major impediment to pan-European recognition of same-sex unions. Chapter 4 showed that another impediment is the recourse to the public policy exception leading to a refusal to apply a governing law which allows same-sex unions. This Chapter moves on to consider the extent to which the EU Treaties might constrain Member States’ adherence to those concepts and the use of nationality as a connecting factor. I argue that some interpretations of the Treaty are too lenient in giving Member States an ability to discriminate in matters of family law.

In the second part of this Chapter I move on to look at how powers granted under the Treaty of Amsterdam are being used to attempt to improve the mutual acceptance of same-sex marriages and partnerships, through the proposals to harmonise conflicts rules over Matrimonial Property Regimes. This also provides an opportunity to discuss the application of the EU Treaties to the public policy exception.

I. Connecting Factors and the EU Treaty

1. Different Treatment

The use of a connecting factor to determine which Member State’s law is applicable to a particular situation will inevitably result in the application of different laws to situations which are similar in every respect save for the connecting factor in question, i.e. the nationality, domicile, or habitual residence of the parties involved. Generally, where the connecting factor is not a territorial factor (such as the place where a contract was formed, or the place where the defendant has his habitual residence) it results in situations occurring within one and the same territory being governed by different rules. Lagarde gives the example of a German couple and a French couple living in the same street in Germany. A German court has jurisdiction to hear divorce matters relating to either couple, on the basis of habitual residence. That court will

apply German law to allow the German couple to divorce after three years' de facto separation. However, that same court will apply French law to the French couple (on the basis of their nationality) who then cannot divorce (on the same basis of de facto separation) till after six years.¹ He describes this discrepancy as being 'difficult to explain to the neighbours'.² Given other similarities between the couples, are there really innate differences between the nationalities in question justifying or requiring the application of different treatment? This seems a dubious position in today's multicultural European societies. If allowances were made for every ethnic, racial or cultural difference, the result would be separate legal and court systems for each such ethnic or cultural group, however it was defined.

Lagarde points out that in fact many jurisdictions show the opposite attitude, namely that different treatment between people living within one and the same territory is not appropriate. The French *Cour de Cassation*, for example, has ruled that all married couples in France have the same rights and duties when it comes to their behaviour towards each other, regardless of the rules which might have applied under the law where they were married.³ This application of a territorial principle in family law matters has been extended as a matter of public policy in France to provide greater equality of treatment between those living in France (*ordre public de proximité*). This development has been applied to allow same-sex marriages for Moroccans living in France despite a Franco-Moroccan convention to the contrary.⁴ Similarly, some Member States, such as Ireland, the UK, Malta, assimilate overseas partnerships into national forms and thereby ensure equal treatment between all those living in the territory regardless of where their partnership or marriage took place. This is not always the case, however, and in many Member States, including France⁵ and Germany, the effects of the partnership instead depend on the law of the place of registration. Germany adds a further complexity that for constitutional reasons the effects of a partnership are not to 'exceed' those provided under German law.⁶

¹ Paul Lagarde, 'Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures', (2004) 68 *RabelsZ* 225, 237.

² *ibid.*

³ *ibid.*, 242, citing Cass Civ. 1ere 20 oct 1987, *Rev Crit DIP* 77 (1988) 540.

⁴ Chapter 4 (n 83).

⁵ Notably France: Art. 515-7-1 Code Civil.

⁶ Art 17(b)(1) EGBGB. See Patrick Wautelet, 'Private International Law aspects of same-sex marriages and partnerships in Europe – Divided we Stand?' in K Boele-Woelki and A Fuchs(eds), *Legal Recognition of Same-Sex Relationships in Europe*, (2nd edition, Intersentia 2012), 143, 173.

If persons located in or having interests within one and the same territory are treated differently when it comes to the rules applicable to their marriages, then by definition some will be treated less favourably than others. The question then arises to what extent different treatment based on nationality is compatible with the prohibition in Article 18 TFEU on discrimination on grounds of nationality.⁷ This has been a ‘constant debate’⁸ for many years.⁹ My analysis of CJEU cases later in this Chapter shows that this prohibition of discrimination on grounds of nationality could apply to connecting factors. Admittedly this interpretation is not yet widely accepted. However if accepted more broadly, a Member State could be restricted from applying a personal law to its own citizens (or to citizens from another ‘non-recognition’ Member State) where the result is to deny them capacity to enter into a same-sex registered relationship or marriage, and hence to deny effect to that marriage or partnership.

All six original Member States of the EEC used nationality as the primary connecting factor for conflicts matters. Given the economic and market-based focus of the original Treaty it was soon recognised that, particularly in commerce, harmonisation of conflicts rules would be necessary concerning contracts between nationals of different Member States.¹⁰ Otherwise the conflicts rules resulted in the application of different laws depending on the nationality of the trader, whether that trader was an individual or a company.¹¹ An Italian trader selling ice creams in Munich might find herself in the ‘absurd’ situation that some of her sales contracts were not after all governed by German law, as Italian law might be applicable for sales to those of her customers who, by coincidence, also turned out to be Italian. Such an outcome conflicted with both the letter and spirit of the ban on discrimination on grounds of nationality and its supposed replacement by the principle of equal treatment with local market participants.¹² This led Drobnig to the logical deduction that the Treaty prohibits the use of

⁷ ‘Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.’ Originally Article 7 of the Treaty of Rome, this provision had become Article 6 EC Treaty before the Amsterdam Treaty amendments of 1999 turned it into Article 12 EC, and following the Lisbon Treaty is now found in Article 18 TFEU.

⁸ Dieter Martiny ‘Objectives and Values of (Private) International Law in Family Law’. Chapter 2 in Johan Meeusen, Marta Pertegas, Gert Straetmans, Frederik Swennen (eds), *International Family Law for the European Union* (Intersentia 2007), 69, 82.

⁹ For early views on the nationality principle and EC law compatibility, primarily from French and German authors, see the extensive list provided by Tito Ballarino and Benedetta Ubertaini, ‘On Avello and Other Judgments: A New Point of Departure in the Conflict of Laws’ in P Sarcevic et al (eds), *Yearbook of Private International Law*, Vol 6 (2004) (Sellier 2005) 85, 100 at n50 and n51.

¹⁰ Ulrich Drobnig, ‘Conflict of Laws and the European Economic Community’ (1967) 15 Am J Comp L 204, 213.

¹¹ Ulrich Drobnig, ‘Vertösst das Staatsangehörigkeitsprinzip gegen das Diskriminierungsverbot des EWG-Vertrages?’ (1970) 34 RabelsZ 636.

¹² *ibid*, 657.

nationality as a method of differentiation between market participants.¹³ However, he did not go as far as to contemplate that conflicts law needed to be aligned in relation to family law. Although his views on nationality are broadly correct, the details have turned out to be more nuanced than he realised, and the use of nationality as a differentiating factor in family matters has not been prohibited. Basedow sees nothing unusual in applying a personal law based on nationality in family matters, so that a Hamburg court applies Turkish or Polish family law to resolve divorce questions between Turkish or Polish couples.¹⁴ This requires Hamburg judges to become experts in foreign law, but Basedow sees this as a minor inconvenience and preferable to imposing German laws on foreigners, even those who have long made Germany their home.¹⁵

Basedow's promotion of separateness might be understandable in the case of a temporary Turkish or other non-EU guest worker, unwilling (or ineligible) to convert his Turkish nationality into a German one, and who perhaps does not intend to stay in Germany permanently. However, for the majority of guest workers, and their children, who have made Germany their permanent home, it seems incongruous that they are able to choose which laws apply to them simply on the basis of whether they choose or not to take German nationality.¹⁶ Party autonomy, in the sense of the freedom to choose the governing law, might still prevail in some areas, such as contract. But even here mandatory provisions in the public interest, such as those needed for consumer protection, will override any decision by the parties to choose an alternative governing law.¹⁷ In many areas, however, such as criminal law or motoring regulations, laws apply equally to everyone based on their presence in the territory.¹⁸ Visitors and immigrants are expected to conform to German law by virtue of being present in Germany, however long or short their stay. I would suggest that equal treatment of all permanent residents should similarly be preferable to a plethora of incompatible and inconsistent legal regimes governing family relations. This would mean that even in family law habitual residence should take over from nationality as the main connecting factor to establish the applicable law, at least once residence is established.

¹³ *ibid*, 642.

¹⁴ Jürgen Basedow, 'Das Staatsangehörigkeitsprinzip in der Europäischen Union' (2011) 2 *IPrax* 109.

¹⁵ *ibid*.

¹⁶ Less than 2% of the world's population change their nationality during the course of their lives; see Ayelet Shachar and Ran Hirschl, 'Citizenship as Inherited Property' (2007) 35(3) *Political Theory*, 253.

¹⁷ Jürgen Basedow, 'Freedom of Contract in the European Union' (2008) 16 *European Review of Private Law*, 901.

¹⁸ For an explanation of the historical transition from personal law to the territoriality principle in criminal law see Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008).

Whilst the claim for separate treatment is dubious for third country nationals, it is even more anomalous for migrants from within the EU, for whom equal treatment with nationals of the state in which they have chosen to make their home is normally an inherent part of their free movement right. For those who have chosen to exercise that right, it seems incongruous to saddle them with a national allegiance which they may have sought to escape, even if they have not yet chosen or been able to change their nationality. In light of this I cannot share the view of the German Federal Constitutional Court, as described by Mansel, where it justifies its ongoing use of nationality as a connecting factor. The Court takes the position that it is in a person's best interests to have their personal affairs judged according to the laws of their 'homeland', which assumes that people maintain a 'continuous personal connection' to that homeland and remain most familiar with the laws of that country.¹⁹

Some 'free-movers' may indeed prefer to be governed by their 'homeland' state despite setting up home elsewhere. This is most likely to be true where the homeland state law provides more advantages than the new host state's law. In such circumstances nationals of the host state may want to *insist* that the incomer receives equal treatment with locals, otherwise the incomer enjoys a privileged position compared to his newly chosen compatriots. A system where a free mover is able to choose between either local law or homeland law, whichever gives him the greatest advantage, seems inherently unjust. It may in any event be unworkable. As Bogdan points out, for every person who finds the application of his national law to his advantage, there will be another of the same nationality who would find it a disadvantage.²⁰ In family matters such discrepancies could be acute. In a divorce case involving spouses of the same nationality but who lived together in a different Member State, differences in the substantive laws mean one spouse will be better off through application of the homeland law, whilst the other will be privileged if the host state law applies. This was effectively the situation in *Johannes v Johannes*, discussed below. Allowing a choice of regime in such circumstances is clearly unfeasible.

¹⁹ Heinz-Peter Mansel, 'The Impact of the European Union's Prohibition of Discrimination and the Right of Free Movement of Persons on the Private International Law Rules of Member States' in Boele-Woelki, K, Einhorn, T et al (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International 2010), 291, 297.

²⁰ Michael Bogdan, 'The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law', Chapter 9 in Meeusen J, Pertegás M, Streatmans G and Swennen F (eds), *International Family Law for the European Union* (Intersentia 2007), 315.

Meeusen reminds us of the CJEU's 'material concept of discrimination', whereby formal unequal treatment does not constitute material discrimination where the difference in treatment arises from having to treat different situations differently, claiming that 'private international law attempts, according to the principle of non-discrimination, to achieve the unequal treatment of unequal situations through the use of multilateral connecting factors.'²¹ The implication is that in specific situations there can be differences between the different nationalities of the Member States justifying different treatment in family law. He asserts that the use of nationality as a connecting factor is inseparable from the multilateral conflicts approach which rests upon 'the equal treatment of nationals and foreigners' under private international law. Even though multilateral choice-of-law rules will result in the application of diverse laws, he still sees this as equal treatment. This is because the analysis of the appropriate choice of law is, supposedly, conducted 'blindly' without regard to the substantive outcome.²²

This attitude, whilst prevalent, is difficult to accept. It is questionable in today's Europe whether national allegiances, particularly amongst migrants, shape a person's identity more than the society in which he lives or works. In conflict of law terms this means that, even if nationality could play a role, it should not be so significant as to trump all other factors which might connect people to a particular legal regime, such as habitual residence, or place of work. There are other differentiating factors between today's EU citizens far more trenchant to a person's identity and position in society, which constitute both divisive and unifying forces across borders in equal measure. These include sex, sexual orientation, religion, race, political opinions, language, age and education. But precisely these differences are deemed unsuitable justifications for applying different treatment, as shown by Article 21(1) of the Charter of Fundamental Rights.²³ It is incongruous then to take what is in practice a *less meaningful* differentiating factor, that of nationality or domicile, and elevate it to a position where it supposedly justifies, more than any other factor, a difference in treatment between people who are in similar situations in all other respects. Bogdan is correct that 'if citizens of two different Member States are deemed, due to their different citizenships, to be in different situations and,

²¹ Johan Meeusen, 'Instrumentalisation of Private International Law in the EU: Towards a European Conflicts Revolution?' (2007) 9 Eur J Migration and Law 287, 293.

²² *ibid*, 294.

²³ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02.

therefore, not entitled to the same treatment, then much of the value of Article [18] as a shield against discrimination on grounds of nationality is lost'.²⁴

2. Connecting Factors and Nationality Discrimination

Discrepancies between national laws in many, if not most, matters falling within the scope of the Treaties have been resolved over the years by a variety of means. These include the caselaw of the CJEU in the development of mutual recognition²⁵ and the country of origin principle,²⁶ private international law conventions such as Brussels I,²⁷ and the specific private international law harmonisation measures now envisaged following the Treaty of Amsterdam. In family law matters, however, the discrepancies remain unaddressed, having been left untouched for many years. Family law and questions of personal status such as capacity to marry were long considered beyond the scope of the EC Treaty. They were consequently unaffected by the prohibition of discrimination on grounds of nationality.²⁸ This position changed in 1999 with the coming into effect of the Amsterdam Treaty, which, as discussed further below, expressly permits the harmonisation of private international law rules for family law.²⁹ Whilst this does not confer any power to harmonise *substantive* family law,³⁰ the inclusion of powers to regulate conflict of law rules affecting personal status means that family law is now without doubt within the scope of application of the Treaties.³¹ The question then arises again whether the nationality principle, given its impact on the recognition or otherwise of foreign same-sex marriages and partnerships, is consistent with Article 18 TFEU.

a) Neutral Conflicts Rules?

The CJEU has considered various cases where nationality was used as a connecting factor in matters other than family law, and in general has not shown any objections to differentiations

²⁴ Bogdan (n 20), 313.

²⁵ See generally Christine Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013).

²⁶ Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (*Cassis de Dijon*), [1979] ECR. 649.

²⁷ Convention on Civil Jurisdiction and the Enforcement of Judgments, Brussels 1968, [1982] OJ L388/1, as updated and since 10 January 2015 superseded by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.

²⁸ Drobnič, (n 11), 646; also Bogdan, (n 20), 307.

²⁹ Clare McGlynn, 'The Europeanisation of Family Law' (2001) CFLQ 35.

³⁰ Masha Antokolskaia, 'Harmonisation of substantive family law in Europe: myths and reality' (2010) 22 Child & Fam LQ 398.

³¹ Maria Rosaria Marella, 'The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law' (2006) 12(1) European Law Journal 78.

on grounds of nationality when used simply to establish the applicable law. In one early competition law case, *Walt Wilhelm*,³² the Court laid down an often repeated rule that Article 7 EEC (the forerunner to Article 6 EC, now Article 18 TFEU):

is not concerned with disparities in treatment resulting from divergences existing between the laws of Member States, so long as these affect all persons subject to them in accordance with objective criteria and without regard to nationality.³³

The expression ‘without regard to nationality’ means a particular Member State’s law is not permitted to apply its law more favourably to one nationality (usually its own) compared to its treatment of others.³⁴ In other words, the intention behind Article 7 is simply to prevent Member States favouring its own nationals above those who to all intents and purposes are in the same situation other than the fact that they hold a different nationality.³⁵ This reading of *Walt Wilhelm* and its consequentially limited view of the ambit of Article 7 EEC has developed into a widely-accepted view that so-called ‘neutral’ conflict of law rules are permitted. Even though a Member State may not apply its internal substantive laws differently on grounds of nationality, it may still use nationality as a connecting factor to determine the law applicable to the relevant case, provided such designation is made without considering the content of the law and without any intention of privileging one party to the disadvantage of the other.³⁶

This distinction is almost impossible to apply in practice. For example, Ballarino considers *Hoorn*³⁷ to be an example of just such a neutral conflicts rule.³⁸ The CJEU considered a 1951 convention between the Netherlands and Germany.³⁹ This regulated the pension rights of Dutch prisoners of Nazi camps in Germany who had returned to the Netherlands immediately after the war. It provided that periods spent by Dutch nationals in ‘forced labour’ in Germany were to be treated as having been completed under the Dutch social security system and gave

³² C-14/68 *Walt Wilhelm* [1969] ECR 1.

³³ *ibid*, para 13. See also C379/92 *Peralta* [1994] ECR I-3453, [47-48].

³⁴ For example in C-92/92 and C326/92 *Phil Collins* [1993] I ECR 5145 German laws which afforded wider copyright protection to nationals than to foreigners were found to breach this principle.

³⁵ Basedow, (n 14), 112.

³⁶ Marie-Paule Puljak, *Le droit international privé à l'épreuve du principe communautaire de non-discrimination en raison de la nationalité* (Presses Universitaires d'Aix-Marseille 2003).

³⁷ C-305/92 *Albert Hoorn v Landesversicherungsanstalt Westfalen* [1994] I ECR 1525.

³⁸ Tito Ballarino and Benedetta Ubertaini (n 9), 105.

³⁹ Complementary Agreement No 4 between the Federal Republic of Germany and the Kingdom of the Netherlands on the settlement of rights acquired under the German social insurance scheme by Dutch workers between 13 May 1940 and 1 September 1945, signed at the Hague on 21 December 1956 (United Nations Treaty Series, Vol. 591, 374).

rise to no entitlement to the (more generous) German pension scheme. The Court found that this was not discriminatory treatment under Dutch law. The fact that Germans in a similar situation (i.e. those who had themselves been interred by the Nazi regime) would have had higher pensions was a disparity existing by virtue of divergences between the substantive laws of the Member States. Oddly, the difference in treatment was found not to be the result of the Convention, which ‘merely determines the law applicable to the workers concerned’.⁴⁰

This is difficult to accept as an example of a neutral system. Although Dutch law cannot be described as discriminatory simply because it happens to give lower pensions than other countries give their own retired workers, the different treatment of Dutch and German former inmates was expressly the result of the Convention. Further, it was specifically based on the nationality of the parties involved, and was deliberately calculated to ensure a different result from that which would have applied under Regulation 1408/71.⁴¹ I cannot then agree with Ballarino that *Hoorn* is an authoritative precedent for future CJEU decisions, or that the CJEU would follow *Hoorn* and *Walt Wilhelm* and necessarily uphold the use of the nationality as a connecting factor today.⁴²

Other cases cited to support the acceptability of a so-called neutral conflicts-of-law rule are similarly unconvincing.⁴³ These reveal a common pattern of an applicant seeking to evade the application of a particular provision of his national law (be it criminal liability for acts committed abroad, liability for defects in goods sold or obligations of spousal maintenance). The applicant usually claims that these provisions would not have been applicable had he had a different nationality. In *Peralta*⁴⁴ the captain of a vessel had been dumping illegal waste. Italian criminal law would have applied to a captain of any nationality committing such an offence in Italian waters, but here the dumping took place in international waters, meaning the ‘long arm’ of Italian law only applied because the captain was commanding a vessel flying an Italian flag. The Court found, citing *Walt Wilhelm*, that ‘the application of national legislation cannot be held contrary to the principle of non-discrimination merely because other Member States allegedly

⁴⁰ *Hoorn* (n 37), [12].

⁴¹ The Convention is listed in Regulation 1408/71 as an international convention whose effect was to survive the coming into force of the Regulation.

⁴² Tito Ballarino and Benedetta Ubertazzi (n 9), 105

⁴³ Ballarino (ibid, 102) refers to C-214/94 *Boukhalfa* [1996] I ECR 2253, C-339/89 *Alsthom Atlantique* [1991] I ECR 107 and C208/00 *Überseering* [2002] I ECR 9919.

⁴⁴ C379/92 *Peralta* [1994] ECR I-3453 citing *Walt Wilhelm* (n 31).

apply less strict rules'.⁴⁵ *Peralta* thus shares the common theme of applicants complaining that their own national law imposes harsher or less advantageous treatment than might have been available under a foreign law. In other words they are seeking to establish the *opposite* of what Article 18 TFEU sets out to achieve. Rather than setting aside advantages accorded by their own national law to the detriment of foreigners, they are seeking to obtain an advantage through the application of a law with which they hold little connection. It is perhaps not surprising that the CJEU has shown itself reluctant to accept that their particular treatment was discriminatory.

For same-sex couples *Walt Wilhem* and *Peralta* will still defeat any complaint that their national law does not permit same-sex marriage. This is not discriminatory even though other nationalities are permitted same-sex marriages elsewhere. Dutch law allows same-sex marriage to couples resident or nationals of the Netherlands but Italians are not discriminated against if Italy does not provide the same treatment. However, these cases do not provide such a clear answer when faced with more nuanced arguments concerning the portability of a civil status validly acquired abroad. Take for example France's application of classic conflicts rules. Same-sex marriages celebrated in Belgium between Belgians could take effect in France but the same marriages involving any French citizens were not recognised despite being lawful in Belgium. This is a clear example of different treatment being accorded on the basis of nationality within one and the same territory. Whilst doctrinally consistent from a private international law perspective, such discrepancies are clearly suspect under EU Law and merit further consideration.

Furthermore, the use of nationality when considering same-sex marriages or partnerships is clearly not the traditional application of a 'neutral' multilateral conflicts of law system. When such an emotive topic is at issue, neither the law of the forum state nor the homeland state are ambivalent as to the law chosen to be applicable, which in many instances result in diametrically opposed substantive outcomes. It is not with impartiality or lack of interest in the outcome that an Italian court will deem Italian law applicable to a Belgian same-sex marriage involving an Italian. The neutrality, and hence ostensibly non-discriminatory, nature of the conflicts system is thereby placed in doubt.

⁴⁵ *ibid*, [48].

b) *Johannes v Johannes* and the Scope of Community Law

The interpretation of the scope and extent of the non-discrimination principle is of course in the hands of the CJEU, yet the Court has never had to rule directly on the compatibility of Article 18 TFEU with different treatment on the basis of applying different laws.⁴⁶ The only case in which the CJEU purported to deal with this point is *Johannes v Johannes*.⁴⁷ It did not directly concern portability of status, yet is the only case where the CJEU has expressly ruled the use of the nationality principle to be acceptable. Whilst taken as support for the notion that different treatment on grounds of nationality for conflicts purposes is not a breach of the EU Treaty, an important factor is that the Court in that case found its subject-matter to fall outside the scope of the Treaties, as discussed below. This finding is no longer true following the Treaty of Amsterdam, meaning that *Johannes* may no longer reflect current thinking.⁴⁸ If so, there is greater scope for the CJEU to find that adherence to nationality as a connecting factor for personal law is indeed a breach of Article 18 TFEU.

Hartmut and Jutta Johannes married in 1963 in the US. Both German, they moved to Belgium in October 1963 when Hartmut became an official at the European Commission. In 1988, they were granted a divorce by a Brussels court, with Belgian law being applicable as the law of the last common residence of the parties. Hartmut retired in 1996 and collected a Commission pension. It is not clear how long Jutta stayed in Belgium after the divorce, but by 1996 she had moved back to Germany and brought a claim in Cologne, under German law, for a pro rata apportionment of the pension rights acquired during the marriage.⁴⁹

In a preliminary reference to the CJEU the German court asked two questions. The first question related to the interpretation of a specific provision of the Staff Regulations.⁵⁰ These provided for a survivor's pension for the divorced wife of an official or former official upon his death, if she could point to a maintenance obligation under a court order or settlement.⁵¹ The question was whether the Staff Regulations were an exhaustive set of rules governing the pension entitlements of a divorced spouse of an official, or whether further claims were

⁴⁶ Bogdan (n 20), 309.

⁴⁷ C-430/97 *Johannes v Johannes* [1999] ECJ I-3475.

⁴⁸ Meeusen, (n 21), 292.

⁴⁹ BGB §1587.

⁵⁰ Article 27 of Annex VII of the Staff Regulations, Regulation No 259/68 of 29 February 1968, [1968] 1 OJ English Special Edition, 30.

⁵¹ There was no equivalent provision for the divorced husband of a female official, although the current version of the Staff Regulations replace the references to 'wife' with 'spouse'.

admissible under national law (in this case, apportionment of pension rights under the German law of obligations). The CJEU answered this in the affirmative, but a closer examination of the history and background of the case show it to be interesting for another reason. It shows why the CJEU was concerned to establish that this was a case falling *outside* the scope of the EC Treaty. To recap, the CJEU held that the Staff Regulations did not preclude the application of national rules on pension apportionment on divorce. The reason the Cologne court suspected otherwise can be deduced from the referring judgment.⁵² German reforms to divorce law in the 1970s had for the first time introduced the apportionment of pension rights built up during the marriage.⁵³ What perplexed the Cologne court was that apportionment was to be used to replace divorced widows' entitlements under German state pensions, but with special rules for the treatment of foreign pensions. Treating the Commission pension as a pension from a 'foreign social security institution', as suggested by the German government, would have made clear that these pension rights also needed to be included in the apportionment.⁵⁴ However, suspecting a Community pension might require special treatment under EC law, the Cologne court wanted to know if under German law it could apportion a pension right which had been acquired under the EC Staff Regulations, suspected of forming part of superior Community law. This was not an unreasonable question. Not only did the Treaty say that the CJEU had jurisdiction over staff disputes,⁵⁵ but academic writing prior to the case had suggested that EEC rules, rather than Belgian or any other national law, constituted an exclusive field of law applicable to officials of the European institutions, including questions relating to pension benefits.⁵⁶ The CJEU ended the confusion by ruling, as suggested by the European Commission,⁵⁷ that Community pensions were *not* subject to a special law in their own right and that the rules governing a former official's responsibilities towards his family were a matter of national law falling outside the scope of the Treaties.

This should have been the end of the matter, but there was a second question referred by the Cologne court, relating to Article 6 EC. As shown below, this ban on nationality discrimination only applies within the field of application of the Treaty. Hartmut argued that Jutta's right to

⁵² AG Köln, 03.09.1997 - 309 F 332/88, FamRZ 1998, 482.

⁵³ 'Scheidungsrecht: Geteilt durch Zwei', Der Spiegel 48/1975, 24 November 1975. Previously the divorced wife had only been entitled to maintenance based on financial need.

⁵⁴ Submission of the German government to the ECJ, as summarised in the ECJ judgment *Johannes*, para 13.

⁵⁵ Article 179 EEC.

⁵⁶ Ulrich Drobnig, 'Conflict of Laws and the European Economic Community' (1967) 15 Am J Comp L 204, 214 and the works referenced in fn 48 and 50 thereof.

⁵⁷ *Johannes* (n 47), [16 -20].

apportionment under German law (which on the facts only applied because both she and Hartmut were German nationals) was constrained by Article 6 EC. His claim was that he would not have had to share his pension under Belgian law, and Belgian law would have been applicable had he been Belgian rather than German.⁵⁸ This, he said, was illegal discrimination on grounds of nationality.

As the question whether Belgian or German law applied was not a question of Community law the Court could simply have said the answer was moot, no longer being relevant for the case being decided.⁵⁹ Germany and the Commission⁶⁰ both argued that Article 6 EC did not come into play as the matter lay outside the scope of Community law. The CJEU had given effectively the same answer to another German court two years earlier.⁶¹ In that case the CJEU been asked in criminal proceedings whether it was contrary to Article 6 EC for a German state prosecutor to show less ‘respect’ to a defendant from another Member State than to a German national. This lack of respect arose allegedly because the prosecutor had omitted to use the title *Herr* (Mr) in court papers and this was claimed to be reason enough not to enforce the punishment order in question. The CJEU remained patient when asked to consider if this was a breach of EU law, and calmly explains that Article 6 only applies to matters within the Treaty’s area of application. The CJEU’s focus on this point in *Johannes* could then be understood against this background of spurious claims. It could explain why the CJEU appeared to find it helpful (despite technically being *obiter dicta*) to elucidate further:

Article 6 of the EC Treaty (now, after amendment, Article 12 EC) does not preclude the laws of a Member State regulating the consequences of divorce between an official of the Communities and his former spouse, regard being had to the spouse’s nationality as a connecting factor, from causing the official concerned to bear a heavier burden than would be borne by an official of a different nationality in the same situation.⁶²

⁵⁸ At the time only Germany and the Netherlands provided for apportionment of pension rights on divorce. For completeness it could be added that the matter would now be dealt with by most Member States under the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, applicable to the EU (subject to UK and Danish opt-outs) by virtue of Council Decision of 30 November 2009, [2009] OJ L 331/17, under which the law of the habitual residence of the creditor is treated as the primary connecting factor to determine the applicable law governing maintenance obligations.

⁵⁹ In a preliminary reference the ECJ only needs to answer questions relevant to the national court’s determination of the case: Case C-428/93 *Monin Automobiles* [1994] ECR I-1707, [15].

⁶⁰ *Johannes* (n 47), [25].

⁶¹ Case C-291/96 *Grado and Bashir* [1997] ECR I-5531.

⁶² *Johannes* (n 47), [28].

The judgment thereby appears to lay down a general principle that according different treatment on the basis of different nationalities is not a breach of what is now Article 18 TFEU. However, this ignores the important fact that the substance of the *Johannes* case fell outside the scope of the Treaties in any event. It was unhelpful and unnecessary to add that discrimination on grounds of nationality was not an issue when using conflicts rules to determine applicable law. The specific facts of the case are such that the CJEU may even not have intended this to be taken as a general principle.

The question remains in any event whether such discrimination is permitted when the substantive issue in question *does* fall within the scope of the Treaties. Does the coming into force of the Amsterdam Treaty (just six weeks before the judgment in *Johannes*) with its express provision allowing the harmonisation of private international law rules, make a difference to the meaning of the decision? It can no longer be the case that private international law and conflicts rules are seen as falling outside the scope of the Treaties.⁶³ The mention in the judgment to the change in Treaty numbering has given rise to discussion, but one view is that the CJEU intended to emphasise that the new Treaty was not to have any impact on its findings. In other words, the CJEU could have been saying that the case would be decided the same way even under the post-Amsterdam rules, despite the scope of application of the Treaty now being extended to encompass harmonisation in the field of private international law.⁶⁴ This view seems to be prevalent, for a number of reasons. Member States act on the basis that nothing has changed, and will go on using nationality as a connecting factor until Regulations or Directives require them to do otherwise⁶⁵. Nothing in *Johannes* would lead them to think that they could not. The Amsterdam Treaty itself did not envisage that all nationality based conflicts rules would disappear.⁶⁶ Finally EU legislation itself, brought in as a result of the Treaty amendments,⁶⁷ continues to use Member State nationality as a connecting factor, albeit usually as a secondary test. This suggests that the Commission, Council and Parliament see no issue with its continuing use.⁶⁸

⁶³ Meeusen, (n 21), 292.

⁶⁴ Bogdan (n 20), 309.

⁶⁵ *ibid*, 308.

⁶⁶ Michael Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing, Groningen 2006), 23.

⁶⁷ for example 'Brussels II bis', Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338, Article 3.

⁶⁸ Bogdan (n.20), 309.

Despite the above, I submit a better view is simply that *Johannes* was decided on the basis of pre-Amsterdam Community law, and may or may not be decided the same way today. Certainly the case is *capable* of being decided differently, with Article 18 TFEU now having effect on the basis that conflicts law in family law matters falls (albeit somewhat tenuously) within the scope of the Treaties. I do not think, however, that any such change of approach would be triggered simply on the basis that the Community now has (limited) powers to harmonise conflicts laws on marriages and divorces, particularly if these are powers which have not yet been exercised. Instead, I believe the CJEU would look carefully at the effects caused by the application of different treatment resulting from applying one law as opposed to another. It would compare the results which might be expected using nationality as a connecting factor against those which would result from applying a different connecting factor such as residence. Where the difference was disproportionate, I believe the CJEU would still find it an unjustifiable difference in treatment, and hence discrimination, to apply a different law only because of nationality. On this basis I accept *Johannes* might well not be decided differently. Hartmut would not necessarily find himself relieved of his obligations to share his pension, even if a different solution might have been reached applying the law of his residence rather than nationality. However, the Dutch victims in *Hoorn* might be treated better, on the grounds that nationality cannot be used to deny the application of rights (as opposed to evading obligations) which would have prevailed if the circumstances had been identical but for the nationality of the claimant.⁶⁹ On the same basis the ban on discrimination would also apply to Italians, resident and previously married in the Netherlands, who found their same-sex marriage void in France under classic conflicts rules on grounds of nationality alone.

Even in 1999 *Johannes* might have been decided differently had EU law not been invoked to try to limit the rights of the weaker party. Given the reputation of the CJEU towards using EU law as a liberalising tool,⁷⁰ one might well have seen the opposite outcome had Jutta's claim been likely to *fail*, rather than succeed, because of the question of nationality. Suppose it was Belgium rather than Germany which had an apportionment law, and, after the divorce, Jutta had remained in Belgium and brought her claim for apportionment under that Belgian law. Suppose also that the Belgian court had refused to make such an award, saying (despite both

⁶⁹ i.e. following C186/87 *Cowan v Trésor Public* [1989] ECR 195.

⁷⁰ For a discussion on whether the CJEU is "activist" and how it manages the overlap between law and policy see for example Joxerramon Bengoetxea, Neil McCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G de Burca and J Weiler (eds), *The European Court of Justice* (OUP 2001), 43-85.

her married life and divorce having taken place in Belgium) that the Belgian law only applied to Belgians. Her claim would then have been unsuccessful simply because she was to be subject instead to German law because of her nationality.

One can speculate that the CJEU might then indeed have found discrimination on grounds of nationality, given the differences in outcome compared with using residence as a connecting factor. One might also well imagine the CJEU finding that her claim fell within the scope of application of the Treaties, because the failure to grant national treatment affected her rights of free movement. I suggest this might easily have been the case. Had the CJEU taken that approach then, as it might do so now, the situation of same-sex couples in the EU today could have been very different.

c) Nationality and the Transferability of Personal Status

For a few years *Johannes* was seen as the only authority on the matter. *Garcia Avello*⁷¹ and subsequent cases then showed that discrimination on grounds of nationality under private international law does fall within the scope of the Treaties. However, the implications for this in terms of transferability of status versus equal treatment in the host state are not obvious.

Mr Garcia Avello, a Spaniard, and his Belgian wife, Ms I Weber, applied to the Belgian authorities to correct their children's birth certificates. The children, who had dual nationality, had been registered at the Spanish Embassy using the traditional Spanish form 'Garcia-Weber' taking the first surname of each of their parents. Belgium would have allowed the children to keep that name had they been exclusively Spanish. However, as they were also Belgian citizens, the Belgian authorities insisted on applying the Belgian rules of naming the children after their father only. To Mr Garcia Avello this meant that the children had the same name as his own siblings, and having different names in different Member States would create confusion as the children sought to exercise their free movement rights throughout the Union.

The CJEU agreed. Although jurisdiction over names remained with the Member States, this jurisdiction had to be exercised in conformity with EU law. The Court dismissed the arguments of some Member States that the children would suffer no real hardship as they would be able to use their rights as Spanish citizens to use their Spanish names in every EU

⁷¹ Case C-148/02 [2003] ECR I – 11613.

country apart from Belgium, and found that Belgium was discriminating on grounds of nationality against the children in refusing to make allowances for their situation.

The CJEU appears to uphold the notion that one's 'state of origin' determines matters of civil status and personal capacity and takes precedence over the law of habitual residence. As such it has been argued that the case can be used to support the immutability of a status acquired elsewhere, and that the family status conferred by the national State of the individual should be accepted throughout the Community 'regardless of the domestic PIL rules of any Member State'.⁷² However, this reads too much into the judgment. *Garcia Avello* is relevant in requiring in some circumstances a Member State to recognise the determination of the laws of another Member State to citizens residing within its own territory, but it cannot be claimed that this requires full portability of status. The judgment's purported ground breaking effect is limited somewhat by the fact that the children had Spanish nationality as well. The end result happened to be, oddly, that Belgium had to treat the children as though they were exclusively Spanish, but the real ratio of the decision is that Belgium could not treat them as exclusively Belgian when they had dual-nationality and were also Spanish. As such, the judgment can be seen as *reinforcing* rather than reducing the role of the nationality principle.

The judgment does not establish a principle of portability of status, or set aside domestic conflicts rules or override the public policy exception. The only correction is that in cases of dual nationality account needs to be taken of the laws of each of the nations concerned rather than each being able to disregard the other one. In light of this, I disagree with one argument that Article 12 EC [Article 18 TFEU], coupled with Article 39(2)EC [Article 45(2) TFEU] and 43 EC [Article 49(2) TFEU], relating to the prohibition of discrimination on grounds of nationality, means that:

legal values granted to a person by its national State cannot be denied by another Member State, in particular whenever this refusal has a negative effect on the integration of European citizens... and their freedom to circulate and enjoy fundamental rights.⁷³

⁷² Roberto Baratta, 'Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC' [2007] 1 IPRax, 4, 8.

⁷³ *ibid.*

Nevertheless, *Garvia Avello* did open the door for a wider involvement of the Court of Justice in determining matters which had previously been considered to fall outside the scope of the Treaty and within the exclusive domain of private international law. There was no suggestion, as might have been the case in light of *Johannes*, that the question of law applicable to surnames might fall outside the scope of application of the Treaties and hence outside the scope of Article 12 EC.⁷⁴ The implications of this have indeed been far-reaching, as discussed below.

More recent thinking on conflicts and nationality is shown in the judgment and Advocate-General's Opinion in the 2008 case of *Grunkin v Grunkin-Paul*.⁷⁵ This was a dispute as to the law applicable to the name of a German child born to German parents who had lived in Denmark since his birth. Danish rules allowed him to take the names of both parents. When his father moved back to Germany and the child moved back and forth between the two counties, the German authorities rejected his Danish-style name, insisting instead on him using the same name as his father. As Germany was also responsible for issuing his passport he found the name on his passport did not match the name on his birth certificate.

A Grand Chamber of the CJEU found that there was *no* discrimination on grounds of nationality, given that both the child and each of his parents were of German nationality and the case concerned the application of German law. Nevertheless, the Court held that:

having to use a surname in the Member State of nationality that was different from the surname conferred and registered in the Member State of birth and residence was liable to hamper the exercise of the right to move and reside freely within the territory of the Member States under Article 18 EC. Such a discrepancy in surnames was liable to cause serious inconvenience at both private and professional level.⁷⁶

Hence the Court required Germany to disapply its own national conflicts of law rules on names and accept the name given to the child by the Danish authorities.⁷⁷ This goes much further than *Garvia Avello* as here the nationality principle is indeed set aside for the sake of free movement. Whilst concerning German law and its application to a German citizen in

⁷⁴ Bogdan (n 20), 312.

⁷⁵ C-353/06 *Grunkin v Grunkin-Paul* [2008] ECR I-7639.

⁷⁶ *ibid*, [9].

⁷⁷ An earlier case relating to the same facts, Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561 resulted in a judgment of 27 April 2006 that the Court lacked jurisdiction, but AG Jacobs' Opinion of 30 June 2005, to the effect that the obligation to carry different names according to different laws of Member States was a clear violation of the status and rights of a Union citizen, itself attracted considerable comment.

Germany, and despite the fact that German conflicts rules treat nationality as the sole connecting factor for the determination of surnames, the German courts were nevertheless obliged to apply Danish law, as they could not justify the obstacle to freedom of movement which otherwise arose.⁷⁸

Aside the important doctrinal development in the judgment, Advocate-General Sharpston's Opinion in the case is also an illuminating pointer towards further potential developments.⁷⁹ The Court largely followed her proposed answer: A choice of law rule under which a person's name is to be determined in accordance with the law of his nationality is not in itself incompatible with Articles 12, 17 or 18 EC as long as it is applied in such a way as to respect the right of each citizen of the Union to move and reside freely in the territory of the Member States.⁸⁰ Her Opinion is important, however, because it also discusses other questions relevant to conflicts law generally, including civil status recognition. The AG recognised the wider impact this might have on related areas where she acknowledges:

A change to one legal system's rules of private international law concerning the determination of names could have repercussions not only on the way in which those rules interact with the equivalent rules of another system, but also on the operation of its own rules of private international law concerning related areas of personal status or family law (with consequent changes in the interactions between those rules and those of other systems) or on its relevant rules of substantive law.⁸¹

In particular she makes reference to the criticism levelled at the Court for a perceived failure in *Garvía Avello* and the AG Opinion in *Niebuß* to appreciate the consequences of the approach taken.⁸² However, she concludes: 'This is clearly an area in which it behoves the Court to tread softly, and with care. But just because it must tread softly, that does not mean that it must fear to tread at all.'⁸³

The AG refers to earlier scholarly comment, which is important because the cited works specifically allude to the question of same-sex marriage and partnerships. She must have been

⁷⁸ *Grunkin Paul*, (n 75), [29-31].

⁷⁹ *Grunkin Paul*, (n 75), Opinion.

⁸⁰ *ibid*, Opinion [94].

⁸¹ *ibid*, Opinion, [39].

⁸² *ibid*, [40].

⁸³ *ibid*, [41].

aware of this angle in formulating her approach that private international law rules cannot be permitted to interfere with Union free movement rights. Commenting on *Avello*, (but whilst referring to *Niebuß*), Ackermann had pointed out that cases other than rules on names may also be regarded as an obstacle to the free movement of Union citizens. In *Niebuß* Denmark relied on residency whilst Germany relied on nationality as being the relevant connecting factor for the law to be applied in choosing a name. Ackermann recognised, however, that the same problem might also be relevant to questions of marital status:

As long as different national conflict of laws rules co-exist in this area of law... the personal status of a Union citizen may vary depending on the forum... [A] Union citizen whose marital status is not judged unanimously in different Member States due to divergent conflict of laws rules may have to face serious legal consequences (such as the loss of social benefits) and thus be discouraged from moving between Member States... Following [*Avello*] and [*Niebuß*] such a situation would come within the scope of the Treaty despite the fact that the rules concerned fall within the competence of the Member States.⁸⁴

AG Sharpston refers also to Henrich, who is even more explicit in his comment on *Niebuß*. He suggests that AG Warner's approach would lead to a *Lebenspartnerschaft* concluded in an EU Member State being required to be recognised in all Member States, even those which did not (yet) provide for the same under their own laws.⁸⁵ The AG is quick to refute such assertions. She refers, for example, to 'the widely expressed concern that the delicate edifice of private international law rules concerning personal status within the European Union should not be thrown into utter confusion'.⁸⁶ In light of this, she stresses how her approach:

would not require any major change to Germany's substantive or choice of law rules in the field of names, but would simply require them to allow greater scope for recognising a prior choice of name validly made in accordance with the laws of another Member State. To that extent, it involves no more than an application of the principle

⁸⁴ Thomas Ackermann, Comment on Case C-148/02 *Garcia Avello*, (2007) 44 MLRev 141, 147.

⁸⁵ Dieter Henrich, 'Anerkennung statt IPR: Eine Grundsatzfrage', IPRax 5 [2005] 422..

⁸⁶ *Grunkin v Grunkin-Paul* AG Opinion (n 78), [90].

of mutual recognition which underpins so much of Community law, not only in the economic sphere but also in civil matters.⁸⁷

This attempts to provide reassurance that this is not a major change in the choice of law system. Nevertheless, she finds it necessary to establish the means to distinguish *Grunkin-Paul* from the cases of civil status which will inevitably follow:

Whilst the determination of a person's name falls within the scope of laws on personal status, it is a rather specific matter within that field. It involves identification, which is a separate matter from legal status or capacity. Consequently, I do not consider that it would *necessarily* follow that a ruling with regard to names should be extrapolated to such other matters.⁸⁸

There is, nevertheless, no reason why 'identification' should be treated separately from other issues of legal status. I agree with Courthaut that someone's marriage or partnership is as much a part of their identity and personal integrity as their name.⁸⁹ The consequences of not being able to assert that status elsewhere could be as distressing as being required to use a different name. In fact, given that a marriage or partnership will result in many countries in a change of name if the spouses desire, a failure to recognise a marriage should ordinarily also entail a refusal to accept the new married name. If then refusing to recognise a name is by itself a hindrance to free movement rights, *a fortiori* is the refusal to recognise the underlying married status.

In short, *Grunkin-Paul* does indeed provide a basis for an interpretation that choice of law rules must not affect civil status in such a way as to interfere with free movement rights. This idea is developed further in Chapter 6. For now, to conclude the discussion on connecting factors, it suffices to recap the two significant developments which have taken place since *Johannes* purported to lay down that using nationality as a connecting fact fell outside the control of EU Law. Firstly, it is now clear that private international law as applied to EU citizens (and in particular those exercising free movement rights) does now fall within the scope of application of the Treaties. Article 18 TFEU and the prohibition on discrimination on grounds of nationality is definitely applicable. This arises possibly as a result of the introduction of Article

⁸⁷ *ibid.*

⁸⁸ *ibid.*, [91], emphasis added.

⁸⁹ Tim Courthaut, *EU Ordre Public* (Kluwer Law International 2012), 404.

65 TEC (now Article 81) by the Treaty of Amsterdam on powers to harmonise conflicts rules, and if not then as a result of cases such as *Garcia Avello* and Article 17 TEC (now Art 21 TFEU) introducing free movement rights as a concept of European Citizenship. This is discussed further in Chapter 6. There it will be seen there that the scope of EU law has potentially been infinitely enlarged by EU citizenship, as 'no national rule falls *a priori* outside the scope of the Treaty, since movement is enough to bring the situation within its scope'.⁹⁰ An added complication is that the movement in question need not be physical or dependent on economic activity.⁹¹ For same-sex unions across borders the free movement aspect is largely present in any event, but in instances where there might be doubt, such as whether it is possible to inherit property in another Member State from a deceased partner, EU citizenship has filled any gap.

Secondly, the fact that the scope of application of the Treaties includes exerting a control on the use of connecting factors means that all the other aspects of Union law apply too. These include the CJEU's jurisprudence relating to obstacles, also discussed in Chapter 6. Union law now also includes the Charter of Fundamental Rights, binding on the Member States, CJEU and Community institutions when implementing EU law.⁹² The implications of this are discussed later in this Chapter.

II. Harmonisation of Conflicts Law? An Uphill Struggle

Difficulties over mutual recognition could be by adopting harmonising PIL Regulations governing certain effects of same-sex unions. This is hindered by the limited competence of the Union to pass such measures, which require unanimity in the Council. In this section I argue that the slow progress is due to a combination of two factors. As well as the reluctance of certain Member States to countenance measures which they fear might require them to give effect to same-sex marriages and partnerships from other Member States, another problem is that the Commission's treatment of same-sex marriages and partnerships has been patchy and inconsistent, leading to confusion as to the effects of the proposals and their conformity with prohibitions on discrimination.⁹³ This lack of confidence to push forward with family law

⁹⁰ Elena Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 CMLRev 13,14.

⁹¹ Dmitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 ICLQ 97, 120.

⁹² Charter of Fundamental Rights (n 23), Article 51.

⁹³ See further Stuart Davis, 'Same-Sex Couples and the Harmonisation of EU Matrimonial Property Regimes: Unjustifiable Discrimination or Missed Opportunities?' (2013) CFLQ 19.

initiatives can be better understood if one looks at the haltering development of the EU's competence in this area. I first set out the history of this competence before considering how it has been used in relation to same-sex relationships.

1. Community Competence

The ability of the EU institutions to act is limited to the extent of the powers conferred on them by the Member States under the Treaties.⁹⁴ Competence to act in matters concerning the harmonisation of family law is particularly controversial, given that only the harmonisation of conflicts rules, rather than substantive family law, is envisaged by the Treaties.⁹⁵ Curry-Sumner concludes his comprehensive study on non-marital registered relationships in Europe with the assertion that the harmonisation of substantive family law, whether or not desirable, is in any event 'evidently not feasible'. Instead the answers to problems of recognition of such partnerships must lie in the harmonisation of private international law ('PIL') rules.⁹⁶ Here he quickly concludes that the EU is competent to act (on the basis of the then applicable Article 61(c) EC Treaty) and that any lack of action is as much a question of political will rather than a question of competence itself.⁹⁷ Interestingly, his analysis excludes same-sex marriages on the basis that same-sex marriages might not be covered by existing PIL rules or international conventions.⁹⁸ I do not share his view, but believe on the contrary that the harmonisation of conflicts over marriage is even more pressing than for partnerships because the personal law aspects are more keenly felt and applied. Curry Sumner may well now agree, given the development of same-sex marriage.

Over time the Community introduced a variety of "scattered" PIL harmonisation measures taken on the basis of Article 100 EC (Article 95 TEC, now Article 114 TFEU) and an emergent competence to take such measures can be seen.⁹⁹ This competence was not made explicit until

⁹⁴ For general background on EU powers with respect to private international law see Katharina Boele-Woelki and Ronald H van Ooik, 'The Communitarization of Private International Law', *Yearbook of Private International Law* (Kluwer 2002), 1.

⁹⁵ Masha Antokolskaia, 'Harmonisation of substantive family law in Europe: myths and reality' (2010) 22 *Child & Fam LQ* 398; Maria Rosaria Marella, 'The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law' (2006) 12(1) *European Law Journal* 78.

⁹⁶ Ian Curry-Sumner, *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe* (Intersentia, Antwerp 2005), 518.

⁹⁷ *ibid*, 529.

⁹⁸ *ibid*, 6 and 258.

⁹⁹ Jürgen Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam' (2000) 37 *CMLRev* 687. For a survey of Community activities in conflicts legislation see also Jürgen Basedow, 'Europäisches Internationales Privatrecht' (1996) *NJW* 1921.

the Treaty of Amsterdam when responsibility for legislation concerning judicial co-operation in civil matters was moved from the third pillar of the European Union to the first pillar. This competence is expressed to include a variety of confusing powers and provisos, but can broadly be condensed into the following:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt [...] measures in the field of judicial cooperation in civil matters [...] having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market [...] promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.¹⁰⁰

Because of the novelty of these competencies in the Community legal order there was complex array of procedures for the adoption of these various matters.¹⁰¹ There was to be a transition period during which time the Commission and the Member States shared competence to make proposals, but with a reduced role for the European Parliament and retaining the need for unanimity in the Council for matters relating to family law. This was the case even though other matters could now use the normal qualified majority voting system.¹⁰² Basedow argues that Articles 61, 65 and 67 TEC merely supplement an existing competence already found under Article 95 TEC.¹⁰³ He suggests it might have been possible to use that power, which does not require unanimity, to harmonise certain conflicts rules more easily, such as those relating to free movement of goods and services, for example conflicts rules relating to succession, matrimonial property invested abroad or assets or property in other Member States owned by spouses or registered partners.¹⁰⁴

¹⁰⁰ Article 61(c) and Article 65 Consolidated Version of the Treaty establishing the European Community [2002] OJ C 325/33, 57.

¹⁰¹ *ibid*, Article 67.

¹⁰² Article 67(5) TEC

¹⁰³ Basedow, 'The Communitarization of the Conflict of Laws' (n 98), 697.

¹⁰⁴ *ibid*, 698. For a survey of Community activities in conflicts legislation see also Jürgen Basedow, 'Europäisches Internationales Privatrecht' (1996) NJW 1921.

This is an attractive argument, but is not a widely-shared view and may be technically unsound.¹⁰⁵ Boele-Woelki, in contrast, sees Article 65 EC as a *lex specialis* whereby all topics covered by Article 65 should have this Article as their legal basis, even when other legal bases such as Article 95 could also appropriately fulfil this task.¹⁰⁶ I think her's is the correct view. The Treaty of Amsterdam is regarded as the first time in which Community competence to harmonise or unify conflict rules was acknowledged.¹⁰⁷ It is then a step too far to say that there already existed a wider Community competence, applicable to all other Treaty freedoms, to harmonise conflicts rules including in relation to family law. Others have even argued that the competence in respect of family law, even after the Treaty of Amsterdam, was narrower, rather than wider, than laid down in Article 65. PIL measures concerning family law were argued not to fall within Article 65 as they were not necessary for the functioning of the internal market.¹⁰⁸

The position is clearer following the Treaty of Lisbon, which provides for development of 'judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.'¹⁰⁹ This includes measures, 'particularly when necessary for the proper functioning of the internal market [...] to adopt measures [...] aimed at ensuring the compatibility of the rules applicable in the Member States concerning... conflict of laws and of jurisdiction.'¹¹⁰

These provisions sit squarely within Title V "Area of Freedom, Security and Justice" and are clearly intended to constitute the general Community competence to harmonise conflicts rules, rather than being limited to matters solely concerning free movement of persons. As such, the exclusion of the use of the ordinary legislative procedure for 'measures concerning family law with cross-border implications' set out in Article 81(3), and the retention of the special

¹⁰⁵ It sits uneasily with the part of Article 95 TEC which says that the procedures only apply 'save where otherwise provided in this Treaty'. Articles 65(b) and 67(5) would then have to be interpreted, simply by virtue of being situated under Title IV relating to the free movement of persons, as not providing the primary competence for measures to harmonise conflict of law rules, but providing competence *solely* to harmonise those conflict rules relating to free movement of persons.

¹⁰⁶ K Boele-Woelki and R H van Ooik, 'The Communitarization of Private International Law', *Yearbook of Private International Law* (Kluwer 2002) 1, 17.

¹⁰⁷ Ulrich Drobnig, 'European Private International Law after the Treaty of Amsterdam: Perspectives for the Next Decade' (2002) 11 KCLJ 190, 199.

¹⁰⁸ Oliver Remien, 'European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice' (2001) CML Rev 53, 74.

¹⁰⁹ Article 81(1) TFEU.

¹¹⁰ Article 81(2)(c) TFEU.

legislative procedure requiring unanimity in the Council, is still regarded as the current full extent of Community competence to act in this area. This, as will be seen, makes it unlikely that much progress can be made on this basis.

2. The Matrimonial Property and Registered Partnership Property Proposals

The difficulties faced in attempting to harmonise PIL rules for the benefit of same-sex couples can be seen in the hesitant start and faltering progress of the Commission's proposals to harmonise the conflicts rules relating to matrimonial property regimes.¹¹¹ I discuss these developments to show the limits on the EU's powers, and the compromises which need to be adopted when legislation requires unanimity. The proposals have also raised certain interesting questions as to the role and nature of the public policy exception.

a) History of the Proposals – Same-Sex and other *De Facto* Unmarried Couples

The issue of a legal instrument at EU level relating to matrimonial property regimes was first identified in the 1998 Vienna action plan.¹¹² As a result of conclusions reached at the Tampere Council in 1999, the Commission had decided to include rights in property arising out of a matrimonial relationship and the property consequences of the separation of unmarried couples into its programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters.¹¹³ The Commission commissioned a study, completed in 2002, on matrimonial property regimes in Member States and on property laws applicable to 'unmarried' couples.¹¹⁴ It then took a further four years to produce the Green Paper which had been required by the Hague Programme adopted by the European Council in November 2004. Draft Regulations were finally published in 2011, one relating to matrimonial property regimes¹¹⁵ and another to the property consequences of registered partnerships.¹¹⁶ A

¹¹¹ See further Davis (n 93).

¹¹² Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [1999] OJ C 19/1.

¹¹³ K Boele-Woelki, 'The European Agenda: an Overview of the Current Situation in the Field of Private International Law and Substantive Law' September [2006] IFL 149.

¹¹⁴ TMC Asser Institute, 'Etude sur les régimes matrimoniaux des couples mariés et sur le patrimoine des couples non mariés dans le droit international privé et le droit interne des états membres de l'union européen', Offre no JAI/A3/2001/03 (The Hague, 2002).

¹¹⁵ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final ('Matrimonial Property Regulation').

¹¹⁶ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final ('Registered Partnership Property Regulation').

total of eleven years had passed between the need for action being identified and the publication of the first proposed solutions. These proposals have themselves been under discussion for over four years, with limited progress.

The Commission had not been intending to deal with registered partnerships as a specific category, or to make any particular provision for same-sex couples. Instead, the project intended to make provision both for married couples and for unmarried cohabiting couples, seen as being the ‘new social reality’ of ‘couples formed without a marriage bond.’¹¹⁷ This ‘new social reality’ fails to take any account of same-sex couples. Where the Commission acknowledges that some unmarried couples can form registered partnerships, these are treated in the Green Paper only as a subcategory of the two ways in which couples choosing not to marry might decide to arrange their affairs, namely ‘unmarried couples bound by a ‘registered contract’ along the lines of the French PACS, and other forms of non-marital cohabitation. Therefore the ‘new social reality’ for the European Commission is decidedly not that same-sex couples have registered partnerships whilst opposite-sex couples have marriages, but simply that some opposite-sex couples in some Member States have a choice of an alternative ‘marriage-lite’ form of relationship recognition instead of entering into marriage.¹¹⁸

One of the consequences of the long period of time spent producing the Green Paper, however, is that attitudes had shifted in the intervening years towards the classes of persons which the legislation was intended to protect. Same-sex marriage did not exist in 1999, and registered partnerships had only been introduced in Denmark (1989), Sweden (1994), Netherlands (1998) and France (November 1999). The original project had arguably been based on a prevailing hierarchy of family forms: first position was retained by marriage, followed by heterosexual cohabitation, with the same-sex family a clear third.¹¹⁹ This background informs the way the Green Paper discusses the protection which should be afforded to unmarried, predominantly heterosexual couples, rather than constituting separate categories for registered couples or same-sex couples.

¹¹⁷ Green Paper COM (2006) 400 final, 3.

¹¹⁸ For an overview of how different categories of registered partnership could be considered see Ian Curry-Sumner, ‘A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe’, in K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe* (2nd edn, Intersentia, 2012).

¹¹⁹ R Bailey-Harris, ‘New Families for a New Society?’ in S Cretney (ed), *Family Law Essays for the New Millenium*, (Family Law, 2000), 67; also Craig Lind, ‘Sexuality and Same-Sex Relationships in Law’, Chapter 6 in Brooks-Gordon and others (eds), *Sexuality Repositioned: Diversity and the Law* (Hart 2004), 109.

During the intervening decade, as an increasing number of states instituted registered partnerships as a mechanism of formalising unmarried or same-sex cohabitation, a distinction emerged between those couples who had consciously taken the step to protect their relationship through registration (albeit in a form other than marriage, either through choice or because of the unavailability of marriage) as against those couples who simply chose to cohabit. This is shown by the 40 responses to the Green Paper from governments, academia and associations of legal practitioners which were summarised in a document issued by the Commission.¹²⁰ The distinction between married and unmarried but registered couples was no longer appropriate, as the Commission found it has misplaced the dividing line. In its own words: ‘many contributors are of the view that the future instrument should deal with both married couples and registered partnerships’, whilst ‘[v]ery few respondents are in favour of including other forms of de facto unions (non-formalised cohabitation) in the same instrument’.¹²¹

Another shift was also occurring specifically in attitudes towards same-sex couples and to the notion of registered partnership itself. Whereas certain states had introduced registered partnerships in the 1990s as an ‘alternative’ to marriage which happened to be made available also for same-sex couples, the 21st Century saw certain Member States introducing partnerships (such as the civil partnership in the UK) which were *only* open to same-sex couples and which were intended to operate as a substitute for marriage.¹²² As such, these partnerships often carry legal consequences identical or similar to those of marriage but attempts to preserve the notion of marriage as an institution between a man and a woman. The notion of registered partnership thus no longer represents simply a less stringent ‘marriage-lite’ form of relationship recognition. Instead, in countries adopting this form of registered partnership, such as the UK, Germany, and the Republic of Ireland, it is clearly intended under national law to operate to give same-sex couples (most of) the same rights as married couples. This development is increasingly recognised at an EU level. For example, the CJEU in *Römer v Hamburg*¹²³ found it unlawful discrimination on grounds of sexual orientation, and a breach of the Equal Treatment

¹²⁰ European Commission, ‘Summary of Replies to the Green Paper on the Conflict of Laws in Matters Concerning Matrimonial Property Regimes, including the Questions of Jurisdiction and Mutual Recognition’ 26 February 2008, available from <http://ec.europa.eu/civiljustice/news/docs/summary_answers_com_2006_400_en.pdf> last accessed 27 March 2015.

¹²¹ Green Paper (n 117), 3.

¹²² Nicholas Bamforth, ‘The benefits of marriage in all but name? Same-sex couples and the Civil Partnership Act 2004’, [2007] Child & Fam LQ 133.

¹²³ Case C-147/08 *Römer v Hamburg*, judgment 10 May 2011, [2011] OJ C 194/2.

Directive,¹²⁴ for a German pension fund to calculate a civil partner's pension entitlement at a lower rate than had he been married. The judgment expressly acknowledged that the civil partnership status should not result in different property consequences for the couple given that they had not had an opportunity to marry but only to enter into a 'life partnership' in accordance with German law. The fact that they were 'partnered' but not 'married' did not justify different treatment. This therefore overrules the notion in *D. & Sweden v Council*¹²⁵ that registered same-sex partnerships are not to be treated as equivalent to marriage. If the Commission were to relaunch its project today, it would probably have as a starting point that registered partnerships should be treated in the same way as marriages, rather than simply asking in the Green Paper whether specific conflict of law rules should be adopted for the property consequences of registered partnerships in addition to those applicable to marriages.¹²⁶

b) Why two proposals?

The proposals both intend to improve legal certainty and protection for married couples and registered partners, but they do so in a slightly different way for registered partnerships. The default applicable law for the latter is proposed to be the law of the state where the partnership was registered. For marriages, on the other hand, the applicable law will only rarely be determined on the basis of where the marriage was celebrated. The applicable law may well end up being the law of that state, but only where there is also some other connecting factor linking the couple to that state, such as nationality or habitual residence.

In light of the developments outlined above, the Commission should have revamped the proposals into one instrument to cover both married couples, and unmarried but registered couples. That would have reflected the increasing recognition being given to registered partnerships as a parallel and ostensibly equal status to marriage. However, the adoption of identical rules for both would have taken rights away from either one or other category, given the existing differences in treatment afforded by the national law of Member States. The lack of recognition of registered partnerships in many Member States would have made it difficult to implement a uniform rule providing for the governing law to follow the habitual residence of the couple. Conversely, allowing married couples to choose the law of the place of celebration

¹²⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

¹²⁵ C-122/99 P, C-125/99 D. *& Sweden v Council* [2001] ECR I-04319.

¹²⁶ Green Paper (n 117), Question 19(a), 10.

as the law governing their matrimonial property regime had been expressly rejected as a solution by the Hague Convention.¹²⁷ It is also a solution unknown in the private international law rules of most Member States.

Keeping the proposals separate may also have been an attempt to deal with the reality that some Member States continue to regard same-sex relationships as a breach of public order or national morals. With those Member States vehemently opposed to any recognition of same-sex relationships, whether governed by marriage or otherwise, it would be difficult to achieve the required unanimity if the proposals required Member States to recognise same-sex relationships as a specific category, or to afford identical treatment to registered partners and married spouses. Some may have taken the cynical view that the Commission wanted to avoid jeopardising the progress of the Matrimonial Property Proposals by keeping separate any provisions relating to same-sex couples. However, the spread of same-sex marriage throughout Western Europe means that both proposals are now equally controversial. The law of the place of celebration, whether proposed as a solution for registered partners or for married same-sex couples, is unlikely to be accepted as a relevant connecting factor. This would require all Member States to accept the property consequences of same-sex marriages and partnerships, wherever celebrated, even as relates to property held by the couple in other states, including the forum state.

This issue was well known to the Commission throughout its preparatory work, as revealed in the Commission's internal working document, published solely as an annex to the French version of the Green Paper and not translated.¹²⁸ The Working Document mentions the three Member States which, at the time of publication in July 2006, had instituted same-sex marriages (Belgium, Netherlands, Spain), and points out that those couples who have entered into such a marriage are 'strictly speaking'¹²⁹ not to be regarded as an unmarried couple for the purposes of the Green Paper. Despite the Commission's entirely correct assumption that 'in principle, such a marriage is a real marriage, and not a separate institution,'¹³⁰ the paper explains that such couples could be expected to encounter difficulties as to the recognition of the effects of the

¹²⁷ 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages, available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=88> accessed 14 September 2013.

¹²⁸ European Commission, 'Document de Travail des Services de la Commission, Annexe au Livre Vert sur le règlement des conflits de lois en matière de régime matrimonial, traitant notamment de la question de la compétence judiciaire et de la reconnaissance mutuelle' accessible at: <http://ec.europa.eu/transparency/regdoc/rep/2/2006/FR/2-2006-952-FR-1-0.Pdf> accessed 30 June 2012.

¹²⁹ *ibid.*, 29.

¹³⁰ *ibid.*

marriage in other Member States who did not have a similar ‘matrimonial status.’¹³¹ The Commission also points out that the situation for same-sex registered couples is no less tricky. The study on comparative law submitted to the Commission as part of its investigations contained reports from several Member States stating that the recognition of registered partnerships, in the sense of a relationship between two persons having similar effects to marriage, would probably be considered as contrary to public policy (*ordre public*).¹³²

3. The Impact of the Proposals for Same sex Couples

Under the current proposals same-sex married couples will still be disadvantaged compared with opposite-sex couples. To this extent discrimination on grounds of sexual orientation is not resolved by the proposed harmonisation of conflicts rules. However, for same-sex registered couples in particular, the proposed solutions for Registered Partnerships are considerably better than might otherwise be the case if they simply mirrored the provisions for married couples.

a) Matrimonial Property Regulation

The proposals allow married couples (whether same-sex or mixed-sex, according to the law applicable to the formation of the marriage) to choose the property regime applicable to their marriage. This choice is restricted, however, to (i) the state of their habitual common residence, (ii) the law of the habitual residence of one of the spouses at the time the choice is made, or (iii) the law of the state of the nationality of one or both of the spouses.¹³³ According to the Explanatory Memorandum accompanying the Matrimonial Property Regulation, this is because the option to choose ‘should be clearly regulated to prevent choice of a law having little relation to the couple’s real situation or past history: it must be based on the law of habitual residence or on the nationality of one of the spouses or future spouses’.¹³⁴

Although the couple are free to choose any one of the available options, and there appears to be no hierarchy or order of preference in the choice to be made, the options notably do *not* enable the couple to choose the law of the state where they celebrated their marriage. This is understandable, given that the couple may well have little connection to the place of marriage, for example if the marriage is being celebrated abroad as part of a holiday. If the couple do not

¹³¹ *ibid*, 30.

¹³² *ibid*, 34.

¹³³ Matrimonial Property Regulation (n 117), Art 16.

¹³⁴ *ibid*, 8.

make a choice themselves (and making a choice is, according to the Green Paper, not the most common scenario) then the default provisions under the Regulation apply. In this case there is a hierarchy of solutions, to be applied in strict order, rather than a free choice between the various options. It will again be the law of the first *common* habitual residence which takes precedence. Failing that, the law of their *common* nationality will apply. Only if neither of these apply will the Regulation apply the law of the place of celebration, but this is itself subject to the proviso that this must be the State where the spouses jointly have the closest links. Hence the place of registration takes only a subsidiary role in determining the law applicable to the property consequences of the marriage, and only becomes relevant in the very rare cases where the couple have (i) made no choice of applicable law, and (ii) had no common habitual residence at any time during the marriage and (iii) have different nationalities. As mentioned above, this is a deliberate restriction based on similar provisions in the Hague Convention,¹³⁵ which is designed to prevent ‘forum shopping’. This occurs whenever couples seek to choose a regime whose application would result in different outcomes from the regimes with which they would normally be most closely connected by virtue of domicile, habitual residence or nationality.

The proposals also allow a married couple to change the law applicable to their matrimonial property at a subsequent time. Again this choice is restricted, this time to the law of the state of habitual residence of one of the spouses at the time the choice is made, or the law of a State matching the nationality of one of the spouses.¹³⁶ A reversion to the law of the place of celebration is not an option, and this is designed to ensure that the applicable law matches the situation most closely connected to the couple. Despite these proscriptions, the Matrimonial Property Regulation would still provide a married couple with considerable freedom in arranging their affairs. For example, a French couple married and living in Germany might choose not to be subject to French law, but instead choose German law to govern their matrimonial property regime (even in respect of property located in France). If they later separate and one moves back to France whilst the other moves to Spain, they might even, by mutual consent, decide that Spanish law will henceforth govern their property.

For a same-sex married couple, however, the proposals reinforce two existing hurdles. Firstly, as for opposite-sex couples, they cannot engage in ‘forum shopping’. Even if they indulge in

¹³⁵ 1978 Hague Convention (n 127).

¹³⁶ Matrimonial Property Regulation (n 117), Art 18.

‘marriage tourism’ by travelling to another jurisdiction which performs same-sex marriages for non-residents, the property effects of that marriage will not be governed by the law of that jurisdiction, but instead by the laws which would apply ‘at home’ – laws which may not recognise them as being married or even as being in a relationship equivalent to a civil partnership. Therefore, regardless of where the same-sex marriage actually takes place, the couple must also be mindful of a second existing hurdle reinforced by the proposals. This hurdle is that they must, at some point, take care to maintain a habitual residence of one or both of them in a jurisdiction which permits same-sex marriages, at least where neither of them has the nationality of such a country. Only in this way can they choose the law of an appropriate jurisdiction to be applicable to their property regime. In other cases they will find, even under the Regulation, that the governing law is one which does not recognise their marriage or necessarily even assimilate it into a registered partnership. Furthermore, unlike opposite-sex couples, the first hurdle is set particularly high – our same-sex couple cannot simply choose to get married in a different Member State and then have the effects of that marriage recognised as though they had been married under the laws of their home jurisdiction – the Regulation does not deal with the substantive validity of marriage and does not require the home Member State to recognise the couple as being married. Where the home jurisdiction does not recognise the relationship, then, in order to have instead the law of the place of celebration as the governing law for their property regime, they will still need to meet the basic requirement for one of the couple either to have the nationality of that state or her habitual residence there.

It will therefore be seen that, even though the Matrimonial Property Regulation is silent as to whether the marriage in question is between an opposite-sex couple or between a same-sex couple, the rules as applied to same-sex couples will indeed lead to a less favourable outcome than for opposite-sex couples. This is because, by continuing the prohibition on ‘forum shopping’ in refusing to allow the state of celebration to provide the governing law, a same-sex couple will only be able to take advantage of the legal certainty intended to be provided by the Matrimonial Property Regulation if they meet the necessary requirements of habitual residence or nationality of a state which itself recognises same-sex marriage. If, however, the law of the place of celebration were allowed to apply, the effect on the validity of ‘evasion marriages’ would be dramatic, with States being required to recognise the same-sex marriages of their own citizens and residents conducted abroad even where such marriages remained prohibited at home. Given the requirement for unanimity under Article 81(3), it is not surprising that the Commission had decided not to include such a measure in its proposals.

b) Registered Partnership Property Regulation

The proposal for Registered Partnerships is that '[t]he law applicable to the property consequences of registered partnerships is the law of the State in which the partnership was registered'.¹³⁷ This mirrors the approach in French law under Article 515-7-1 Code Civil,¹³⁸ and was accepted without question when the proposals were considered by European Economic and Social Committee in September 2011.¹³⁹ The Commission seeks to justify this as the sole connecting factor on the basis of the differences between the national laws of those Member States that make provision for registered partnerships, and claims that 'this principle is in line with the Member States' laws on registered partnerships, which usually provide for application of the law of the State of registration, and do not offer partners the option of choosing any law other than the State of registration'.¹⁴⁰

This has become a significant area of contention in the progress of the proposals. The Fundamental Rights Agency used its powers¹⁴¹ to issue an Opinion, at the request of the European Parliament, in May 2012.¹⁴² The European Parliament had asked whether the proposals, and their divergence from the solutions provided for matrimonial property, breached EU principles of equality set out in Article 20 of the Charter of Fundamental Rights¹⁴³ ('the Charter') or the principle of non-discrimination under Article 21. The FRA thought there was indeed a breach, by virtue of the different treatment accorded by the proposals to registered partnerships as opposed to marriages. The European Parliament subsequently issued amendments to the proposals attempting to enshrine the same rights for registered partners to

¹³⁷ Registered Partnership Property Regulation (n 118), Article 15.

¹³⁸ See also 'Harmonisation en Europe des droits des personnes liées par un pacte civil de solidarité' question écrite 13480, JO Sénat du 13/05/2010, 1197.

¹³⁹ Opinion of the European Economic and Social Committee of 21 Sept 2011, SOC/416 Matrimonial Property Regimes and SOC/417 Property Consequences of Registered Partnerships.

¹⁴⁰ *ibid*, comments, [5.3]. The FRA disputes whether this lack of choice under existing national law is in fact true, citing provisions under Dutch, Swedish and Austrian law which suggest that registered partners may be allowed to choose the applicable law in certain Member States – Opinion, 10.

¹⁴¹ Council Regulation 168/2007, [2007] OJ L53/1, recital 13 and Article 4(1)(d).

¹⁴² 'Opinion of the European Union Agency for Fundamental Rights on the Proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships', Vienna 31 May 2012, FRA Opinion 1/2012, accessible from <http://fra.europa.eu/fraWebsite/research/opinions/op-property-regimes_en.htm> accessed 30 June 2012 ('Opinion')

¹⁴³ Charter of Fundamental Rights (n 23).

choose the law governing their property.¹⁴⁴ As I have written elsewhere, it is difficult to see how this could work in practice, as a couple subject to a PACS could then effectively chose to have English law govern their relations in respect of French property as soon as one of the couple was British, even though a PACS would ordinarily confer a very different set of rights.

¹⁴⁵ The Commission, in its response to the European Parliament's suggested amendments, rejected these suggestions and reiterated the connection with the place of registration as being required for the sake of legal certainty.¹⁴⁶

Despite the disagreement with the European Parliament, the Registered Partnership Property Regulation, even if adopted in its original form, would offer considerable scope to same-sex couples to take advantage of the law of another Member State both to allow them to register a partnership and to have that law govern the property aspects of that relationship. For example, a couple resident in a state with no same-sex marriage or partnership recognition, such as Italy, would be able to enter a Registered Partnership in the UK and then, *despite remaining habitually resident in Italy*, have English law govern the property consequences of their partnership. Clearly the public policy exception then becomes of keen interest to Italy, and the attempts to control its use in the legislation, discussed in the next section, may be one reason why Italy remains so opposed to the proposals.

Despite the differences with the Matrimonial Property Regulation, this proposal is to be welcomed, not least because, as highlighted in the press release issued by the Commission at the time of the proposals, this was the 'first ever proposal for an EU regulation on registered partnerships'.¹⁴⁷ Aside the public policy considerations discussed below, there are three other important consequences - Firstly, it enshrined on a pan-EU basis the *notion* of same-sex registered partnerships as a legal institution, albeit an institution which only 'exists' (in the sense of granting a right for partnerships to be registered) in certain Member States. Even though the

¹⁴⁴ European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011)0127– C7-0094/2011 –2011/0060(CNS)) available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-337> accessed 15 March 2015, Amendments 63-70.

¹⁴⁵ Davis (n 93).

¹⁴⁶ Commission Response 6 December 2013, SP(2013) 774, available at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2011/0060\(CNS\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2011/0060(CNS)), accessed 15 March 2015.

¹⁴⁷ IP/11/320 of 16/03/2011 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/320&format=HTML&aged=0&language=EN&guiLanguage=en>

right to register a partnership might not be extended to every Member State, the fact that it is named in legal proposals as a right which exists in *some* Member States leads to a de-stigmatisation of registered partnerships as a concept. Whilst it has not made them any more acceptable in some Member States, it means that topic is no longer taboo and it has facilitated discussions. The definition of registered partnership, and its status as an institution with similarities to marriage, now becomes a common term of reference throughout the EU. If implemented it would also make it impossible for the host state to deny that the couple in question are actually registered partners, and instead correctly shifts the focus to the recognition or otherwise of the effects of that partnership in the host state.

Secondly, the Regulation would in itself require recognition of other Member State's registered partnerships and the property consequences which derive from them, as a judicial decision concerning the property consequences of a registered partnership must be recognised and enforced in another Member State even if the law of that second State does not recognise registered partnerships or accord them the same property consequences.¹⁴⁸ Again this means that the *moniker* of the couple as registered partners becomes transferable to any state in which one or both of the couple hold property. The host state must recognise the effects of the partnership to the extent required, even if it would not normally acknowledge the partnership itself.

Finally, the proposed Regulation is significant in that it expressly recognises that these measures are necessary and proportionate to achieve free movement of persons, providing the opportunity for partners to arrange their property relations in respect of themselves and others during their life as a couple and when liquidating their property.¹⁴⁹ This constitutes express acknowledgment that lack of mutual recognition of same-sex couples hinders the free movement rights of homosexuals, and provides additional support for future jurisprudence of the CJEU to be directed towards greater recognition using its obstacles caselaw as discussed in Chapter 6.

¹⁴⁸ Registered Partnership Property Regulation, Art 24

¹⁴⁹ *ibid*, recital (27).

The minutes of the Council meeting of 4 and 5 December 2014¹⁵⁰ show that progress on the proposals continues to be slow, with further discussions not scheduled until possibly the end of 2015. Italy has apparently prepared a counter proposal and demanded a period of further 'internal reflection'. This does not bode well for the future progress of the proposals.

As an alternative to the protracted negotiations on the matrimonial property regimes, Curry-Sumner has suggested the possibility for those interested Member States to make use of the enhanced cooperation possibilities instituted by the Treaty of Amsterdam, pointing out the advantage that this can lead to the creation of a measure applicable to a certain number of Member States but to which additional States can accede when they wish.¹⁵¹ He rightly points out that this would avoid 'the adverse consequences of having to ensure that any proposal is also acceptable to those countries without national forms of non-marital registered relationship'.¹⁵² This procedure has already been used in the creation of 'Rome III', enabling couples to choose the law applicable in the event of divorce.¹⁵³ EU governments adopted the Council Decision authorising enhanced cooperation on the law applicable to divorce and legal separation in July 2010.¹⁵⁴ Consequently, the 14 participating countries adopted a Council Regulation containing detailed rules on the choice of the law applicable to international divorces and since coming into force Lithuania has also announced its decision to join.¹⁵⁵ This procedure may indeed be suitable, but is likely to represent a significant body of work. National authorities may not consider this work worthwhile and may seek instead to persuade the increasingly diminishing number of opposed states to accept the proposals. With the growing number of states creating registered relationships it may be just as easy to wait a year or two and progress the existing proposals. I suspect by then the Proposals on Matrimonial Property will have taken on a new importance, and the debate will centre on the treatment of same-sex marriages rather than registered partnerships.

¹⁵⁰ Council Press Release 3354th Council meeting, Justice and Home Affairs, Brussels, available from <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/146049.pdf> accessed 4 January 2015.

¹⁵¹ Ian Curry-Sumner, *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe* (Intersentia 2005), 531.

¹⁵² *ibid.*

¹⁵³ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation OJ [2010] L343/10.

¹⁵⁴ IP/10/917

¹⁵⁵ IP/12/1231, Brussels 20 November 2012.

III. EU Treaty Powers and the Public Policy Exception

1. Public Policy under the PIL Regulations

The extent to which EU law is able to exert a restraining effect on the use of the public policy exception depends on how the exception is categorised. The CJEU's competence to intervene is less obvious if the public policy exception is seen as a PIL mechanism not falling within the scope of the Treaties. If so-called 'neutral' conflicts rules do not fall within the scope of the Treaties, as others have suggested,¹⁵⁶ then the CJEU should perhaps see the public policy exception simply part of that mechanism, and not claim jurisdiction to control it. This is discussed further below.

The public policy exception, when applied to family law matters, could be seen instead as part of family law, but there is still relatively little that EU law can do to constrain the discretion of the forum court. Even if the 'Europeanisation of family law'¹⁵⁷ means matters previously outside the scope of the Treaties now fall within its ambit, not every aspect of family law is subject to the jurisdiction of the Court, and this is the case for matters falling outside one of the PIL harmonisation Regulations.

Where the CJEU can certainly intervene, however, is where the matter falls under the scope of one of the PIL harmonisation Regulations,¹⁵⁸ such as the Brussels II Regulation.¹⁵⁹ The Regulations generally contains provisions similar to those in Brussels II which allow foreign judgments or acts not to be recognised where 'manifestly contrary to the public policy of the Member State in which recognition is sought.'¹⁶⁰ At first sight this provides an opportunity for Member States to continue to invoke the public policy exception. Importantly, however, it means the exercise of that public policy is now subject to review, as any Member State's abuse or lack of adherence to the Regulation is itself a breach of EU Law.¹⁶¹ It also means the general principles of EU Law become applicable to the manner in which the Regulation is applied by

¹⁵⁶ Tito Ballarino and Benedetta Ubertazzi, Chapter 5, n 9.

¹⁵⁷ Clare McGlynn, 'The Europeanisation of Family Law' (2001) CFLQ 35.

¹⁵⁸ Peter McEleavy, 'The Brussels II Regulation: How the European Community has moved into Family Law' (2002) ICLQ 883.

¹⁵⁹ Council Regulation (EC) 2201/2003 of 27 Nov 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility [2003] OJ L 338/1.

¹⁶⁰ *ibid*, Articles 22-23.

¹⁶¹ Article 288 TFEU.

the forum state, as is the Charter of Fundamental Rights.¹⁶² The CJEU can then ensure, for example, that such exercise complies with principles of non-discrimination and proportionality.¹⁶³

As previously mentioned, it has been suggested that the PIL harmonisation rules do not apply to same-sex marriages.¹⁶⁴ But the wording does not explicitly exclude them. It is evidently capable of applying to them, even if such relationships were not envisaged by its drafters. Same-sex marriage is recognised in an increasing number of Member States and I agree with those who argue there is no reason why the Regulation should not also apply to those marriages.¹⁶⁵ If so, Article 25 provides that ‘the recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts’. That could mean that a same-sex divorce granted in Belgium would need to be recognised in Poland. This might not make much difference, as in practice Poland currently would simply not recognise the (former) marriage in any event. Further, as the Regulation does not apply to maintenance obligations, a Polish divorcee of a Belgian same-sex marriage would still have difficulties enforcing payment obligations in Poland. The Regulation applies to the recognition of foreign judgments only, rather than the underlying status itself. Nevertheless, the Regulation might still be applicable if the Belgian court had ordered, for example, property jointly held in Poland to be sold and the proceeds divided. I suggest that there is no public policy reason why Poland should not give effect to that. A dispute over this would now, unlike in the past, be justiciable before the CJEU, either in infringement proceedings brought by the Commission or another Member State, or in a preliminary reference.¹⁶⁶

This brings us back to the ongoing negotiations concerning the Matrimonial and Registered Partnership Property proposals.¹⁶⁷ As discussed above, the Registered Partnership Property Proposals propose using the law of the place of registration. This could have far reaching consequences for registered couples who own properties in Member States which have not to

¹⁶² Charter (n 23).

¹⁶³ C-7/98. *Krombach v Barberski* [2000] ECR I-01935

¹⁶⁴ Ian Curry-Sumner, *All's well that ends registered?* (n 151), 258; also Bea Verschraegen, ‘The Right to Private and Family Life, the Right to Marry and to Found a Family, and the Prohibition of Discrimination’ in K Boele-Woelki and A Fuchs(eds), *Legal Recognition of Same-Sex Relationships in Europe*, (2nd edition, Intersentia, 2012), 255, 267.

¹⁶⁵ Peter McEleavy, ‘The Communitarization of Divorce Rules: What Impact for English and Scottish law?’ (2004) ICLQ 605, 607.

¹⁶⁶ Articles 258, 259 and 267 TFEU.

¹⁶⁷ See above (n 115 and 116).

date recognised their relationship. Even if the measures are adopted the necessary unanimity to do this would suggest a lack of objection to this development. However, recalcitrant states might still later be tempted to revert to the public policy exception in order to avoid these consequences. The proposal also contains a provision (as amended by the European Parliament to mirror the Succession Regulation) to limit the ability of the state of jurisdiction to invoke public policy. This provides that ‘the application of a rule of the law of any State determined by this Regulation may be refused only if its application is manifestly incompatible with the public policy of the forum.’¹⁶⁸

Article 18(2) then provides that ‘the application of a rule of law determined by this Regulation may not be regarded as contrary to the public policy of the forum merely on the grounds that the law of the forum does not recognise registered partnerships’. This is an important proviso. Whilst it enables a recalcitrant forum state to continue to purport to deny recognition of the partnership itself, it would oblige it at least to recognise the property effects of the partnership under the foreign applicable law. As also mentioned above, however, this may be one reason the Regulation is still not making any particular progress.¹⁶⁹

2. Public Policy outside the PIL Regulations

Outside the scope of the Regulations, the situation is less clear. As mentioned above, the competence of the Court to review the application of public policy decisions by forum courts only arises in circumstances covered by those Regulations, or by other measures already falling within the scope of the Treaties, rather than there being an overarching oversight into all areas of family law. However, the CJEU has not been reticent in controlling the exercise of public policy exceptions. This might suggest that even ‘neutral’ conflicts rules are still subject to review under the Treaties whenever the public policy exception is invoked. In practice, as will be shown in Chapter 6, there is some convergence occurring under which a public policy exception, whether seen as an exception to a conflicts analysis, or as an impediment to free movement, will in either case be subject to review. In other words, one argument is that the CJEU’s caselaw on citizenship rights suggests that public policy is subject to review on the basis

¹⁶⁸ European Parliament Procedure File 2011/0060(CNS), available at [http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?lang=en&reference=COM\(2011\)0127](http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?lang=en&reference=COM(2011)0127), accessed 28 March 2015, Article 18(1).

¹⁶⁹ See above (n 150).

that its application by the forum court is ‘a national measure liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty.’¹⁷⁰

I agree that this is a valid interpretation, but need to be cautious as to the extent of its use. AG Sharpston’s warning that caselaw on names might not be extrapolated to other instances of civil status¹⁷¹ suggests that treating the public policy exception as an obstacle to free movement would require an updated understanding of Art 21 TFEU and its relationship to other parts of EU Law. The following factors militate against being too optimistic.

Firstly, even if seen as a question of free movement, derogations to the usual principle of mutual recognition then exist by virtue of the *other* concept of public policy. In the area of free movement of goods and services where the “country-of-origin” principle usually applies, Article 36 TFEU still allows derogations from the prohibition on measures equivalent to quantitative restrictions where these are, among other reasons, ‘justified on grounds of public morality, public policy or public security’. Similar limitations are permitted under Article 45(3) TFEU in the case of free movement of workers, and under Article 52(1) for different treatment of foreign nationals in the context of freedom of establishment. *Henn and Darby* established that public morality on a Member State’s own territory remains a matter for that State alone to determine.¹⁷² Furthermore, the EU has long steered away from any attempt to harmonise morality, with Member States usually being granted a wide discretion to determine such matters. This was demonstrated by early disputes concerning the ability of Member States to restrict the reception of adult programmes broadcast legally in other Member States.¹⁷³

Secondly, the CJEU has shown itself unwilling to interfere in Member States’ concepts of public policy more generally. In *Krombach v Bamberski*¹⁷⁴ the CJEU had an opportunity to develop a pan-European public policy notion, but chose instead to affirm the national nature of the public policy exception.¹⁷⁵ In the Brussels Convention of 1968 for the jurisdiction,

¹⁷⁰ C-55/94 *Gebhard* [1995] ECR I-4165, 4201. See Chapter 6 (n 174).

¹⁷¹ *Grunkin Paul* Opinion, [93].

¹⁷² 34/79 R v *Henn and Darby* [1972] ECR 3795, [16].

¹⁷³ Stuart Davis, ‘Still Red Hot: Pornography, Freedoms and Morality’ (1995) Ent LR 201. As an exception to the country of origin principle, the rule that it is for the receiving State, rather than the broadcasting state, to define the standards for permissible and non-permissible pornography was not clarified until the CJEU’s Advisory Opinion in Case E-8/97 TV 1000 *Sverige AB v Norway*, [1998] OJ C -268/12.

¹⁷⁴ Case 7/98 *Krombach v Bamberski* [2000] ECR I-1935.

¹⁷⁵ Haris Meidanis, ‘Public policy and ordre public in the private international law of the EU: traditional positions and modern trends’ (2005) ELRev 95, 109.

recognition and enforcement of foreign judgments,¹⁷⁶ Article 27(1) provides a judgment of another contracting state shall not be recognised ‘if such recognition is contrary to the public policy in the State in which recognition is sought.’ Krombach had been investigated in Germany for the death of Bamberski’s 14-year old daughter, but no charges had been brought in Germany. He was subsequently found guilty and sentenced to 15 years imprisonment by a French court (jurisdiction being established as the victim was a French citizen). Compensation was awarded in favour of Bamberski in the corresponding civil proceedings. The CJEU decision relates to the enforcement of the civil proceedings judgment. Bamberski had failed to respond to his French summons or to appear in person at the hearing. Under the French civil procedure rules of the time, he therefore was not entitled to be legally represented. The question arose as to whether this was a breach of Article 6 of the Convention on Human Rights (right to a defence) justifying a public policy breach sufficient to enable Germany to refuse to enforce the judgment. The CJEU found that Germany was indeed entitled to take this view even though it was allowed to invoke Article 27(1):

only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle.¹⁷⁷

The case does then set out significant constraints on Member States’ ability to invoke public policy (at least as against foreign judgments falling under Brussels II *bis*). However, it still allows public policy to be invoked to protect a ‘fundamental principle’. This returns to the argument of Poland, Italy and other Member States that they have a ‘fundamental principle’ of limiting marriage to opposite-sex couples. It will be interesting to see whether the CJEU, even if it confirmed that Brussels II *bis* applies to same-sex marriages, would still allow a forum state on this basis to invoke public policy in order to avoid its provisions.

In light of the above it does not appear that EU law places many constraints on the exercise of the public policy exception as applied to the recognition of same-sex relationships. It may do so where those relationships are subject to a PIL Regulation and the Regulation itself limits the application of the public policy exception, and where its use is then subject to an overriding

¹⁷⁶ OJ [1978] L 304/1 and (amended version) 77 (now consolidated into Council Regulation 44/2001).

¹⁷⁷ *Krombach* (n 170), [37].

requirement of proportionality in accordance with general principles of EU law. However, where a PIL Regulation does not apply, then it is currently difficult to see how the choice of law rules of a Member State can be challenged. This view, however, will be revisited in Chapter 6 by looking at the topic from another angle. Using a broad interpretation of the free movement obstacles jurisprudence makes it possible to argue that the public policy exception can be limited by requirements of equal treatment and proportionality. Whilst an indirect, implicit argument, the prospects for a doctrinal requirement for cross-border recognition appear much greater under this heading.

Chapter 6: EU Treaty Freedoms, Rights and Citizenship

Commissioner Reding's 2010 assertion that any EU resident living in a legally recognised same-sex partnership or marriage in a particular Member State has a 'fundamental right' to take that status to any other Member State clearly merits close examination. As does her view that any failure to acknowledge that status and its portability between EU Member States would be a breach of EU law.¹ Whilst this is a welcome finding, her forthright and unambiguous statement fails to show how this so-called 'fundamental right' arises, or its scope.

This Chapter assesses the strength of Reding's contention against various sources of EU law. It looks at the express Treaty rights which might be invoked to mandate the portability of civil status, and the attempts of the EU legislature to try to enshrine such a principle into secondary law. In doing so particular account needs to be taken of the interpretation of relevant Treaty provisions provided by the CJEU, usually viewed as a source of judicial activism in furthering and expanding the scope of Treaty rights and freedoms through its teleological approach.²

Many scholars have argued the case for mutual recognition of same-sex relationships based on new interpretations of existing EU law. These entail asserting the primacy of free movement rights above private international law, but also need to take into account the difficulties over the interpretation of Directives and the constraints of Treaty powers to introduce new legislation. I consider the advantages and difficulties associated with this and show that there is indeed merit in these arguments, but it depends on the circumstances of the couple concerned.

This Chapter therefore comprises three sections. The first looks at express treaty rights, the second at rights granted under secondary EU legislation, and the third at whether a general principle of mutual recognition can be inferred.

¹ Statement by Commissioner Vivianne Reding to European Parliament PV 07/09/2010
<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20100907+ITEM-017+DOC+XML+V0//EN&language=EN>> accessed 15 June 2011.

² Takis Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 Eur LR 199. For an explanation of why this perceived judicial activism continues to be justified see also Tim Moorhead, *The Legal Order of the European Union: The Institutional Role of the Court of Justice* (Routledge 2014), 60.

I. Express Treaty Rights

The four freedoms laid down in the EC Treaty are the starting point for assessing the ‘fundamental right’ to take civil status across EU borders. These freedoms, also considered ‘fundamental’ by the CJEU, ensure that citizens of EU Member States and certain third-country nationals are able to enjoy the ability to move around the EU and conduct property, business and investment transactions in a single market.³ In addition to the free movement of goods and capital, the EC Treaty originally established a right of free movement for Community nationals who were exercising economic rights, whether workers (Article 39 EC), self-employed persons (Article 43 EC) or providers or receivers of services (Article 49 EC). These were extended by the Treaties of Maastricht and Amsterdam to provide a general right for citizens of the Union to ‘move and reside freely within the territory of the Member States’.⁴ In 2002 the CJEU confirmed that this right was directly applicable and enforceable in national courts by every EU citizen, albeit ‘subject to the conditions and limitations laid down by the [] Treaty and by the measures adopted to give it effect’.⁵ Finally, the Charter of Fundamental Rights further elevates the right to move and reside ‘freely’ into a fundamental freedom.⁶

1. Freedom from discrimination on grounds of nationality and Equal Treatment

Article 45(1) TFEU enshrines the free movement of workers within the Union, adding in subparagraph 2 that ‘such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment’. Article 49 TFEU provides similarly for ‘freedom of establishment’, which:

³ See Chris Hilson, ‘What’s in a Right? The Relationship between Community, Fundamental and Citizenship Rights in EU Law’ (2004) EL Rev 636, 638 and 641, in which he sees free movement rights as separate from fundamental human rights or citizenship rights and claims that, although that the distinction is likely to be immaterial in relation to the free movement of persons, other freedoms and rights could, by virtue of being ‘fundamental’, be extended from EU citizens to other non-citizen residents. See also Alina Tryfonidou, ‘The Notions of ‘Restriction’ and ‘Discrimination’ in the Context of the Free Movement of Persons Provisions’ Yearbook of European Law, (2014, OUP) (forthcoming), 27, on why free movement rights have been transformed into fundamental (citizenship) rights.

⁴ Now Article 20(2)(a) TFEU.

⁵ C-413/99 *Baumbast v Sec State Home Dept* [2002] ECR I-7091, 7136, paras 81-86, now reflected in Article 21 TFEU.

⁶ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02, Article 45.

shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings... under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

This freedom from discrimination on grounds of nationality has developed into a common principle no longer limited to workers or entrepreneurs.⁷ It is also enshrined in Article 18 TFEU: ‘within the scope of application of the Treaties... any discrimination on grounds of nationality shall be prohibited.’⁸

The extent of this prohibition is important, but is still a developing concept. Based around the cognate principle of ‘national treatment’, it mandates at its simplest level a requirement to be treated no less favourably than nationals of the host state.⁹ It should ensure that the increasing number of Member States which already recognise same-sex marriages or partnerships in some way do not discriminate against couples from elsewhere in the EU. This could be the case, for example, where the host Member State in question grants certain tax advantages to married or registered couples. France, in common with many other Member States, has a great number of progressive income tax bands, but allows married couples with unequal incomes to pool their personal allowances. This means averaging the higher and lower incomes between the two so as to maximise the use of lower tax bands. Just as this concession has been extended to couples in a PACS, it is also available to all foreign registered and married same-sex couples. The French law on recognition of foreign partnerships¹⁰ has been interpreted as meaning that overseas registrations will be assimilated to a PACS which will then also provide for the joint assessment of income tax.¹¹ UK civil partners, like married couples, would not be eligible to share their tax bands in the UK, so this ruling gives them more rights in France than they would have had at home (albeit that the tax burden might overall be much greater in France). As such it is an interesting interpretation implementing national treatment, even though the intention of the

⁷ C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089, [29].

⁸ See generally Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006), 118.

⁹ ‘By prohibiting “any discrimination on grounds of nationality” [...] the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State’ - Case 186/87 *Cowan v Trésor Public* [1989] ECR 195, [10].

¹⁰ Loi 2009-526 of 12 May 2009, now Article 515-7-1 Code Civil.

¹¹ ‘Instruction of 29.12.2009 ‘Impôt sur le revenu. Modalités d’imposition des personnes liées par un partenariat enregistré par une autorité étrangère. Commentaires des dispositions de l’article 1er de la loi du 12 mai 2009.’ *Bulletin Officiel des Impôts no. 6*, 13.01.2010, Direction Générale des Finances Publiques 5 b-4-10. See also ‘Reconnaissance des unions civiles étrangères’, *La Revue Fiscale Notariale* No. 1, Janvier 2010, alerte 2 and Maryline Bruggeman, ‘Reconnaissance des partenariats enregistrés à l’étranger: des précisions fiscales nécessaires’ *Revue Droit de Famille*, juillet 2010, n 7-8.

law was to import the effects of foreign partnerships into French law, rather than assimilate them into a locally recognisable format.¹²

However, a right to be treated the same way as nationals does not suffice if the host state in question does not allow or recognise same-sex unions. A Member State with no laws recognising same-sex marriage or registered partnerships is not discriminating on grounds of nationality if it refuses to accord such a status to migrants. In such a case a same-sex couple would *not* want equal treatment with nationals. A Belgian married same-sex couple demanding ‘equal’ recognition of their status in Poland can only do so by insisting on being treated the same way as a Polish different-sex married couple, but differently from a Polish same-sex couple. The difference in treatment they experience is not based on nationality but on sex or sexual orientation.

Article 18 is therefore of limited value as a means of trying to obtain recognition of civil status in other states. It may be of most use where a state has a form of same-sex relationship recognition but refuses to allow the same effects to be given to same-sex partners or spouses from other Member States. Clearly a couple in a UK civil partnership, analogous to a marriage in the UK, and unable to form a French PACS as they are no longer single, should have the right under Article 18 to be treated no less favourably than a PACSed couple. The couple may even argue they should be treated the same way as a French married couple, although the question then arises as to why the couple have not exercised their right to convert their civil partnership into a UK marriage.¹³

The distinctions between different forms of relationship in different Member States then become critical. The points of comparison and analogies which can be made between them become determinative in whether to apply national treatment. This is particularly the case in the treatment of ‘marriage-lite’ partnerships. Some Member States will not recognise these as being equivalent to marriage, either because of the lack of judicial involvement in their dissolution or because their inherent flexibility is perceived as requiring a lower standard of

¹² For a discussion on the tax treatment of foreign relationships prior to the decision to assimilate them to a French PACS see Nathalie Joubert and Benoit Morel, ‘Les partenariats enregistrés en droit international privé depuis la loi du 12 mai 2009’, JCP éd N 2009, 1285, available at http://www.benoitmorel.fr/les_partenariats_enregistre_en_droit_international_privé accessed 20 December 2014’.

¹³ Marriage (Same Sex Couples) Act 2013, s9 and The Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 (SI 2014/3181).

commitment. A French same-sex PACSed couple may not therefore be able to take advantage of privileges accorded to registered partners in Finland or the Republic of Ireland. The situation is not as marked as in the past, because in many cases the couple in question may now have the opportunity to get married instead. This is the case for most French, Belgian and Dutch ‘marriage-lite’ partnerships. If the couple had a choice to marry, but chose not to do so, then Ireland and Finland might be justified in continuing to refuse to accord their own ‘marriage-like’ status to those couples. Although the couple in question are losing a status they had previously legitimately acquired, that status cannot readily be assimilated to a marriage. Indeed perhaps such assimilation should be avoided, given that the couple themselves did not want the status of marriage. In many respects a ‘marriage-lite’ partnership resembles a *de facto* unregistered partnership and there may then be reasons to continue to treat it as such. However, not every jurisdiction with partnerships also offers marriage, and for those which do restrictions under national law affecting personal capacity may mean marriage was not an option for every couple. This means there will be couples who would have married had they been offered the opportunity, but could not. A Polish-French couple could not marry in France until after January 2015, for example.¹⁴ Where this occurs, one might consider whether a failure by Ireland to recognise the ‘consolation’ PACS previously registered by that Polish-French couple might still be discrimination on grounds of nationality. If so, Article 18 may then indeed provide a fundamental right for that PACSed couple to take their civil status to Ireland (and have it ‘upgraded’ to an Irish civil partnership). This is effectively the situation which occurs if that same couple moves to the UK instead of Ireland. The problem, however, is that it is frequently impossible to distinguish between those couples who have rejected marriage in favour of a ‘marriage-lite’ alternative, as opposed to those who might have married at the earliest opportunity. The question may well not arise until the relationship breaks down. At that point, a decision between treating the couple as unmarried, or imposing a marriage-like status with corresponding implications for divorce, needs then to be based on the perceived original intentions of the couple in their original State. This would be an impossible task.

The other possible use for Article 18 TFEU is likely to be in relation to a situation where a Member State has same-sex unions, but denies effect to one of its own unions or a foreign union on the basis of the lack of capacity of one of the couple. This has already been explored

¹⁴ Cour de Cassation, ‘Communiqué relatif à l’arrêt dit du « mariage franco-marocain entre personnes de même sexe du 28 janvier 2015’ available from https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_dit_30975.html accessed 20 February 2015.

in some depth in previous Chapters, and a finding that this is nationality discrimination would be a new interpretation of matters already decided in a contrary sense in the cases mentioned in Chapter 5. Nevertheless, a reversal of the doctrine behind *Johannes* or *Hoorn* is not unlikely, for reasons outlined.

France's former refusal to categorise foreign same-sex marriages as partnerships, whilst at the same time refusing to give effect to a same-sex marriage unless both spouses had capacity, could have given rise to an interesting test case. Whilst the new French law allowing same-sex marriage¹⁵ now makes such a case unlikely, I think the CJEU might well have decided not to follow *Johannes* had it been faced with a scenario where the only factor preventing recognition of a foreign same-sex marriage or partnership in an otherwise 'friendly' Member State was the nationality of one of the spouses or partners. I leave aside for now the complex question whether a refusal to recognise a marriage involving a French citizen might have been seen as permitted 'reverse discrimination', particularly as the citizen in question must have gone elsewhere for the marriage in question to have taken place, and may well have been living in another Member State.¹⁶ Instead I speculate purely on whether France would have been justified in refusing to recognise, for example, a Belgian marriage, valid under Belgian law, between a German and a Spaniard both resident in Brussels, on the grounds that the German lacked capacity. The marriage would have been recognised in Belgium (as a marriage) and in Germany (as a *Lebenspartnerschaft*), but would not have been given effect in France even as a PACS until 2009.¹⁷ The German might well claim 'Had I been a Belgian citizen and married a Spaniard, you, France, would recognise my marriage, but because I am German you will not recognise it'. It is tempting to think that a refusal to accord at least a PACS status, if not full recognition as a marriage, would indeed have been condemned as discrimination on grounds of nationality. There would appear to have been no public policy justification to refuse to give effect to the union, other than strict adherence to a set of conflicts rules based exclusively on nationality.

In the remaining cases, however, where the forum state provides for no recognition of same-sex relationships, national treatment is accorded by giving no recognition. Even if family status

¹⁵ Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

¹⁶ For which generally, and on its increasingly limited acceptability even in internal situations see Koen Lenaerts and Piet van Nuffel, *European Union Law* (3rd edition Sweet & Maxwell 2011), 174; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Econ. Integration* 43.

¹⁷ Loi 2009-526 of 12 May 2009, now Article 515-7-1 Code Civil.

now falls within the scope of the Treaties, Article 18 appears not to be breached in such a case, following the CJEU's doctrine in *Walt Wilhelm*¹⁸ and subsequent cases discussed in Chapter 5.

2. Freedom from Discrimination on Grounds of Sex

Another primary Treaty right is the ban on discrimination on grounds of sex, now broadened beyond employment rights to constitute a general principle under Article 23 of the Charter of Fundamental Rights.¹⁹ A refusal to recognise a partnership or marriage could be seen as sex-discrimination on the grounds that the sex of one half of the couple concerned is being singled out for different treatment. A male claimant in a same-sex marriage could say 'you would recognise my marriage to a woman but do not recognise that I am married to a man. This is discrimination against me because of the sex of my spouse.' Another way to say this, highlighting that the sex of the claimant himself is also relevant, is to say 'had I been a woman (married to that same man) you would have recognised my marriage, but as I am a man rather than a woman you reject my marriage as being valid; this is sex discrimination because you are treating me differently for being a man rather than a woman'.

Arguments such as these were raised, although rejected by the CJEU, in *Grant v South West Trains*.²⁰ This was not a case concerning cross-border rights, or even registered relationships or marriages, but related to a claim for equal treatment as between unmarried same-sex couples and unmarried opposite-sex couples. Lisa Grant, a railway worker (who at the time of course had no option of either marriage or registered partnership with her female partner) sought equality with her predecessor and other colleagues who were entitled to travel concessions for a 'common law opposite sex spouse' (i.e. an unmarried cohabitee) as soon as there had been a 'meaningful relationship' for at least two years.

Advocate-General Elmer agreed with Grant's argument that the 'opposite sex' requirement was discrimination on grounds of gender.²¹ The Court, however, agreed with the European Commission and the Governments of France and the UK that there was no discrimination. They saw the requirement as applying regardless of the sex of the worker concerned, as the restriction was as applicable to a male worker living with someone of the same sex as it was to a

¹⁸ C-14/68 *Walt Wilhelm* [1969] ECR 1.

¹⁹ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02.

²⁰ C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621

²¹ *ibid*, Opinion [28].

woman living with a person of the same sex.²² Grant's situation was not to be compared with that of a man living with a woman, but with a man living with another man. On this basis there was formal equality. The Court went on to consider whether there was substantive equality by asking whether a person in a stable same-sex relationship was in the same situation as a person in a stable opposite-sex relationship, but concluded that she was not.

Academic opinion is divided as to whether the Court was right to decide there was no sex discrimination.²³ I think it was not, as it was inappropriate to take a hypothetical gay man as the relevant comparator to a lesbian in a sex discrimination claim. If the couple had been compared with a different-sex couple, or if Grant had been compared to a man in the same situation, i.e. a man also living with a woman, it becomes clear that the discrimination was based on sex as well as sexual orientation.

Nevertheless, the CJEU concluded:

It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.

In those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position.²⁴

A similar finding was reached shortly thereafter in relation to a registered relationship in *D and Sweden v Council*.²⁵ In this case, the CJEU had to decide whether a Swedish same-sex registered

²² *ibid*, Judgment, [27].

²³ Robert Wintemute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes' (1997) 60 MLR 334; Andrew Koppelman, 'Why Discrimination against Lesbians and Gay Men is Sex Discrimination' (1994) 69 NYU L Rev 197 and Nicholas Bamforth, 'Sexual Orientation Discrimination after *Grant v South-West Trains*' (2000) MLR 694; cf Takis Tridimas, *The General Principles of EU Law*, (2nd ed OUP 2006), Chapter 2 'The Principle of Equality', 59, 107 and Jo Shaw, 'The Problem of Membership in European Union Citizenship', Chapter 4 in Zenon Bańkowski and Andrew Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (Blackwell, Oxford 2000), 65, 87.

²⁴ *Grant v SWT* (n 20) Judgment, [35-36].

²⁵ C-122/99 P, C-125/99 P, *D and Sweden v Council* [2001] ECR I-04319.

partnership should be treated as a marriage under the EU Staff Regulations in order to pay a family allowance which was only available at the time to ‘a married official’. D’s claim that it was sex discrimination not to treat his Swedish registered partnership as equivalent to an opposite-sex marriage was also rejected, on the basis that it was not the sex of the official or his partner which determined any entitlement to a household allowance, but the legal nature of the ties between them which were held not to be equivalent to marriage, even if they were also distinguishable from unregistered couples.

The determination in *Grant* that there was no discrimination was based on a number of factors, each of which has been substantially changed since 1998. The CJEU based its findings on the following now outdated factors:

- a) No Community rules providing equivalence despite calls from European Parliament to ban discrimination on grounds of sexual orientation;²⁶
- b) No Member State treats same-sex cohabitation as fully equivalent to marriage; most treat them as equivalent to opposite-sex cohabitation only in certain limited respects, or not at all;²⁷
- c) The European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the [ECHR];²⁸
- d) National provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention, which prohibits inter alia discrimination on the ground of sex.²⁹

²⁶ *Grant v SWT* (n 20), [31].

²⁷ *ibid*, para 32, a justification which could be seen as a disingenuous at the time on the basis that same-sex marriage did not exist.

²⁸ *ibid*, [33].

²⁹ *ibid*.

- e) The European Court of Human Rights has held Article 12 of the Convention as applying only to the traditional marriage between two persons of opposite biological sex.³⁰

The CJEU would not decide *Grant* the same way today. The situation would now be covered by the Employment Equality Directive, which specifically prohibits direct and indirect discrimination on grounds of sexual orientation in relation to employment matters and pay and benefits.³¹ Further, *Hay* established, even prior to the introduction of same-sex marriage in France, that couples entering a PACS were to be treated the same way as opposite-sex couples celebrating a marriage in situations covered by the Employment Equality Directive.³²

Outside the scope of the Employment Equality Directive the situation is not quite as certain. Developments in the ECHR may, surprisingly, assist. As will be shown in Chapter 7, the ECtHR has modified its understanding of the notion of ‘family life’. Equality between unmarried same-sex couples and unmarried opposite-sex couples (as was the issue in *Grant*) has been reinforced by the ECtHR decision in *Schalk & Kopf*,³³ even if this did not go as far as to establish equality with opposite-sex married couples. Another important development, as seen in *Karner v Austria*, is that the formal comparison between individuals may no longer be necessary. As shown in *Grant* the choice of comparator is vital and makes sex discrimination claims difficult. It is only when the couple and their rights together are examined that the issues become clearer and the evident mistreatment of same-sex couples as opposed to opposite-sex couples becomes evident. This was recognised for the first time in *Karner*, where Article 14 ECHR was applied to render suspect the different treatment of same-sex and opposite-sex couples rather than just looking at the protection of the individual.³⁴

³⁰ *ibid*, [34], referring to *Rees* judgment (ECtHR) of 17 October 1986, Series A no. 106, 19, para 49.

³¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³² A couple celebrating a PACS were to be entitled to those bonuses and benefits accorded on the occasion of marriage, despite the assertion in Recital 22 that Directive 2000/78/EC was ‘without prejudice to national laws on marital status and the benefits dependent thereon’: Case C267/12 *Hay v Credit Agricole Mutuel*, judgment 12 December 2013, [2014] ECR 0000 [not yet published]. This contrasts sharply with the ECtHR’s approach in September 2010 in *Manenc v France*, no 66686/09, 21 Sept 2010, where a claim for a survivor’s pension under a PACS was declared inadmissible. The ECtHR found a PACS different from a marriage in terms of conditions for contracting and terminating it, as well as in its scope as regards financial responsibilities.

³³ Case 30141/04 (ECtHR) *Schalk and Kopf v Austria*.

³⁴ Helen Toner, ‘Migrations Rights and Same-Sex Couples in EU Law: A Case Study’ in K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe*, (2nd edition, Intersentia 2012), 285, 292.

In light of this, the CJEU might reconsider its understanding of sex discrimination, such as when dealing with questions of inheritance tax for spouses or state pensions. If another claim based on sex discrimination should find its way to the CJEU, this time one based not on employment rights but on pension rights or inheritance tax, then the argument raised in *Grant* or *D and Sweden v Council* might now succeed. If so, a same-sex couple married in Belgium might be able to show they should be treated in Poland in the same way as an opposite-sex married couple. Much would depend on the precise framing of the claim. A claim that not allowing same-sex couples to marry was sex discrimination might not be successful. It is unlikely to result in Poland having to allow same-sex marriages to take place in Poland. However, if the claim was that Belgium had already conferred the status of spouses but Poland had rejected it because of the sex of one of the spouses, it could be sex discrimination for Poland not to treat those marriages which had taken place in the same way as Polish opposite-sex marriages.

3. Freedom from Discrimination on Grounds of Sexual Orientation? A Rocky Path

A search through the Treaties discloses no other rights directly supporting the free movement of civil status for same-sex couples, despite a plethora of statements in support of general principles of equality and non-discrimination. Article 2 TEU provides:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Similarly Article 10 TFEU provides: ‘In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

These provisions are, however, not directly effective, conferring no rights capable of being enforced by individuals. Additional measures are needed to implement these principles, and there is a mismatch between the broad equality aspirations of Articles 2 and 10 TFEU and the powers granted to achieve them. Such measures may only be brought about in accordance with

the legislative procedures laid down in the Treaties and subject to the limits of Union competence. The key provision is Article 13EC, inserted by the Treaty of Amsterdam, and now found at Article 19(1) TFEU, which provides:

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.

This inclusion in the Treaty of Amsterdam of powers for the EU to take action against discrimination on grounds other than sex or nationality followed a longstanding battle between the European Parliament and the Commission and Council during the 1990s. The European Parliament regularly called on the Commission and Council to take action against, for example, racism and disability discrimination but was rebuffed by a supposed lack of legal competence.³⁵ Bell points out that ‘the requirement of unanimity naturally raised doubts as to whether the Member States would be able to find consensus on issues that tend to provide considerable social and political controversy, such as... the rights of same-sex couples’.³⁶ However, doubts as to its usefulness were dispelled in 2000 when the entry of the extreme-right into the Austrian government inspired the speedy promulgation of the Racial Equality Directive³⁷, quickly followed by the Employment Equality Directive³⁸ which managed to extend the prohibition of discrimination to include grounds of sexual orientation for the first time, albeit only in employment matters.

Nevertheless, whilst the question of legislative competence to counter race, age or disability discrimination may have been controversial, the wider debate as to the limits of community competence to legislate, particularly on matters concerning homosexuality, continues unabated.³⁹ This debate arises on two levels. There are divergent opinions between the Community institutions themselves on the extent of their powers, as well as the ongoing debate

³⁵ Mark Bell, ‘The Principle of Equal Treatment: Widening and Deepening’, Chapter 20 in Paul Craig and Grainne de Burca (eds) *The Evolution of European Union Law*, (2nd edn, OUP 2011).

³⁶ *ibid*, 618.

³⁷ Council Directive 2000/43, [2000] OJ L180/22.

³⁸ Council Directive (EC) 2000/78, [2000] OJ L303/16.

³⁹ Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2010), Chapter 5 ‘Competence, Categories and Control’.

on the relationship and balance of powers between the Union and the Member States. In addition, as Tridimas points out, Article 19 is subject to two provisos.⁴⁰ Firstly, being ‘without prejudice to the other provisions of this Treaty’, it cannot be used to circumvent more specific legal bases for the adoption of anti-discrimination on specific grounds. Secondly, and more importantly, it can only operate ‘within the limits of the powers conferred by the Treaty’, meaning that, as well as respecting the principles of subsidiarity and proportionality, the field of action must fall *rationae materiae* within the competence of the Community.

As early as 1994 the European Parliament called on the Commission to present a ‘Recommendation’ on equal rights for ‘lesbians and homosexuals’ [sic], seeking to remove bans on same-sex marriage and to allow the registration of partnerships throughout the EU.⁴¹ The Commission ignored this request. Whilst the Parliament was right to highlight the injustice and lack of equal treatment, the Commission’s lack of enthusiasm is understandable. It was being asked to produce proposals with no legal effect, which might well go beyond the scope of competence of the Community, or whose chances of being adopted were slight in the face of inadequate support in the Council.

However, there is a qualitative difference between these earlier, widely-cast and almost rhetorical requests, and more recent initiatives which also continue to go unanswered. For example, a resolution from the European Parliament requiring the European Commission to bring forward proposals to address mutual recognition⁴² was still missing from the Commission’s action plan for implementing the Stockholm programme.⁴³ This is a notable failing on the part of the Commission.

One reason for this conflict is differences of opinion as to the Community’s scope of competence, a debate which has become acutely political over the last fifteen years. Declaration 23 to the Treaty of Nice of 26 February 2001⁴⁴ established a process for future discussion on ‘how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity’. The resulting

⁴⁰ Tridimas (n 8), 65.

⁴¹ European Parliament Resolution on equal rights for homosexuals and lesbians [sic] in the EC, A3-0028/94 [1994] OJ C 61/40.

⁴² Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, 2007/2145(INI).

⁴³ COM(2010) 171 final dated 20 April 2010 – Commission Communication ‘Delivering an area of freedom, security and justice for Europe’s citizens- Action Plan Implementing the Stockholm Programme’

⁴⁴ [2001] OJ C80/1, 86.

Laeken Declaration was adopted at the European Council of 14-15 December 2001. It set up the Convention on the Future of Europe with a view to drawing up the new Constitutional Treaty. The Declaration highlights that issues as to the competence of the EU to act needed to be addressed, specifically mentioning ‘the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States’.⁴⁵ Craig claims that in fact the Convention did not conduct any systematic review of the heads of EU competence, focussing instead on ‘clarity, conferral and containment’.⁴⁶ The resulting Lisbon Treaty (whose provisions on competence are based with minor amendments on the proposed but abandoned Constitutional Treaty) reinforces the principle already established in Article 5 EC Treaty of attributed competence and conferral. Competences not conferred on the Union remain with the Member States, and the Union shall only act within the limits of competence conferred by the Member States.⁴⁷

In conclusion to this section, it appears that Treaty interpretations do not readily support the mandatory recognition of same-sex relationships, whether the failure to accord recognition is seen as discrimination on the basis of nationality, sex or sexual orientation. This may change in future as new cases are brought to the CJEU and new understandings emerge as to the intrinsic worth of same-sex relationships and the merit of protecting them against discrimination. Developments in the US Supreme Court, discussed in Chapter 2, may have some influence on future CJEU thinking. An alternative approach is discussed later in this Chapter, based on EU citizenship and free movement rights, which may also prove fruitful. In the meantime, however, the next section shows how the exercise of Treaty powers in implementing secondary legislation has also failed to construct any meaningful basis for cross-border relationship recognition.

⁴⁵ Not published in OJ. Available from < <http://european-convention.eu.int/pdf/1knen.pdf> > accessed 7 July 2012.

⁴⁶ Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2010), 158.

⁴⁷ Article 5 TEU.

II. Secondary Legislation – the Free Movement and Equality Directives and the Definition of Family Members

As seen the CJEU in *Grant*⁴⁸ effectively told the Commission and Council that they needed to take legislative steps if they wanted to prohibit discrimination on grounds of sexual orientation, rather than relying on an expansive interpretation by the Court. The EU Institutions did go on to try to achieve this, but with mixed results. This section discusses the outcome of these developments and the scope for further initiatives.

1. Free Movement Directive

Regulation 1612/68, the original Free Movement Regulation,⁴⁹ was extended in 1990 to economically inactive but self-sufficient persons. Three new Directives set out the free movement rights for persons with sufficient resources, pensioners, and students to move and reside in another Member State.⁵⁰ These have now been consolidated, and replaced, by Directive 2004/38.⁵¹ In 1992 the Treaty of Maastricht established citizenship of the Union and provided the right for all Union citizens to ‘move and reside freely within the territory of the Member States’.⁵² Importantly, Regulation 1612/68 already stressed in its preamble that the exercise of a free movement right must include the right to be accompanied or joined by ‘family members’, defined as being ‘a spouse’, children under the age of 21, and dependent relatives in the ascending and descending lines.

Doctrinally this is another basis to claim that same-sex relationship recognition is already mandated under EU law, at least when dealing with couples who have been able to take advantage of a same-sex marriage in another Member State or another jurisdiction which permits same-sex marriage. Evidently the original 1968 Regulation would not have contemplated a same-sex spouse, but the same terminology appears (in a modified form) in the new Free Movement Directive. The definition is wide enough to encompass same-sex spouses.

⁴⁸ See above (n 20).

⁴⁹ Council Regulation 1612/68/EEC on freedom of movement for workers, [1968] L 257/2 (as amended).

⁵⁰ Council Dir. 90/364/EEC on the right of residence, [1990] OJ L 180/26; Council Dir. 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, [1990] OJ L 180/28; Council Directive 93/96/EEC on the right of residence for students [1993] L 317/59.

⁵¹ Directive 2004/38 EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (‘Free Movement Directive’)[2004] OJ L 158/77.

⁵² Now Article 20 TFEU.

This raises the argument that, where a Member State has accorded a spousal status on an individual, it is not for another Member State to take it away. The US arguments in relation to DOMA s2, as discussed in Chapter 2, and the Supreme Court's expected forthcoming judgement,⁵³ now provide further inspiration for this argument.

a) Free Movement and EU Couples

One initial point to address is that the Directive, and its definitions, remain important even for EU couples who have free movement rights independently of their married or partnership status. I disagree with Guild when she suggests free movement rights and relationship recognition are only relevant where one of the couple is not already an EU citizen.⁵⁴ It is true that for EU couples each partner can simply exercise his own free movement right. For example a German and an Italian can both exercise an individual right to retire to Spain. However, there are still conditions which EU citizens must fulfil in order to exercise their rights, and this may be difficult unless the relationship is taken into account. For instance, the Directive only allows an unfettered free movement rights for economically inactive EU citizens for periods up to three months at a time. After that period the free-mover must show he has health insurance and sufficient personal funds to avoid becoming a social security burden on the host State, or that he is a family member of another EU citizen fulfilling certain criteria.⁵⁵ Take the example of Peter, an economically inactive UK citizen who accompanies his husband, Bill, to Italy. If Peter wants to stay longer than three months, he has to show that he is the family member of an economically active citizen (i.e. if Bill has a job in Italy). If Bill is not economically active, Peter must show he is the family member of a Union citizen who has sufficient resources to support the family.⁵⁶ If Italy refuses (as it does) to take account of the relationship⁵⁷ and the resulting status of 'family member', then Peter is more vulnerable as he will need to show that he has his own health insurance and sufficient resources, independently of his marriage to Bill.⁵⁸ It is of course possible to 'manage' such a situation by taking out

⁵³ US Supreme Court docket 14-571 available at

<<http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-571.htm>> accessed 8 March 2015.

⁵⁴ Elspeth Guild, 'Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC' in Robert Wintemute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships* (Hart 2001), 677, 678.

⁵⁵ Free Movement Directive (n 50), Article 7.

⁵⁶ *ibid.*

⁵⁷ Under Article 8(4) the Member State must take account of the 'personal situation' of the free-mover, but might still refuse to treat him as being married.

⁵⁸ For a discussion on why this might be inconsistent with Peter's citizenship rights under Article 18(1) EC see Condinanzi, M., Lang, A. and Nascimbene, B., *Citizenship of the Union and Free Movement of Persons* (Martinus Nijhoff, Leiden 2008), 24.

appropriate insurance and maintaining a personal bank account, but that requires expense and trouble which the couple might otherwise have avoided. This means the Directive is important even for EU citizens, and appropriate recognition of civil status for same-sex couples is not just an issue for third country nationals.⁵⁹

b) Background Caselaw

In 1986 the CJEU held in *Reed* that the definition of ‘spouse’ could not be interpreted as including a third-country national unmarried (opposite-sex) partner, and was limited to persons who had formally contracted a civil marriage recognised by law.⁶⁰ Registered partners were also originally viewed as a category of unmarried status, as seen in *D. and Sweden v Council*.⁶¹ In *Grant*, Advocate-General Elmer suggested that it would not be contrary to Community law to restrict rights to married couples, even if same-sex couples could not marry, as the criterion would be defined by reference to a family law concept whose content was to be determined by the laws of the Member States.⁶² This approach was maintained in *D. and Sweden v Council* where the Court found that ‘...according to the definition generally accepted by the Member States, the term “marriage” means a union between two persons of the opposite sex.’⁶³

That interpretation might not be true today. *Reed* predates the introduction of same-sex marriages and hence leaves open the question whether the definition includes same-sex spouses or a registered partner. That interpretation is certainly possible, and although it represents a major development, the change is no greater than that taken by those Member States who have already removed the gender definition of ‘spouse’. Further, it is not true that the definition of ‘marriage’ or ‘spouse’, where it appears in a Regulation, is a matter which ought to be reserved to the Member States. The CJEU could lay down a specific pan-European definition given that the interpretation of the entire Regulation is reserved to itself.⁶⁴ In this respect the Court’s views in *D and Sweden v Council* may have caused the Commission later to take the incorrect view that same-sex marriages did not need to be recognised in other Member States. When the

⁵⁹ Further difficulties are set out in the European Parliament Report 24 March 2009 on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2008/2184(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2009-0186+0+DOC+XML+V0//EN> accessed 16 January 2015.

⁶⁰ C-59/95 *Netherlands v Reed*, [1986] ECR 1283

⁶¹ Case C-122/99P and 125/99P *D. and Sweden v Council* [2001] ECR I-4319.

⁶² Opinion (n 21).

⁶³ *D. and Sweden v Council* (n 61), [34].

⁶⁴ Article 19(1) TEU, Article 267 TFEU.

Netherlands introduced same-sex marriage in 2001 the Commission was asked by the European Parliament whether this changed the definition of spouse for various purposes of EU law.⁶⁵ The Commission responded that, whilst it would itself recognise such marriages for the purposes of the Staff Regulations:

the Dutch legislation, while it can have effects on Dutch territory, does not have the consequence of extending the notion of spouse under Article 10 of Regulation 1612/68 or of imposing on other Member States an extended definition of spouse.⁶⁶

The Commission was mistaken if it thought this assertion could be based on the ratio of *D and Sweden v Council*. D was not married (and at the time could not have been) even under Swedish law, but rather was an unmarried but registered partner. Had D been married to his partner and had the CJEU still decided he was not entitled to a family allowance under the Staff Regulations, then the Commission's legal view that spousal status was not portable might have been correct. However, the judgment merely sets out the prevailing thinking at the time that registered partnerships were a form of status deliberately constructed not to be marriages. Therefore they did not need to be recognised as marriages either by the EU or in other Member States. The CJEU did not rule that marriages validly celebrated in a particular Member State do not need, as a matter of EU Law, to be recognised elsewhere.⁶⁷

Furthermore, whilst Dutch legislation clearly cannot change the meaning of a Directive or change the legislation of another Member State, the Commission appears to be granting itself the competence to define the term 'spouse'. In reality this power falls somewhere between the Member States and the Council and Parliament rather than on the Commission alone. Meanwhile the role of interpreting the Directive itself falls within the exclusive competence of the CJEU.⁶⁸

⁶⁵ Question E-3261/01 by Joke Swiebel (13 November 2001)

⁶⁶ 12 March 2002, reply to question E3261/01

⁶⁷ See further Mark Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union' [2004] 5 ERPL 613, 621, and his observation that this was also a point made in the Opinion on the amended Free Movement Directive given to the Commission in 2003 by the EU Network of Independent Experts on Fundamental Rights (ibid, fn 42)

⁶⁸ Article 19(1) TEU.

D and Sweden v Council has now been overturned by subsequent cases.⁶⁹ In *Maruko*, a Member State was required to uphold the pension rights of a civil partnership widower.⁷⁰ The CJEU thereby established the principle of equal treatment as a matter of domestic law as between married heterosexual couples and same-sex registered couples. Although it only applies once that national law recognises civil partnerships, it prevents the partners being treated differently from married couples. Similarly, *Römer v Hamburg*⁷¹ established a breach of the Equal Treatment in Employment Directive.⁷² It was unlawful discrimination on grounds of sexual orientation when a German pension fund calculated a civil partner's pension entitlement at a lower rate than had he been married. The Directive itself is expressly 'without prejudice to national laws on marital status and the benefits dependent thereon'.⁷³ Nevertheless, the judgment accepts that the pensioner and his partner did not have the opportunity to get married, but only to enter into a life partnership under German law. Hence the fact that they were 'partnered' but not 'married' did not justify different treatment. The CJEU again overrules the notion in *D. & Sweden v Council*⁷⁴ that registered same-sex partnerships are not equivalent to marriage. This has been further upheld by *Hay v Credit Agricole Mutuel*.⁷⁵

Römer does not, however, completely overrule *Grant v South West Trains*.⁷⁶ In particular, it does not disturb the view of AG Elmer that rights can be reserved for married couples. This means that, domestically, if a Member State does not provide for registered partnerships, it is still not obliged to treat same-sex couples the same way as heterosexual married couples. The judgment only therefore expressly affects those Member States which do provide for same-sex partnerships instead of or as well as marriage. It does not lay out any general principle of recognition of same-sex relationships.

Even so, it is open to Member States to understand the term 'spouse' so as to encompass not only different-sex married couples, but also same-sex married couples and same-sex registered partners not eligible under national law to be married. Further, it reinforces the notion that the

⁶⁹ Notably Case T-58/08 P *Commission v Roodhuijzen* [2009] ECR II-3797, where the Court of First Instance confirmed that an opposite-sex Dutch cohabitation agreement (*samenlevingsovereenkomst*) was equivalent to a marriage for the purposes of the EU Staff Regulations.

⁷⁰ Case C-267/06 *Maruko* [2008] ECR I-1757.

⁷¹ Case C-147/08, *Römer v Hamburg*, [2011] ECR 3591.

⁷² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

⁷³ *ibid*, Recital 22.

⁷⁴ *D. and Sweden v Council* (n 61).

⁷⁵ Case C267/12 *Hay v Credit Agricole Mutuel*, judgment 12 December 2013, [2013] ECR 0000 [not yet published].

⁷⁶ C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621.

relevant distinction, in terms of relationship recognition, if there is one to be made, is between couples who have adopted a legally-binding framework to govern their union (whether a marriage or partnership) and those who maintain a *de facto* relationship without the need or desire for such a framework.

c) Definition of Spouse

In light of the background set out above, I now turn to consider the definition of ‘spouse’ and the implications of this for cross-border situations. The definition of ‘spouse’ became a key area of debate when the EU institutions were developing the ‘Free Movement Directive’⁷⁷ The original Commission proposal of May 2001⁷⁸ sought to define ‘family member’ as ‘the spouse’ or ‘the unmarried partner, if the legislation of the host Member State treats unmarried couples as equivalent to married couples’. No particular mention was made of ‘same-sex’ spouses, although the Commission could not have believed that a spouse could only mean a different-sex married couple, as this would have disregarded the existence of Dutch same-sex marriages. The omission is perhaps deliberate. Whilst the prohibition in Article 4 of discrimination on grounds of sexual orientation shows an awareness that same-sex spouses should be recognised as such, Bell maintains that the Commission and Council were reluctant to make any specific reference to same-sex spouses, believing *D. and Sweden v Council* to be determinative.⁷⁹ The final version, as resulting from the Common Position of the Council agreed by the Commission and Parliament in December 2003, was to leave the definition of spouse open. This can be seen as a deliberate compromise rather than an oversight. The final result is far from ideal for same-sex couples, as it has not always been interpreted in a manner favourable to them. In Germany, a Dutch marriage between a Dutch national and a Taiwanese man was held insufficient to grant latter a permanent resident permit even though marriage was to be treated as a *Lebenspartnerschaft*.⁸⁰ However, an opposite result was reached in Luxembourg, where a Belgian same-sex marriage between a Belgian national resident in Luxembourg and a Madagascan was recognised as a marriage giving rise to entitlement to a Luxembourg residence permit.⁸¹ The result, in Bell’s words, is that ‘registered partners moving in the Union will find themselves in

⁷⁷ Free Movement Directive (n. 51).

⁷⁸ COM (2001) 257, [2001] OJ C270/E 150.

⁷⁹ Bell (n 67), 620.

⁸⁰ VG Karlsruhe, 9.9.2004, (2006) IPrax 284; Anne Röthel, ‘Anerkennung gleichgeschlechtlicher Ehen nach deutschem und europäischem Recht’ (2006) IPrax 250.

⁸¹ Tribunal Administratif Luxembourg 3.10.2005, BIJ 2006,7; see Patrick Kinsch, ‘Recognition in the Forum of a Status Acquired Abroad: Private international Law Rules and European Human Rights Law’, in K Boele-Woelki et al (eds) *Convergence and Divergence in Private International Law, liber amicorum Kurt Siehr* (Schultheiss 2010), 259.

the strange situation of passing between states of recognition and states where they are rendered unmarried'.⁸²

As the number of Member States allowing same-sex marriage increases, the current definition at least leaves open the possibility for individual Member States to allow for recognition to be granted to same-sex marriages from elsewhere. At wider EU level, a change could of course be brought about by amending the legislation so as to make express provision for same-sex spouses and registered partners, and there are repeated calls for this to occur.⁸³ Whilst this is the ideal solution, it may be difficult to achieve given the difficulties involved in originally securing the passage of the Directive, and the ongoing disagreement in the Council of Ministers over matters seen as relating to public policy. I see it as more likely that change will only result in the event that the CJEU takes any opportunity presented to it to clarify the definition of 'spouse'. The CJEU does not need to accept conflicting and mutually incompatible Member States' definitions of a term set out in an EU instrument. Rather it should set out an inclusive definition of 'spouse' for the purposes of the Directive. This would encompass at least all parties to same-sex marriages, wherever celebrated. Following *Römer v Hamburg*⁸⁴ and *Hay v Credit Agricole Mutuel*,⁸⁵ it should also encompass all those in registered partnerships considered equivalent to marriage in the home state. The Court might be more likely to take this view if it was shared by the Commission. Here, there is some evidence that the Commission is changing its view, as can be seen in the document issued (but not published) in July 2009 as a Commission Communication on the implementation of the Free Movement Directive.⁸⁶ This highlights disappointments overall in the level of transposition. Again it does not mention same-sex marriage, but tellingly it does contain a reminder that 'Marriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the Directive.'⁸⁷

⁸² Bell (n 67) 624.

⁸³ Alina Tryfonidou, 'Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships : The Case for Mutual Recognition' (2015) 21(1) Columbia Journal of European Law (2015) (forthcoming), also available at < <https://www.academia.edu/8098636> > accessed 5 January 2015, para 5.1.

⁸⁴ Case C-147/08, *Römer v Hamburg*, [2011] ECR 3591.

⁸⁵ Case C267/12 *Hay v Credit Agricole Mutuel*, judgment 12 December 2013, [2013] ECR 0000 [not yet published].

⁸⁶ Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, COM(2009) 313 final (not published in Official Journal).

⁸⁷ *ibid*, [2.1.1].

d) Registered Partners as Family Members

Registered partners were also not mentioned as a separate category in the proposals for the Free Movement Directive. They were treated at the time as little more than a form of unmarried cohabitation whose status was broadly equivalent to *de facto* couples and whose recognition would depend on the legislation of the host state. Toner explains how the discussions in the Council throughout 2001 and 2002 were polarised, with some delegations specifically wishing to define ‘spouse’ as being exclusively heterosexual and then granting rights only to these couples.⁸⁸ This would deny equal treatment to all unmarried couples, whether the latter were registered or *de facto* and whether different-sex or same-sex. In response, the European Parliament, typically, sought to extend rather than restrict the Commission’s original definition so as to include both spouses and ‘registered partners’, in each case ‘irrespective of sex, according to relevant national legislation’ *and* to unmarried partners in durable relationships. This was again irrespective of sex, if either the host or home Member State treated such couples in ‘a corresponding manner’ to married couples.⁸⁹

The final version reads that the definition of ‘Family Member’ includes ‘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*’ (emphasis added).⁹⁰ This emphasis on the law of the host Member State restricts the territorial application of the law of the Member State which granted the civil partnership only to those other Member States which also recognise a form of registered partnership.⁹¹ Countries which have no recognition of same-sex relationships, such as Poland or Italy, can therefore continue to refuse to allow EU nationals to be accompanied by their third-country national partners if they are seeking to exercise their rights of free movement. Guild describes this situation as an obstacle to the free movement right of the EU citizen which is disproportionate and not justifiable by imperative requirements in the general interest: ‘Recognition of same-sex partnerships for the limited purpose of allowing the partners to live in the same country would

⁸⁸ Helen Toner, *Partnership Rights, Free Movement and EU Law* (Hart 2004), 62.

⁸⁹ First Reading of 11 February 2003, (COM(2001) 257 - C5-0336/2001 - 2001/0111(COD)), [2004] OJ C 54E/42.

⁹⁰ Free Movement Directive (n 50), Article 2(b).

⁹¹ If a Member State allows its nationals to bring in unmarried partners being third country nationals (eg on the basis of a stable and enduring relationship) then for the purposes of Regulation 1612/68 it could not deny the same right to nationals of other Member States to do the same, as was the case in Case 59/85 *Netherlands v Reed* [1986] ECR 1283.

not undermine the sanctity of marriage and the social mores of the Member State, and would prevent the severe emotional harm the partners would suffer if their relationship could not continue.⁹²

Furthermore, in allowing the two additional provisos - that the host Member State must treat registered partnerships as 'equivalent to marriage', and that it is entitled to lay down conditions in its national legislation, the Directive even allows Member States which have their own registered partnerships to disregard both its own unions and marriages celebrated elsewhere. France concluded that entering into a PACS did not confer the status of 'family member' and hence did not enable the couple to take advantage of the Free Movement Directive.⁹³

Also unsatisfactory is the ambiguous provision that the recognition by the host state needs to be '*in accordance with the conditions laid down in the relevant legislation of the host member State*', This could engender the situation already described where a country with 'marriage-like' partnerships, like Ireland, is entitled to refuse to recognise 'marriage-lite' partnerships such as a French PACS.

2. Equal Treatment Directives (actual and proposed)

The limitations and controversies around Article 13EC (now Article 19(1) TFEU) have already been mentioned above, as has its success as the basis for the Racial Equality Directive⁹⁴, and the Employment Equality Directive,⁹⁵ both passed in 2000. However, the Commission's enthusiasm to use these new powers was short lived. Despite repeated calls from the European Parliament and various civil society organisations for further anti-discrimination legislation, the Commission claimed that it would be inappropriate to propose additional legislation until Member States had time to transpose the 2000 directives.⁹⁶ Article 13 was not put to significant use again for many years. The Gender Goods and Services Directive,⁹⁷ which has Article 13EC as its legal basis, extends the prohibition of sex discrimination beyond the realm of employment

⁹² Guild (n. 52), 686.

⁹³ Question écrite (written question) n° 75749 - 13ème législature from M. Cambadélis Jean-Christophe, Journal Officiel (France) 6 April 2010.

⁹⁴ Council Directive 2000/43, [2000] OJ L180/22.

⁹⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (EC) 2000/78, [2000] OJ L303/16.

⁹⁶ Lisa Waddington, 'Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive', (2011) EL Rev 163.

⁹⁷ Directive 2004/113 implementing the principle of equal treatment between men and women in access to and supply of goods and services [2004] OJ L373/13

and into the area of the supply of goods and services, but it does not explicitly cover sexual orientation discrimination. The so-called ‘Recast Directive’⁹⁸ updates and consolidates earlier gender equality Directives, but also does not expand their scope into other areas of discrimination. This led to debate on whether it was justifiable to propound a ‘hierarchy of equalities’.⁹⁹ Although, such discussion falls outside the scope of this Chapter, the fact remains that the Commission appeared unwilling to take further action to outlaw discrimination on grounds of sexual orientation. Despite sustained pressure from the European Parliament to propose a ‘horizontal’ or multi-ground non-discrimination Directive,¹⁰⁰ it was not until 2008 that the Commission published its proposed instrument outlawing sexual orientation discrimination in areas outside of employment. By this time the eastern enlargement of the EU had made sexual orientation equality an even more sensitive topic.

The instrument in question, the proposed ‘Equal Treatment Directive’¹⁰¹ encountered laboured progress through the legislative process, particularly over questions of competence. The Commission painstakingly tried to respect the views of those Member States opposed to the proposals, obviously aware that unanimous support was necessary in the Council before the measures could be adopted. Moreover, Article 19 can only be used ‘within the limits of the powers’ conferred. The proposals are therefore framed in such a way as to try to minimise the numerous and far-reaching controversies and disagreements between Member States and the EU institutions on various matters including the type and number of Directives needed.¹⁰²

The proposed Directive tried to establish a principle of equal treatment to combat discrimination, both direct and indirect, on grounds of sexual orientation. ‘Indirect discrimination is defined as being:

where an apparently neutral decision, criterion or practice would put persons of... a particular sexual orientation at a particular disadvantage compared with other persons,

⁹⁸ Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L204/23.

⁹⁹ Bell (n 67) 620.

¹⁰⁰ Waddington (n 96), fn 15.

¹⁰¹ Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final.

¹⁰² For a broader discussion on the different approaches see Waddington (n 96).

unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹⁰³

In order to avoid the result that refusing to allow or recognise another State's same-sex marriages or registered partnerships is a form of indirect discrimination on grounds of sexual orientation, the Directive goes on to state that 'this Directive is without prejudice to national laws on marital or family status and reproductive rights.'¹⁰⁴ This appears to suggest that national laws on family status are immune from EU law, or even fall outside of the competence of EU powers to act. This interpretation of EU powers lies at the heart of a dispute between the European Parliament and the Commission.

The Commission, as shown in the preamble to the proposal, clearly takes the view that it would be inappropriate, or even impermissible, to use Article 19 TFEU to try to harmonise laws over recognition of registered partnerships. Referring to the public consultation which took place in 2007, as part of the European Year of Equal Opportunities for All, the Commission states:

The responses to the consultation highlighted concerns about how a new Directive would deal with a number of sensitive areas and also revealed misunderstandings about the limits or extent of Community competence. The proposed Directive addresses these concerns and makes explicit the limits of Community competence. Within these limits the Community has the power to act (Article 13 EC Treaty) and believes that action at EU level is the best way forward.¹⁰⁵

This view is repeated elsewhere in Commission documents. In its 2010 Green Paper on civil status, it stresses:

the EU has no competence to intervene in the substantive family law of Member States. Therefore, the Commission has neither the power nor the intention to propose the drafting of substantive European rules on, for instance, the attribution of surnames in the case of adoption and marriage or to modify the national definition of marriage. The

¹⁰³ Equal Treatment Directive proposal (n 101), Article 2(2)(b)

¹⁰⁴ *ibid*, Article 3(2)

¹⁰⁵ *ibid*, Explanatory Memorandum, 4.

Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution.¹⁰⁶

As well as questions of competence, the Commission, in a ‘belts and braces’ approach, also puts forward a subsidiarity issue when it comes to the mutual recognition of same-sex family status. The recitals of the proposed Equal Treatment Directive state that:

The diversity of European societies is one of Europe’s strengths, and is to be respected in line with the principles of subsidiarity. Issues such as the... recognition of marital or family status.... are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to [this] issue.... So, for example, it will remain for Member States alone to take decisions on questions such as whether to.... recognise same-sex marriages.¹⁰⁷

Applying the subsidiarity principles set out in Article 5(3) TEU, the Commission appears to suggest that the issue is one best decided at national level. This is a further reason why the Commission has not gone further in its proposals. However, the Commission fails to recognise the distinction to be drawn between the recognition of same-sex marriages as a matter of domestic law (i.e. the right for nationals and residents to celebrate a same-sex marriage in a particular Member State) and the recognition of foreign marriages, whether marriages involving one or more partners from the Member State in question, or between two foreign partners now residing in that State. The question of whether to permit same-sex marriage might well be a matter left to determination at national level. However, issues over cross-border relationships by definition cannot be dealt with at a national level and the EU is best placed to take action. This should address any subsidiarity concern. The Commission should recognise that the Council and Parliament are competent under Article 19 to make proposals for mutual recognition of same-sex relationships, and their effects, as this does not necessarily amount to a harmonisation of family law. Certainly the view of the European Parliament on this is clear. On 14 January 2009, in its Resolution on the situation of fundamental rights in the European Union 2004-2008, it:

¹⁰⁶ European Commission Green Paper, ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ Brussels 4.12.2010, COM(2010) 747 final, [4.2].

¹⁰⁷ Equal Treatment Directive proposal (n 101), Explanatory Memorandum, 6.

calls on those Member States who have adopted legislation on same-sex partnerships to recognise provisions with similar effects adopted by other Member States; calls on those Member States to propose guidelines for mutual recognition of existing legislation between Member States in order to guarantee that the right of free movement within the European Union for same-sex couples applies under conditions equal to those applicable to heterosexual couples.¹⁰⁸

The European Parliament also:

urges the Commission to submit proposals ensuring that Member States apply the principle of mutual recognition for homosexual couples, whether they are married or living in a registered civil partnership, in particular when they are exercising their right to free movement under EU law.¹⁰⁹

The European Parliament suggests that Article 21 Charter Fundamental Rights provides a more solid basis than Article 19 TFEU for legislation.¹¹⁰ That is not quite true, as Article 21, whilst prohibiting all discrimination on grounds of sexual orientation, does not itself confer competence to make legislation. However Article 10 TFEU does now give the Commission greater ammunition in terms of asserting its competence using Article 19, where it provides '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on ... sexual orientation.'

In light of the above, it is disappointing that the Equal Treatment Directive has not succeeded. The minutes of the various Council meetings which discuss the matter¹¹¹ show very little has moved on since the position outlined in a Press Release from 1 December 2011

The proposed directive has been examined in the Council for more than three years now. It would extend EU legislation into new areas, based on Article 19 of the EU treaty...

¹⁰⁸ European Parliament, Resolution on the Situation of Fundamental Rights in the European Union 2004-2008, 14 Jan 2009, [75], available at <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0019&language=EN&ring=A6-2008-0479> accessed 2 July 2012.

¹⁰⁹ *ibid*, [76].

¹¹⁰ *ibid*, [36].

¹¹¹ European Parliament Procedure File 2008/0140 (APP) available at [http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?lang=en&reference=2008/0140\(APP\)](http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?lang=en&reference=2008/0140(APP)) accessed 14 January 2015.

Further discussion is needed on a number of outstanding issues, such as:

- the division of competences, the overall scope and subsidiarity; [...]
- the implementation calendar;
- legal certainty in the directive as a whole.¹¹²

The same statement on the need for further discussion is found in the European Parliament's summary¹¹³ of the meeting of the Council on 11 December 2014.¹¹⁴ Thus, the proposal has effectively now been stalled in the Council for over six years.

It is quite possible, therefore, that these proposals will not be successful and may only come to fruition if the issue of civil status recognition is first mandated elsewhere, such as in the CJEU or ECtHR. The effective application of Article 21 of the Charter in removing discrimination against same-sex relationships requires greater clarity from the CJEU. This could be either in terms of the competence and subsidiarity questions already raised, which would enable the Council to make greater progress on legislative initiatives even if Article 19 TFEU was still the legal basis; or by widening the scope of other interpretations of Community Legislation, such as the Free Movement Directive or other Treaty provisions relating to free movement.

In conclusion to this section, I have shown that, even though the EU does have powers to ensure the cross-border recognition of same-sex relationships, these are not easily implemented and have not resulted in any concrete progress. Whilst this can be considered a failing on the part of the EU institutions in light of Article 10 TFEU, doctrinally it appears irrefutable that there is no provision of EU primary or secondary legislation expressly requiring cross-border recognition. However, as shown in the next section, an implied duty to provide recognition does exist.

¹¹² 3131st Council meeting Employment, Social Policy, Health and Consumer Affairs Brussels, 1 and 2 December 2011, PRES/11/471 of 01/12/2011.

¹¹³ <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1327879&tt=e&cl=en> accessed 14 January 2015.

¹¹⁴ CS-PRES/2014/16803, see <http://eur-lex.europa.eu/procedure/EN/197196> accessed 4 January 2015.

III. Mutual Recognition, Home State Control and Obstacles to Free Movement

The mutual recognition argument, as will be seen, has been promoted for some time, although it has taken various forms and has been based on various factors. One approach looks at how private international law rules may be affected by a duty of mutual recognition in the sense formulated by the CJEU's jurisprudence starting with *Cassis de Dijon*.¹¹⁵ This looks at whether obstacles to free movement exist and, if so, whether they can be justified. Importantly, it treats the private international law rules themselves as one of the potential obstacles.

A second approach has been to argue for a broader interpretation of the rights granted under the Treaty and under the Free Movement Directive, particularly in light of Article 21 of the Charter, Article 19 TFEU and the developing caselaw of the CJEU relating to citizenship.¹¹⁶ Recognising that the current definitions in the Free Movement Directive do not necessarily require recognition to be accorded by recalcitrant states, recourse is then needed to various arguments concerning the need to justify obstacles to free movement, the potential existence of 'vested rights', and human rights requirements. The citizenship and obstacles jurisprudence is considered here, whilst the human rights aspects are addressed in Chapter 7.

1. Mutual Recognition instead of Private International Law

The growing role playing by the principle of mutual recognition has given rise to much discussion as to whether it constrains or even replaces private international law.¹¹⁷ Jessurun d'Oliveira suggests that:

The Court has repeatedly held that those national conflicts rules and their effects – like all national measures – have basically to comply with the requirements flowing from the

¹¹⁵ Case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung fuer Branntwein (*Cassis de Dijon*) [1979] ECR 649.

¹¹⁶ Eg Alina Tryfonidou, 'Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition' (2015) 21(1) *Columbia Journal of European Law* (2015) (forthcoming).

¹¹⁷ Marc Fallon and Johan Meeusen, 'Private International Law in the European Union and the Exception of Mutual Recognition' in P Sarcevik and Paul Voken (eds), *Yearbook of Private International Law*, Vol 4 (2002) (Kluwer, Amsterdam 2002), 37; Heinz-Peter Mansel, 'Anerkennung als Grundprinzip des Europäischen Rechtsraums: Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts?' (2006) *RabelsZ* 651; Dieter Henrich, 'Anerkennung statt IPR: Eine Grundsatzfrage', *IPRax* 5 [2005] 422.

four fundamental freedoms. If national conflicts rules or their consequences are incompatible with those freedoms, they may only survive if they are in tune with the criteria as laid down by the European Court of Justice for justifiable inroads upon Community law.¹¹⁸

The criteria in question are set out in *Gebhard*:

National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.¹¹⁹

This is true insofar as the measures in question prevent the exercise of free movement rights. The cases d'Oliveira refers to relate to obstacles against directly effective rights of free movement of establishment.¹²⁰ However, for these principles to take precedence over conflicts rules relating to civil status involves first establishing the free movement right affected.

Mutual recognition only enjoyed two brief mentions in the original EEC Treaty, relating to the recognition of professional qualifications, which was to be achieved through a legislative process,¹²¹ and the mutual recognition of companies and legal persons.¹²² The concept developed following *Cassis de Dijon*.¹²³ It was subsequently reproduced in a Commission Communication which states that:

[t]he principles deduced by the Court imply that a member-State may not in principle prohibit the sales in its territory of a product lawfully produced and marketed in

¹¹⁸ Hans Ulrich Jessurun d'Oliveria, 'The EU and a Metamorphosis of Private International Law', Chapter 5 in Fawcett, J (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (OUP 2002), 111, 133.

¹¹⁹ C-55/94 *Gebhard* [1995] ECR I-4165, 4201.

¹²⁰ C212/97 *Centros* [1999] ECR I 1450 and C208/00 *Überseering* [2002] ECR I-9919.

¹²¹ Article 57 EEC.

¹²² Article 220 EEC.

¹²³ '*Cassis de Dijon*' (n 111).

another member-State even if that product is produced according to technical or quality requirements which differ from those imposed on its domestic products.¹²⁴

This essentially imposes a notion of ‘home state control’ under which each product or service on the market only need comply with one set of regulatory controls (the home state).¹²⁵ But the test is more nuanced than this, as the host state may still decide to impose additional controls, if necessary and proportionate, as long as it does not seek to revisit functionally equivalent controls already met in the home state.¹²⁶ The concept has been equated to one of ‘mutual trust’ under which a Member State, within the sphere of market integration, must trust the sufficiency of another Member State’s regulations and requirements, even if these are more lenient than its own.¹²⁷

Nevertheless, this trust only functions up to a certain threshold, as the doctrine of mandatory requirements has been developed. This test includes an accompanying proportionality analysis, to constitute a ‘dynamic safety valve’ allowing residual host state control.¹²⁸ For this reason I agree with Cramér that the system is effective, avoiding the need for the intervention of harmonising measures, only when the regulatory differences between the participating states are not too great. In matters of regulatory controls and standards, even the most lenient regime must be capable of being seen as broadly equivalent to the regimes of other, more restrictive, Member States. However, the sheer variety of ‘regulatory differences’ (if they can be seen as such) concerning same-sex relationships make it difficult to see how a mutual recognition principle can successfully be applied using this technique. As recorded in the Commission’s conclusions following the Tampere summit¹²⁹ ‘Mutual recognition requires a common basis of shared principles and minimum standards, in particular in order to strengthen mutual confidence’.

¹²⁴ Commission Communication of 3 October 1980, [1980] OJ C256.

¹²⁵ for a more detailed discussion on the scope and limits of this see Christine Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013).

¹²⁶ Kenneth A Armstrong, ‘Mutual Recognition’, Chapter 9 in Catherine Barnard and Joanne Scotts (eds), *The Law of the Single European Market, Unpacking the Premises* (Hart 2002), 225, 230; see further M Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Hart 1998), Chapter 4.

¹²⁷ Per Cramér, ‘Reflections on the Roles of Mutual Trust in EU Law’, Chapter 3 in Dougan, M. and Currie, S. (eds), *50 Years of the European Treaties* (2009, Hart), 43, 52.

¹²⁸ *ibid.*

¹²⁹ Communication from the Commission to the Council and the European Parliament ‘Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations’, 2 June 2004, Brussels COM(2004) 401 final, 10.

Mutual recognition has indeed expanded to become a lead principle of Community private international law, at one time destined to become ‘the cornerstone of judicial co-operation in both civil and criminal matters’.¹³⁰ However, although clearly favoured as an alternative to harmonisation following the Tampere summit,¹³¹ as evidenced by the Mutual Recognition Programme relating to judicial decisions,¹³² its use in the Hague Programme was to be the guiding principle in the negotiation and conclusion of the various private international law harmonisation measures to be put in place using Amsterdam Treaty powers. It was not envisaged that such measures were no longer necessary, or could be substituted by some kind of directly effective principle of mutual recognition of civil status regimes to replace conflicts of law.¹³³

Thus, whilst it is an interesting perspective to claim by analogy that registered partnerships and even marriage should benefit from mutual recognition in the same way as goods and services, it can only ever be a loose analogy. Civil status is not a good, service or person with free movement rights under the Treaties, and a marriage certificate is not a product or service as envisaged within the single market. Those who carry that status do have free movement rights, and, as discussed below, the principle may therefore be more relevant in the sense that the lack of portability of status might constitute an obstacle to that freedom. However, it cannot reasonably go beyond this. I am sympathetic to Melcher’s aspirations where she argues for a ‘general EU mutual recognition principle’ when faced with limping relationships, as an extension of the country of origin principle for the free movement of goods.¹³⁴ Such a system might well be possible in the future if, aside from the need for greater mutual trust and similarities between policy positions, there was also an acceptance that any Member State could confer civil status on any EU citizen. This would be in the same way that the free movement of goods depends on goods being able to be produced in any Member State. However, for now, any forced imposition of such a system on the Member States would require, as she recognises, a new interpretation by the CJEU of Article 21 TFEU.¹³⁵ However, as Mansel

¹³⁰ Johan Meeusen, ‘System Shopping in European Private International Law in Family Matters’ Chapter 7 in Meeusen and others (eds), *International Family Law for the European Union* (Intersentia, Antwerp 2007) 239, 265.

¹³¹ *ibid.*

¹³² Council of Ministers, ‘Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters’, 15 January 2001, [2001] OJ C12/1.

¹³³ Johan Meeusen, ‘Instrumentalisation of Private International Law in the EU: Towards a European Conflicts Revolution?’ (2007) 9 *Eur J Migration and Law* 287, 302.

¹³⁴ Martina Melcher, ‘Private International Law and Registered Relationship: An EU Perspective’ (2012) 4 *Eur R Priv L* 1075, 1081.

¹³⁵ *ibid.*, 1082 and the works cited at fn 26

points out, if Article 21 were used in this way, the CJEU would be undertaking a legal approximation of EU law, substituting the lack of competence and ‘intruding’ into substantive areas such as family law, succession and personal law.¹³⁶

2. Citizenship Free Movement Rights and Obstacles to Free Movement

There is considerable literature and discussion on the meaning of citizenship generally and the significance in particular of the creation of European Citizenship.¹³⁷ Some have focussed on free movement rights,¹³⁸ others on the concept of belonging and participation in society.¹³⁹ Space permits only a brief glance at these contributions. For the purposes of this thesis it suffices to mention only one or two points. Firstly, there has been a view, for at least twenty years, that the EU would be a liberating force ‘forging ahead’ with more progressive standards than those contained in national measures.¹⁴⁰ As shown by Waaldijk in Chapter 1 this has not been the case. The concept of European Citizenship has created expectations which have not been fulfilled. Stychin observes that lesbian and gay activism increasingly focuses on ‘rights claims as Europeans’ leading to a unitary sexual identity being articulated with demands that it be included within the framework of citizenship.¹⁴¹ Shaw, meanwhile, highlights the current uncertainties around European Citizenship as the basis for rights.¹⁴²

¹³⁶ Heinz-Peter Mansel, ‘The Impact of the European Union’s Prohibition of Discrimination and the Right of Free Movement of Persons on the Private International Law Rules of Member States’ in Boele-Woelki, K, Einhorn, T et al (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International, 2010), 291, 302.

¹³⁷ For an overview see Dimitry Kochenov, *The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?* (2013) 62 ICLQ 97; see also Dimitry Kochenov, ‘The Right to Have What Rights? EU Citizenship in Need of Clarification’ (2013) Eur LJ 502, 505.

¹³⁸ Helen Stalford, ‘For Better, For Worse: The Relationship between EU Citizenship and the Development of Cross-Border Family Law’ Chapter 10 in Dougan, M., Nic Shibhne, N. and Spaventa, E. (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012), 225.

¹³⁹ Jo Shaw, ‘The Problem of Membership in European Union Citizenship’, Chapter 4 in Zenon Bańkowski and Andrew Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (Blackwell 2000), 65; Richard Bellamy, ‘Evaluating Union citizenship: belonging, rights and participation within the EU’ in Bellamy R and Palumbo A (eds), *Citizenship* (Ashgate 2010), 417 originally published as (2008) *Citizenship Studies*, 12, 597.

¹⁴⁰ Kees Waaldijk and Andrew Clapham (eds), *Homosexuality: A European Community Issue - Essays on Lesbian and Gay Rights in European Law and Policy*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993), reviewed by Nicholas Bamforth, ‘Sexuality and Law in the New Europe’ (1995) 58(1) MLR 109.

¹⁴¹ Carl Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Temple University Press, Philadelphia 1998), Chapter 5 “Eurocentrism” 115, 135; Carl Stychin, ‘Disintegrating Sexuality: Citizenship and the EU’, Chapter 6 in Bellamy, R and Warleigh, A, *Citizenship and Governance in the European Union* (Continuum, 2001), 107. For more on the collective identity of citizenship and the challenge presented by diversity and pluralism to the development of anything more than a ‘thin’ rights-based liberal citizenship see Ireneusz Pawel Karolewski *Citizenship and Collective Identity in Europe* (Routledge 2010).

¹⁴² Jo Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’, Chapter 19 in Craig, P. and de Burca, G., *The Evolution of EU Law* (2nd edn, OUP 2011), 575.

My premise, as outlined in Chapter 1, is that full citizenship cannot be achieved for gays and lesbians until they have equal rights as others, including the right to marry.¹⁴³ The Commission and Council should recognise that European Citizenship is incomplete unless this equality is achieved. Although there are numerous conflicting concepts of citizenship,¹⁴⁴ one prevalent, if not universal understanding is that of “a homogenous political status within the context of the state”.¹⁴⁵ Support for this view is shown by Advocate General Léger in *Boukhalfa v Germany* where he asserts that ‘every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations.’¹⁴⁶

That status comprises both rights and duties, but the key point is homogeneity. On this understanding of citizenship, if the rights and duties in question are not consistent within the boundaries of the area in question than that territory cannot constitute a state. Free movement rights are an essential part of citizenship, but the key point is that citizenship rights, to be such, need to transgress provincial or municipal boundaries:

Within states, individuals who move from one jurisdiction to another (from one city or province to another, for example) lose the rights and duties associated with their status as residents of the first jurisdiction and gain new status as residents of the second, but they experience no change in the rights and duties associated with their overarching citizenship.¹⁴⁷

The fact that certain EU citizens have a right to marry or form partnerships whilst others do not (depending on their nationality and residence) reduces marriage to a local, provincial right rather than one enjoyed as a whole by EU citizens. This discrepancy is even more marked when one takes into account the fact that a married EU citizen can lose this status as he crosses borders whilst exercising free movement rights. This contradicts the Charter and Convention on Human Rights, a point considered further in Chapter 7.

The relevant Treaty provisions should be read in this light. Article 20 TFEU establishes a concept of Citizenship of the Union’, but this citizenship expressly includes the right, under

¹⁴³ Chapter 1, Weeks (n 112).

¹⁴⁴ For an overview of some of the types of citizenship theories, including sexual citizenship, see Engin Isin and Patricia Wood, *Citizenship and Identity* (Sage 1999).

¹⁴⁵ Willem Maas, *Creating European Citizens* (Roman & Littlefield 2007), 2.

¹⁴⁶ Case C-214/94 *Boukhalfa v. Germany* [1996] ECR. I-2253, 2271, [63].

¹⁴⁷ *ibid*, 117.

Article 20(2)(a) to ‘move and reside freely within the territory of the Member States’. Article 21 TFEU then repeats the point, stating ‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.’ Subject to these limitations, this provision has direct effect in relation to individuals.¹⁴⁸

On this basis it is arguable that, in order not to deprive those provisions of any useful effect, the right to free movement should include the right to move with the personal status and family situations legally acquired in his or her Member State of origin. Baratta,¹⁴⁹ as already discussed,¹⁵⁰ submits that personal and family relationships are a necessary component of the unhindered circulation of persons, and that their mutual recognition among Member States is an inevitable corollary of the freedom to circulate. Further, this is the only conclusion consistent with the respect for family life set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁵¹

a) Mutual Recognition of Status?

Baratta’s supports his argument that free movement rights include the portability of by reference to *Dafeki*.¹⁵² This was a reference from a German court concerning a Greek migrant worker’s entitlement to social security benefits. The CJEU had to decide whether Article 48 EC required Germany to recognise certificates and analogous documents relating to civil status issued by Greece. The CJEU found that the free movement of workers was not possible without production of documents relative to personal status ‘which are generally issued by the worker’s State of origin’.¹⁵³ It followed that the administrative and judicial authorities of a Member State must accept such certificates and documents issued by the competent authorities

¹⁴⁸ C-413/99 *Baumbast v Sec State Home Dept* [2002] ECR I-7091

¹⁴⁹ Roberto Baratta, ‘Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC’ (2007) IPRax 4,7. For a much more detailed exposition see Roberto Baratta ‘Les techniques de reconnaissance visant à assurer la circulation des status dans une logique de protection des droits fondamentaux des personnes concernées: La reconnaissance internationale des situations juridiques personnelles et familiales’, Collected Courses of the Hague Academy of International Law (2011) 348 Recueil des Cours. See also Tim Corthaut, *EU Ordre Public* (Kluwer Law International, Aalphen aan den Rijn, 2012) Chapter 14 ‘Case-Study: Same-Sex Marriages’ 405.

¹⁵⁰ Chapter 5, n 162.

¹⁵¹ Baratta (n 148), 7.

¹⁵² C-336/94 *Defeki* [1997] ECR I-6761

¹⁵³ *ibid*, [19].

of the other Member State ‘unless their accuracy is seriously undermined by concrete evidence’.¹⁵⁴

Germany, evidently suspecting fraud, complained that the rectification of Greek birth certificates (by a single judge on the evidence of two witnesses) was subject to far less verification than would be the case in Germany. Such ‘rectification’ had become a frequent occurrence generally operating in favour of applicants shortly before retirement age.¹⁵⁵ However, the CJEU held that the probative value of a corrected Greek birth certificate, showing that Mrs Dafeki was already 60 years old and hence entitled to a German state pension, could not automatically be questioned by the German authorities.

Nevertheless, I would argue this does not lay down a general principle of recognition. The Court’s judgment limits the circumstances in which the host Member State can challenge the validity of the documents in question. But ‘validity’ here is not necessarily the same as ‘applicability’. Even if the probative value of the original documents can only be questioned in certain defined circumstances, the evidentiary weight of the document in question is to be differentiated from the effects which are to derive from it. Applying this principle to same-sex unions, the *fact* that someone has indeed registered a civil partnership (or marriage) with another person of the same sex in accordance with the law of Member State “A” cannot be denied by Member State “B”. However, that does not *of itself* determine that that person is to be recognised as married or partnered in Member State “B”. Indeed, the French approach under its former regime shows that the contrary can be true. A French national in a same-sex marriage with a Dutch national celebrated in the Netherlands was not regarded as married in France, and not even recognised as in a PACS. This was the case even if, bizarrely, the couple were still not permitted to enter into a subsequent PACS in France. In a reply to a written question in the French senate,¹⁵⁶ the Secretary of State confirmed that in such a case France could not permit the couple to register a PACS as to do so would mean the non-French partner would be both married and PACSed. In other words, as was the case with the French attitude to UK civil partnerships until 2007, France did recognise a marriage to the extent that it constituted an impediment to a subsequent PACS. More specifically, France recognised the

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*, [14].

¹⁵⁶ Réponse Ministérielle no. 1127S, Secrétaire d’Etat chargé des transports : JO Sénat 19 janv 2011, discussed by Maryline Bruggeman, ‘Droit International Privé : de quelques difficultés nées de la légalisation du mariage entre personnes de même sexe à l’étranger’, *Droit de la Famille* 3 (mars 2011), alerte 19

validity of the Dutch marriage certificate as it related to the Dutch partner, as France continued to apply nationality as the relevant test for the applicable law. But it did not recognise the French partner as being married to the Dutch one, nor did it recognise either of them as being married for the purposes of French law.

Baratta's views on the pan-European recognition of the status 'legally acquired in his or her Member State of origin' are, however, shared by Advocate General La Pergola in his Opinion in *Defekci*, although these were not expressly accepted by the Court.¹⁵⁷ The AG considered that, where an individual's civil status is a condition for entitlement to a subjective legal position guaranteed under Community law, the status of the person concerned should not be evaluated differently from one Member State to another:

It cannot be accepted that an individual's status, in the sense of his legal position within the legal system in question—in this instance the Community legal system—should be evaluated differently depending on the law of the State in which he is residing or working within the territory of the Community. Were that to be the case, the way in which the competent national authorities treat the events which are relevant for the purpose of defining the status of the person concerned would determine whether that right of the individual was recognised or denied. That is incompatible with the basic concept underlying the Treaty according to which subjective legal positions under Community law must enjoy equal recognition, that is to say it must be possible to invoke them in the same way in every Member State of the Community. In other words, the immutability of status—whenever, of course, it constitutes an element of or prerequisite for a right of the individual—derives from the necessity to guarantee in a uniform manner the actual form of subjective legal positions under Community law and their protection. It would be contrary to the very idea of integration were a right to exist and be enforceable in one Member State but not in another because the civil status of the person concerned—and more specifically his age, upon which that right depends—is assessed differently within the Community, though the Community itself is conceived, also for the purposes under consideration here, as being a single area without internal frontiers.¹⁵⁸

¹⁵⁷ *Defekci* (n 152) AG Opinion, [6].

¹⁵⁸ *ibid.*

This is useful ammunition in the argument for cross-border transportability of civil status. However, the basis for AG La Pergola's assertion regarding 'immutability of status', itself stems from *Micheletti*.¹⁵⁹ There the CJEU had found that Spain could not refuse, on the basis of its own laws, to accept the status of Micheletti as an Italian citizen. Questions of nationality were within the exclusive competence of the particular Member State granting that nationality.¹⁶⁰ This shows a circular argument. If a Member State has exclusive competence to determine status, it necessarily follows that no other Member State has competence to challenge that status:

[O]nce it has thus been established that a person's status is determined by the law of the State to which he belongs and, consequently, that it is the authorities of that State which have the power to certify that status, the determinations made by those authorities must be accepted uniformly in all the Member States and cannot be the subject of differing assessments.¹⁶¹

This is certainly true in relation to questions of nationality, where the EU has no independent power to confer nationality except as a corollary to the one granted by a Member State.¹⁶² It is also true insofar as possession of the nationality of a particular Member State is to be determined solely by reference to the nationality rules of the Member State concerned.¹⁶³ However, this line of reasoning simply reinforces the idea of 'belonging' to a single Member State whose law then determines status throughout the whole Union. The citizen remains unable to acquire a certain status in any *other* part of the Union and take it across internal borders. The reference to a 'Member State of Origin' is equivalent to using nationality as the connecting factor in conflicts law. Whilst it would produce absolute legal certainty the resulting immutability of status would not be welcome. The outcome, as soon as one of the partners was Italian, would be to deny recognition of the partnership or same-sex marriage in *any* Member State.

Thus, whilst status should be capable of surviving a transition from one Member State to another, it is too simplistic to limit this to those forms of status acquired in the 'state of origin'

¹⁵⁹ C369-90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

¹⁶⁰ *ibid*, [10].

¹⁶¹ C-336/94 *Defekki* [1997] ECR I-6761, Advocate-General's opinion[7]

¹⁶² Article 9 TEU.

¹⁶³ Koen Lenaerts and Piet Van Nuffel, *European Union Law* (3rd edition, Sweet & Maxwell 2011), [8-005].

(other than, following *Micheletti*,¹⁶⁴ perhaps regarding the question of nationality itself). Ideally, a status should also be transferable when acquired in a Member States other than the state of origin (as is the case with professional qualifications, for example). For matters of personal status, I submit that it should be possible to acquire a status in another state with which the citizen has a relevant or closest connection, such as his habitual residence, and still be entitled to transfer it. This seems after all to be the finding in *Grunkin-Paul*.¹⁶⁵

b) Personal Relationships and Free Movement

Following on from the above, and despite the perhaps overly wide interpretation of *Dafeki*, it seems Baratta's view of the portability of status has other judicial support. The recognition of personal relationships has indeed become the inevitable corollary of the freedom to circulate. *Carpenter*¹⁶⁶ concerned a British citizen married to a Philippine woman whom the British authorities were seeking to have deported. Mrs Carpenter had overstayed her visitor's visa and, although she had in the meantime married Carpenter and applied for leave to remain on this basis, UK policy was to require Mrs Carpenter to return to the Philippines and seek entry clearance from there. Carpenter ran a business providing services to customers in other Member States, and the case famously established that his overseas customers were sufficient to activate EU free movement law, even though the couple were both resident in the UK and were not intending to move. Having held that Carpenter was availing himself of the right freely to provide services guaranteed by Article 49 EC,¹⁶⁷ the CJEU decided a right of residence in favour of Mrs Carpenter:

the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.¹⁶⁸

A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that

¹⁶⁴ C369-90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

¹⁶⁵ C-353/06 *Grunkin v Grunkin-Paul* [2008] ECR I-7639; see Chapter 5, n 75.

¹⁶⁶ C-60/00 *Carpenter v Sec of State Home Department* [2002] ECR I-6305.

¹⁶⁷ C-60/00 *Carpenter v Sec of State Home Department* [2002] ECR I-6305, [30].

¹⁶⁸ *ibid*, [36].

measure is compatible with the fundamental rights whose observance the Court ensures.¹⁶⁹

The deportation of Mrs Carpenter would therefore represent an obstacle to the exercise of Mr Carpenter's directly enforceable Treaty right under Article 49 EC. Importantly, the CJEU did not discuss whether it was Mrs Carpenter's contribution to childcare, housekeeping or the business which would be missed if she was deported. Rather it accepted that even the emotional aspect of a forced separation of Mr Carpenter from his wife would be sufficient to breach Mr Carpenter's EU Treaty rights.

I agree with Toner that *Carpenter* was 'hopelessly lacking in reasoning'¹⁷⁰, adding to the confusion of the previous 'obstacles' jurisprudence rather than taking the opportunity to clarify it. It was, however, the forerunner to a series of cases concerning Article 20 and Article 21 TFEU.¹⁷¹ These established that rules leading to family break up or preventing family reunifications must not be allowed to interfere with what is referred to as the 'genuine exercise of Citizenship rights'. These cases essentially concern third country nationals' rights to immigrate, or remain, in the EU with family members who are EU Citizens. They have generated considerable discussion,¹⁷² because of their developing treatment of internal situations (where the individuals concerned or their families have not exercised a free-movement right). More relevant to this thesis, however, is that the reference to the 'genuine exercise of Citizenship rights' has become important for another reason. A further corollary of citizenship rights is that it makes it easier to claim that certain situations fall within the scope of the Treaties. Despite assertions that the introduction of EU citizenship was not intended to extend the *ratio materiae* of the Treaties, freedom from discrimination is now the corollary of free movement whether the citizen concerned is exercising an economic function or not.¹⁷³ Again this provides further support for the portability of status, as explained below.

¹⁶⁹ *ibid*, [39] and [40].

¹⁷⁰ Helen Toner, *Partnership Rights, Free Movement and EU Law* (Hart 2004), 208.

¹⁷¹ Eg C-127/08 *Metock v Minister for Justice*, April 17, 2008 [2009] Q.B. 318, C-34/09 *Ruiz Zambrano v Office National de l'Emploi*, 8 March 2011, [2011] 2 CMLR 46, C-434/09 *McCarthy v Secretary of State for the Home Department*, 5 May 2011, [2011] 3 CMLR 10, C-256/11 *Dereci and others v Bundesministerium für Inneres*, 15 November 2011, [2012] 1 CMLR 45.

¹⁷² Eg Stanislas Adam and Peter van Elsuwege, 'Citizenship Rights and the federal balance between the European Union and its Member States: Comment on *Dereci*' [2012] ELRev 176.

¹⁷³ Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', Chapter 19 in Craig, P. and de Burca, G., *The Evolution of EU Law* (2nd edn, OUP 2011), 575, 589.

c) Obstacles and Public Policy Exceptions

As mentioned above, the CJEU's 'obstacles' jurisprudence is reflected in *Gebhard*, a preliminary reference brought by an Italian court in a case concerning the right of a German lawyer to practice in Italy.¹⁷⁴ The case sets out the principle that national measure 'liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty' requires justification under various tests.

The CJEU considered these tests in *Grunkin-Paul*.¹⁷⁵ There it decided that 'An obstacle to freedom of movement such as that resulting from the serious inconvenience described [...] could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued'. This test was not met in the case, as Germany did not prohibit double-barrelled names or even insist in every case that the right to determine a name is decided by nationality.

This provides an alternative mechanism to control the application of private international law rules where they affect free movement rights. The jurisdiction of the CJEU is then widened.¹⁷⁶ *Grunkin-Paul* was not a case of the application of a public policy exception to a conflicts analysis. Germany's refusal to accept the name was not because its conflicts rules deemed Danish law applicable but found the effects of applying Danish law unconscionable. Instead, German conflict rules deemed German law applicable, and hence under a German conflicts analysis there was no need to apply a public policy exception. Nevertheless, Germany's insistence on applying German law was still subject to the control of the CJEU and needed to be in conformity with Community Law. It appears that all conflicts rules are to be judged against EU principles of equal treatment, even those which result in the application of the law of the forum court by usual reference to nationality as a connecting factor, As AG Sharpston puts it

Whilst the mere fact of choosing to use nationality rather than habitual residence (or vice versa) as a connecting factor does not itself offend against the requirement of equal treatment in Community law, a refusal to recognise the effects of measures which are

¹⁷⁴ C-55/94 *Gebhard* [1995] ECR I-4165, 4201. (n 118).

¹⁷⁵ C-353/06 *Grunkin v Grunkin-Paul* [2008] ECR I-7639; see Chapter 5, n 75.

¹⁷⁶ See Chapter 5.

valid under another legal system using another connecting factor does seem to offend.¹⁷⁷

This demonstrates a convergence. As mentioned in Chapter 4, the various conflicts regimes are sometimes little more than the manifestation of public policy considerations, particularly when the application of those rules affects free movement and EU citizenship rights. Yet *Grunkin-Paul* shows that, precisely because of those effects, there is no distinction between the public policy exceptions used as part of the free movement and mutual recognition systems, and the public policy exception used specifically as part of the conflicts regime to guard against the application of foreign law in exceptional circumstances. Even though *Grunkin-Paul* did not concern the application of a PIL harmonisation Regulation, the CJEU still saw itself competent to review the application of German law under conflicts law and to review this choice against requirements of objectivity and proportionality, given that it constituted an obstacle to free movement. If so, this surely means that the Court also has the power to assess the conformity with Community law of *any* public policy exception invoked under those conflicts rules. If Germany can be prevented from applying German law resulting from a classic conflicts analysis, *a fortiori* it can be prevented from applying German law where a conflicts analysis would ordinarily result in the application of, say, Belgian law and Germany is invoking the public policy exception to prevent this.

This is highly significant. If failure to recognise a civil status is acknowledged as an obstacle to free movement, it suggests that proportionality and objectivity requirements could also be breached, for example, if Italy refused to accept the validity of a marriage between two English domiciliaries performed in England and valid under English law.

Continuing the potential confusion, in *Grunkin Paul* AG Sharpston expressly recognised the rights of Member States to bring forward ‘public policy exceptions’, but required these to be justifiable on their own merits.¹⁷⁸ One exception she mentions is of particular interest, namely that ‘It might also be justifiable to refuse to recognise a name given in accordance with the law of another Member State to which a child is connected by birth but not nationality, if the place of birth is shown to have been chosen simply in order to circumvent the rules of the Member

¹⁷⁷ *Grunkin-Paul* (n 172) Opinion, [67].

¹⁷⁸ *ibid*, [92].

State of nationality, without there being any other real connection with that place.¹⁷⁹ This is clearly a reference to a form of ‘evasive’ case and as such can easily be applied to evasive cases of same-sex marriage or partnership. However, again the AG is not really referring to the public policy exception in the conflicts sense. Here the forum state is saying that the applicable law is still that of nationality and no other connecting factor is appropriate in the circumstances, rather than being a case of disapplying its own conflicts rules because of the undesirability of the outcome. As such, the AG’s comment can be seen as another example of a requirement for all refusals to acknowledge civil status to be compatible with Community law, even if normal choice of law rules are being applied.

This view is further supported by *Sayn-Wittgenstein*,¹⁸⁰ a further case where the choice of law was itself subject to Community control. In this case the CJEU held that it was legitimate for Austria to ban the registration of names involving a title of nobility. The applicant, an Austrian citizen who had been adopted by a German, was permitted to take the title ‘*Fürstin von*’ by a German court. She was later in adult life faced with a decision by the Austrian authorities to remove this title from her civil status documents. This was despite having been permitted to use it for several years in official documents, and in fact having used it to some advantage in her business as a luxury-market estate agent. The CJEU held it was not disproportionate for Austria, pursuant to constitutional provisions abolishing the nobility, to prohibit any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which might create the impression that the bearer of the name was holder of such a rank:

By refusing to recognise the noble elements of a name such as S’s, the Austrian authorities did not appear to have gone further than necessary to ensure the attainment of the fundamental constitutional objective pursued and accordingly the measure could not be regarded as an unjustified restriction on her freedom of movement under Art.21.¹⁸¹

Objective considerations relating to public policy were capable of justifying, in a Member State, a refusal to recognise the surname of one of its nationals, as accorded in another Member State. The concept of public policy as justification for a derogation from a fundamental freedom had to be interpreted strictly, so that its scope could not be determined unilaterally by each Member

¹⁷⁹ *ibid*, [86].

¹⁸⁰ C208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien*, [2011] 2 CMLR 28.

¹⁸¹ *ibid*, [93-94].

State without any control by the EU institutions. Thus, public policy could be relied upon only if there was a genuine and sufficiently serious threat to a fundamental interest of society.¹⁸²

This suggests that the control of the measures in question applies even where they are only exercised against the Member States' own citizens, whereas normally the 'reverse discrimination' exception would mean only measures against other nationals would be at issue. However, the judgment makes clear that it is referring to Austria's policy in respect of its own nationals. It is far from clear that Austria would have been allowed to maintain the same policy against non-nationals living in Austria. The question then arises as to whether a Member State is entitled to treat its own national any differently than those from other Member States. Sharpston's suggestion in *Grunkin-Paul* that evasive activities need not be recognised suggests that, where the forum state is dealing with one of its own nationals, it can exert a control which might not be possible against those more closely connected to another Member State. *Sayn-Wittgenstein* suggests that even a control against own nationals needs justification (but finds the tests met) but does not consider the situation of controls against non-nationals. One way to reconcile this apparent divergence is to say that the forum state may be more justified in refusing recognition to one of its own nationals than to others. As Sayn-Wittgenstein was Austrian, Austria's policy of refusing to recognise her title acquired in Germany can be seen either as 'reverse discrimination' or as a reaction to an 'evasive' action, although justifications were still needed. However, had she been German rather than Austrian, the court might have been less willing to allow Austria to ignore the status validly granted under German law, thereby favouring the law of the state of origin rather than that of the host state.

The favouring of the law of the state of origin would be consistent with the CJEU's approach in *Konstantinidis*.¹⁸³ There the Court found an infringement to the free movement right of establishment where a Greek national was obliged in Germany to adopt a Latin-alphabet spelling of his Greek name which distorted its pronunciation and caused him serious inconvenience. Some authors have made a comparison to other forms of civil status. That is, if the CJEU acknowledges that interference in one's name is a deterrent or discouragement to free movement and hence prohibited, then the same can also be said of questions of marital

¹⁸² *ibid*, [7].

¹⁸³ Case C-168/91 *Christos Konstantinidis* [1993] ECR-I 1191.

status, such as changes in a marital property regime adversely affecting a spouse or the loss of freedom to dispose of one's estate by a will.¹⁸⁴

To conclude on public policy, it will be seen that the conclusion to Chapter 5 now needs to be revisited. There recourse to the public policy exception in matters of family law seemed to be unfettered, unless specifically constrained by a PIL harmonisation Regulation. However, the prospect for mutual recognition is improved immeasurably once conflicts rules themselves and the application of one or other Member States law are seen as a potential obstacle to free movement. It remains to be seen how far such arguments will succeed.

3. Vested Rights

A further theory propounded to facilitate mutual recognition is that of 'vested rights', under which Member States may find themselves under an obligation to recognise a right duly created under the legal system of another Member State.¹⁸⁵ Michaels writes persuasively that the country-of-origin principle can be better understood when viewed as a new sort of vested rights principle under private international law.¹⁸⁶ Coester-Waltjen similarly puts forward a recognition theory, specifically for civil status, based on accepting legal situations created elsewhere, without regard being paid to which law applied or should have applied.¹⁸⁷ The vested rights theory itself, first proposed by Huber, enjoyed some support in the US under the First Restatement but has been largely discredited. Indeed, its failings are seen as one reason for the so-called US conflicts revolution leading to the Second Restatement.

The analysis provided by scholars is detailed and complex, and, whilst it may well lead to new understandings and reconciliations between private international law and Union law, I do not explain it in detail here. As a method for ensuring the recognition of same-sex marriages it has two major failings. First, as Kuipers recognises, Union law can only generate the duty to recognise a duly acquired right when the situation falls into its scope of application.¹⁸⁸

However, as we have seen, if family law falls outside the scope of the EU Treaties then the

¹⁸⁴ Michael Bogdan, *Concise Introduction to EU Private International Law* (Europa Law Publishing, 2006), 29.

¹⁸⁵ Jan-Jaap Kuipers, 'Cartesio and Grunkin-Paul: Mutual recognition as a vested rights theory based on party autonomy in private law' (2009) *European Journal of Legal Studies*, vol. 2 (2), 66; Jan-Jaap Kuipers, *EU Law and Private International Law: The Interrelationship in Contractual Obligations* (Martius Nijhoff 2012), 303.

¹⁸⁶ Ralf Michaels, 'EU Law As Private International Law? Reconceptualising the Country-of-Origin Principle as a Vested-Rights Theory' (2006) *J Priv Int Law* 195.

¹⁸⁷ Dagmar Coester-Waltjen 'Anerkennung im Internationalen Personen-, Familien- und Erbrecht und das Europäische Kollisionsrecht' (2006) *IPrax* 392.

¹⁸⁸ Kuipers, *EU Law* (n 182) 310.

status conferred by another Member State is not per se a 'right' requiring recognition elsewhere. If, conversely, the failure to recognise the married status of an EU free-mover constitutes an obstacle to free movement there is now a Union law connection. But in that case the obstacles approach outlined above already provides greater scope for protection than the vested rights theory, particularly as the vested rights theory does not itself prevent outright the application of a public policy exception.

The second failing is that, as I have shown above, in order to determine whether the right has been validly created, European conflicts law (more so than in the US) requires reference to be made to the connecting factors used by the host state, which Kuipers' accepts 'operate independently' of vested rights.¹⁸⁹ In the case of same-sex marriage, a vested rights doctrine in this form, or the recognition principle put forward by Coester-Waltjen, is not sufficient to mandate universal pan-EU recognition. This is because it fails to answer the question as to which Member State has the authority to allow the person concerned to enter into such a marriage. Von Savigny himself noted that a right can only be said to have been duly acquired if one has first identified the law applicable to the creation of that right.¹⁹⁰ This was indeed the critique which led to the original decline of the doctrine, both in Europe and, as already discussed in Chapter 2, in the US.

A related argument is that an obligation of recognition arises by virtue of the principle of loyal cooperation laid down in Article 10 EC, now replaced in substance by Article 4(3) TFEU. Article 10 required Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty and to facilitate achievement of Community tasks, and in doing so, to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. In his analysis of *Dafeki* and *Garcia Avello*, cases where an explicit argument using Article 10 had not been raised,¹⁹¹ Baratta suggests that it would be a breach of this principle where a Member State 'refuses a priori any recognition of the family relationships duly acquired by a European citizen according to his national legal system solely because the Member State claims the application of its own conflict of laws system.'¹⁹² I agree this might be true if accepting the conflict choice of law of another Member State were a Community obligation,

¹⁸⁹ Kuipers, 'Cartesio and Grunkin-Paul' (n 185), 84.

¹⁹⁰ Kuipers *EU Law* (n 180), 306, citing F von Savigny, *System des heutigen römischen Rechts*, Band VIII, 1849, 132.

¹⁹¹ *C-336/94 Dafeki* [1997] ECR I-6761; Case C-148/02, *Garcia Avello*, [2003] ECR I-11613.

¹⁹² Roberto Baratta, 'Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC' (2007) 1 *Praxis des Internationalen Privat- und Verfahrensrechts* [IPRax], 4.

but this is not the case, even if that other Member State is the state of nationality of the citizen concerned. This is not unfortunate. If it were the case, it might equally be a breach of the duty of loyal co-operation for Belgium to refuse to accept the *incapacity* of a Pole to enter a same-sex marriage. If Baratta's argument were applied consistently, Belgium would be unable to apply its own conflicts of law system and would be obliged to accept the binding application of Polish law to Polish nationals.

Taking the cases already discussed, the CJEU has confirmed that a name requires recognition on the basis that the nationality of the person in question (rather than his residence) determines the law applicable to that name.¹⁹³ Similarly, the laws governing the formation of a company (*lex loci registrationis*) are applicable to determine the legitimacy of that company formation in other Member States. Here we see again a mechanism which treats that company according to its nationality rather than its residence.¹⁹⁴ In each case the law creating the right is undisputed. For a same-sex couple married and resident in the jurisdiction of their nationality and domicile no questions as to capacity or applicable connecting factors will arise, and in these circumstances the vested rights concept might then indeed have some advantages. Other Member States would find themselves obliged (as suggested by Reding) to recognise the legal situation validly created in that Member State. The private international law rules of every Member State would point to the law of celebration/nationality/residence as being applicable in the first place. The effect of the vested right would then be not to ignore any conflict rule, but instead (if the theory were suitably expanded to have such consequences) to set aside the application of the local public policy exception.

If, however, the couple had a nationality which did not confer capacity to enter into a same-sex marriage, and were reliant on the rules applicable in the country of celebration to override or ignore such incapacity (such as a Greek couple marrying in Belgium), then the obligation of their 'home state' to recognise the marriage cannot be seen as being based on any 'vested right'. The exception would be if the home state, here Greece, first recognises the authority of the celebrating state (Belgium) to perform the marriage. Otherwise, where it deems Greek law to apply on the basis of the nationality of the parties, Greece will claim that the 'right' in question (if the marriage is seen as a 'right') was not duly acquired.

¹⁹³ Case C-148/02, *Garcia Avello*, [2003] ECR I-11613; Case C-353/06, *Grunkin-Paul*, [2008] ECR I-7639

¹⁹⁴ *Centros* (n 120).

In other words, unlike the name and company cases, where the link to nationality is applied and even reinforced as a reason to command respect for foreign legal situations elsewhere in the EU, the doctrine of capacity based on nationality continues to create conflicts of law which cannot in themselves be solved by a vested rights doctrine. Vested rights might be used (although, traditionally, it has not been) as a way of limiting the situations when the public policy exception might be applied. It cannot, however, in itself solve the issue of denying recognition where the forum state's conflicts laws would not normally apply the law of the place of celebration or registration to determine the validity of the relationship.

IV. Conclusion

This Chapter has examined the substantive Treaty obligations and secondary EU legislation governing cross-border recognition. It shows the difficulties encountered in using doctrinal interpretations of the EU Treaties to achieve cross-border recognition, and the failings of existing and proposed Directives.

Nevertheless, by analysing existing caselaw and Treaty interpretations, it is possible to argue that, at least in some circumstances, cross-border recognition is already required under the Treaties. In that case Commissioner Reding was correct, and the Commission should consider opening infringement proceedings against those Member States who persist in refusing to accord recognition to the valid same-sex marriages and partnerships of nationals of other Member States. That would enable the CJEU to provide a definitive interpretation on the 'genuine enjoyment of citizenship rights' envisaged under Article 20 TFEU and its interrelationship with the *Gebhard* obstacles to free movement. Finally, it would provide another opportunity for the CJEU to clarify the role and position of personal law based on nationality.

Chapter 7: Human Rights and the Portability of Status and Identity

In this Chapter I look briefly at the current understanding of human rights law regarding the granting of same-sex relationship recognition, before turning to consider human rights arguments in favour of the portability of civil status. I argue that, independently of the normative claim to same-sex marriage as a human right, a further claim can be made for the recognition of family situations created abroad.

I. Background and Current Position

The last decade has seen considerable progress in the human rights protections accorded to (or finally recognised as applying to) same-sex relationships.¹ These are reflective of the corresponding changes in social attitudes to these relationships. They have resulted from significant reinterpretations of the European Convention on Human Rights (ECHR),² together with an additional impetus provided within the EU by the gender-neutral approach towards family and private life taken by the Charter of Fundamental Rights.³

There may come a time when it is recognised throughout the 47 Contracting States of the ECHR that denying meaningful marriage to homosexuals, and the aspiration of love, warmth, belonging, stability and permanence which generally accompanies it,⁴ is a breach of the human right to marriage set out in Article 12 ECHR.⁵ There may perhaps also be a period before same-sex marriage is generally available when same-sex couples are recognised as having a right, possibly under Article 8 ECHR, i.e. based on their right to family life, to an equivalent form of relationship recognition.

¹ For more on the distinction between entitlement to rights and having them recognised legally (i.e. normative versus positivist interpretations of human rights) see John Eekelaar, *Family Law and Personal Life* (OUP 2006), Chapter 6 'Rights', 132.

² As shown notably in Case 30141/04 *Shalk and Kopf v Austria*, Judgment 24 June 2010, becoming final under Article 44(2) of the Convention on 22 November 2010.

³ Charter of Fundamental Rights of the European Union [2007] OJ 303/1, reissued with the Lisbon Treaty, [2010] OJ 83/2.

⁴ As described by Baroness Hale in *Ghaidan v. Godin Mendoza*, [2004] UKHL 30; [2004] 2 AC 557, para. 142.

⁵ For a summary and discussion of these developments and why same-sex couples might be 'cautiously optimistic' see Sarah Lucy Cooper, 'Marriage, Family, Discrimination & Contradiction, Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights' (2011) 12 German LJ 1746.

That time is not yet here, and may be some way off. Neither marriage nor partnership is currently required to be made available to same-sex couples.⁶ The European Court of Human Rights (ECtHR) shows hesitant progress towards acknowledging that marriage is a human right for homosexuals in substantive, rather than simply formal terms, meaning it should therefore be made available to same-sex couples. There is an evident lack of consensus over homosexual equality amongst a significant number of states as well as a continued margin of appreciation left to states in what are perceived to be matters of public morality.

These factors make it difficult to predict how quickly the ECtHR is moving towards a recognition of the right to some form of same-sex relationship recognition. Prior to *Schalk and Kopf v Austria*,⁷ the outlook was not considered promising.⁸ The judgment itself has provoked a variety of views. Some see same-sex relationship recognition as inevitable.⁹ Others continue to take a more cautious approach, pointing to the judgment's defensive 'heteronormative privileging of heterosexual marriage'.¹⁰

II. The Developing Position of the European Court of Human Rights

The ECtHR's position on same-sex relationships has been under steady, if restrained, development for many years, and there is no need to discuss the whole history here.¹¹ The main points of my argument can be seen by looking at the Court's current position shown principally in its cases in *Schalk and Kopf* and the more recent case of *Vallianatos*.¹² The findings of earlier cases are also discussed where they show a significant development in the Court's attitudes.

⁶ *Schalk* (n 2); discussed in Nicholas Bamforth, 'Families but not (yet) marriages? Same-sex partners and the developing European Convention "margin of appreciation"' (2011) CFLQ 128 and Loveday Hodson, 'A marriage by any other name: *Schalk and Kopf v Austria*', (2011), 11(1) *Human Rights Law Review* 170.

⁷ *Schalk and Kopf v Austria* (n 2)

⁸ Shazia Choudry and Jonathan Herring, *European Human Rights and Family Law* (2010 Hart), Chapter 4 "Marriage", 140.

⁹ Cooper (n 5); also Nicholas Bamforth, 'Families but not (yet) marriages? Same-sex partners and the developing European Convention "margin of appreciation"' (2011) CFLQ 128; Jens Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' (2013) *Equal Rights Review* 83.

¹⁰ Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013), particularly Chapter 6 'A Right to Marriage', 149, 157.

¹¹ Johnson (n 10).

¹² Applications nos. 29381/09 and 32684/09 *Vallianatos and Others v Greece* judgment 7 November 2013.

1. No right to Same-Sex Marriage (yet)

Article 12 ECHR provides that ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’. In *Schalk* the Court continues to assert that Article 12 is not infringed where a Contracting State excludes marriage between two men or two women. However, the judgment discusses whether the wording of Article 12 could ever be applied to same-sex marriage.¹³ It was obviously not so intended when the Convention was signed in 1950.¹⁴ Although the English wording does not specifically limit the right to being for men and women to marry ‘each other’, the Court found the reference to ‘men and women’ (rather than ‘everyone’) to be deliberate. One might say the implication of opposite sexes is even more pronounced in the equally authentic French version of the text: ‘*l’homme et la femme ont le droit de se marier*’, but this was not commented on by the Court. In any event the majority judgment did not turn on the literal interpretation of the provision.

Importantly, the Court refused to accept arguments put forward by Austria and the UK that Article 12 could only ever be interpreted as referring to opposite-sex couples. The Court looked at the wording of Article 9 of the Charter, in force in the EU since 1 December 2009, which reads ‘The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights’ deliberately dropping the reference to men and women. In light of this, it could not be said that Article 12 could only ever apply to persons of different sexes: ‘regard being had to Article 9 of the Charter... the Court would no longer consider that the right to marry enshrined in Article 12 must *in all circumstances* be limited to marriage between two persons of the opposite sex.’¹⁵ In other words, even a literal interpretation of Article 12 as referring in the past only to opposite-sex marriage does not preclude its application to same-sex couples in the future.

¹³ *Schalk* (n 2), [55].

¹⁴ In some of the earliest applications (at a time when cases to go before the Court were first vetted by the European Commission on Human Rights) the Commission on Human Rights even found it was not even a breach of Article 14 ECHR (freedom from discrimination on grounds of sex) to punish male, but not female, homosexual conduct as a criminal offence. The right to respect for private and family life in a democratic society could be subject to interference in accordance with the law of that party ‘for the protection of health or morals under Article 8(2)’, see Warwick McKean, *Equality and Discrimination under International Law* (Clarendon, Oxford 1983), 215.

¹⁵ *Schalk* (n 2), [61], emphasis added. Two judges disagreed, as shown in the Concurring Opinion of Judge Malinverni joined by Judge Kovler.

This is significant as it shows that the development of Contracting States' understandings of what is meant by marriage in Article 12 may itself influence the scope of the rights devolving from it. As an increasing number of States do provide for same-sex marriage, so the right to marriage in Article 12 will necessarily be interpreted as including such marriages.

It is also interesting because it serves to validate some of the arguments put forward by Murphy in his vigorous debate with Bamforth referred to in Chapter 1.¹⁶ A legalistic interpretation of the Convention could support the recognition of a right to same-sex marriage. Murphy himself accepted that his arguments depended on 'a number of contingencies, not least of which was progressive jurisprudence at a European level.'¹⁷ His predictions, however, appear to be well-founded, in that the jurisprudence does appear to be progressing in line with a certain emerging consensus amongst contracting states. Murphy and Bamforth's divergent views can then be reconciled by suggesting that moral and philosophical justifications are behind the increasing recognition at national level, whilst the ECtHR plays a joint role with the member states in developing a revised understanding of the existing provisions. As Bamforth himself puts it:

The further development of legal protections for same-sex couples thus appears, where one or more of Articles 8, 12 and 14 of the European Convention on Human Rights is in play and so far as the Court and First Section Chamber are currently concerned, to be something of a joint endeavour: the Court and First Section Chamber will need to see evidence of developments at national level in a sufficient number of states in order to recognise new protections at European Convention on Human Rights level, but will also be prepared to nudge those signatory states which fall behind any perceived consensus.¹⁸

On this basis it may also be possible eventually to agree with Murphy's suggestion that the current 'heterosexist interpretation' of Article 12 is due to reading it through culturally conditioned heterosexist eyes. In future law students may be surprised at a suggestion that it

¹⁶ John Murphy, 'Same-sex marriage in England: a role for human rights?' (2004) 16 CFLQ 245. See Chapter 1 (n 88).

¹⁷ *ibid*, 259.

¹⁸ Nicholas Bamforth, 'Families but not (yet) marriages? Same-sex partners and the developing European Convention 'margin of appreciation' (2011) CFLQ 128, 143.

only applies to opposite-sex couples, reading it instead to mean that the right applies only to adults rather than children.¹⁹

Turning back to the judgment's treatment of Article 9 of the Charter, the Court found the silence over sexes was deliberate, but also found the reference to national laws to be important.²⁰ Rather than being a requirement for national laws to be crafted to give effect to the principle of marriage, the Court found the reference to constitute a proviso, an exclusive competence and hence a discretion on the States as to whether or not to allow same-sex marriage. The Court also referred to the commentary to the Charter.²¹ Here the Court specifically highlights the commentary's interpretation that... 'it may be argued that there is no obstacle to recognise same-sex relationships in the context of marriage. There is however, no explicit requirement that domestic laws should facilitate such marriages'.²²

The Charter did not then alter the fact that, whilst the Convention was a living instrument to be interpreted in present-day conditions,²³ there was still no European consensus regarding same-sex marriage and the question whether or not to allow same-sex marriage was still to be left to the national law of the Contracting State.²⁴ Nevertheless, the Court's reiteration²⁵ that '*as matters stand*, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State' suggests that this might be called into question at some point. This could be as a result of the new understanding of Article 12 to which we may be heading, as mentioned above. Any refusal to open up marriage to same-sex couples would then continue to depend on an increasingly diminishing margin of appreciation left to the member

¹⁹ John Murphy, 'Some Wrongs and (Human) Rights in the English Same-Sex Marriage Debate' (2004) *BYU J Pub L* 543, 557.

²⁰ *Schalk* (n 2), [60].

²¹ The judgment does not make clear which commentary is being referred to here, but it is not referring to the official 'Explanations relating to the Charter of Fundamental Rights' [2007] *OJ C* 303/17. Instead, it could be referring to the non-binding EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of the European Union' (June 2006), available at <http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf>, accessed 5 September 2013 (Commentary), 102.

²² *Schalk* (n 2), [60].

²³ ie applying its own caselaw in Case 43546/02 *E.B. v France*, [98], and 28957/95 *Christine Goodwin v UK* [GC] (2002) 35 *EHRR* 447, [2002] 2 *FLR* 487, [74-75].

²⁴ *Schalk* (n 2), [57] and [61]. For more on the margin of appreciation see George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) *OJLS* 705.

²⁵ *Schalk* (n 2), [61].

states.²⁶ Bamforth is right to see the significance in the fact that the Court stressed that states were *still* free, as opposed to free *per se*, to restrict access to marriage to opposite-sex couples.²⁷

Some further precision may be necessary here, given that the judgment exemplifies certain ongoing ambiguities and ‘central uncertainties in contemporary human rights law’²⁸ as to the correlation between Article 9 Charter and Article 12 ECHR. Even prior to the judgment Craig suggested that Article 9 modifies the analogous ECHR right where it countenances the possibility of marriage by those of the same sex where permitted by the relevant national law.²⁹ The majority of the Court appears to share this view that a modification is underway, if not yet complete. However, despite the requirements of Article 51(1) of the Charter for EU Institutions to respect Charter rights, and a corresponding obligation on Member States when implementing or even when acting within the scope of Union law,³⁰ it is not clear how an EU instrument such as the Charter can have any bearing on the rights granted under the Convention when it is not being applied to EU law. To this extent Judge Malinverni in his otherwise concurring view may well be justified in asserting that Article 9 of the Charter should not affect the interpretation of Article 12 ECHR.³¹ There are other unresolved questions as to the respective status of Article 9 of the Charter and Article 12 of the Convention. For example, Article 52(3) of the Charter lays down that:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Within EU law, Article 9 of the Charter applies and has a potentially broadening effect on the interpretation of Article 12 for EU Member States, if not other ECHR Contracting States. But Article 52(3) suggests the scope of Article 9 within the EU is limited to the interpretation given to Article 12 ECHR in respect of the Council of Europe more generally.

²⁶ Bamforth (n 18), 142.

²⁷ *ibid*, 141.

²⁸ P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2010), 232.

²⁹ *ibid*, 233.

³⁰ *ibid*, 211 and the works cited at fn76. Article 51(1) refers only to ‘implementing’ but a better view is that Member States are bound by the Charter whenever acting within the scope of EU law.

³¹ *Schalke* (n 2), Concurring Opinion of Judge Malinverni joined by Judge Kovler.

In practice, this means Article 9 by itself will not change the meaning of Article 12. It may also mean that a consensus emerges within the EU as to a right to same-sex marriage which is then not shared by the other ECHR Contracting States, which will present a challenge to a homogenous interpretation throughout the Contracting States. This is even more likely when one considers another factor affecting the margin of appreciation, raised in the Commentary (but not mentioned in the judgment), namely:

Article 21 of the Charter, which prohibits discrimination on grounds of sexual orientation, is of special importance with respect to the interpretation of Article 9, and it may be invoked in relation to the exercise of the right to marry. It can be argued that the exclusion of same-sex couples from marriage would constitute discrimination on the basis of sexual orientation in violation of Article 21.³²

As already mentioned, the discrimination outlawed in Article 21 of the Charter may also be relevant to an interpretation of Article 8, together with Article 14 of the Convention, when it comes to determining the effects of a marriage or partnership already entered into elsewhere. I come back to that later in this Chapter.

2. Right to an alternative form of relationship recognition?

Although *Schalk* makes progress towards determining a human right to same-sex relationship recognition, the situation ultimately is left vague, being based on the Contracting States' margin of appreciation. However, the Court found, for the first time, that it was artificial to maintain its previous position that a cohabiting same-sex couple's relationship could constitute 'private life' but not 'family life'.³³ The Court found instead that a stable de facto same-sex partnership falls within the notion of 'family life' as much as a cohabiting opposite-sex couple.³⁴

This is a significant development. In *Dudgeon*,³⁵ the Court had recognised the homosexual as a subject of rights (and hence as a class of persons), which led to recognition that Article 8 and the right to private life applies, but this was not extended to recognise the right to family life.³⁶ By limiting recognition only to a right to private life, homosexuality was treated as only existing

³² Commentary (n 21), 102.

³³ *Schalk* (n 2) [90].

³⁴ *ibid*, [94].

³⁵ *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

³⁶ Johnson (n10).

behind closed doors and undermined desires for what Stychin calls attempts to ‘construct meaningful categories of belonging’.³⁷ The Court’s deliberate separating out of ‘family’ and ‘private life’ so that each encompassed different sets of rights was positive in that it enabled the Court to establish a sphere of sexual privacy outside of ‘family’ relationships, thereby providing gays and lesbians (couples or otherwise) with the same sexual freedoms available to heterosexuals.³⁸ However, the Court was then able to maintain the view that same-sex partnerships, whilst an expression of protected private life, do not constitute a form of family life.

For example, in *Mata Estevez v Spain*³⁹ the Court upheld a refusal to grant a survivor’s pension which would have been available to an opposite-sex married couple. The Court specifically stated that ‘long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention’.⁴⁰ Two years later, in *Karner v Austria*⁴¹, the beginnings of a different approach emerged. Here it was held that unmarried same-sex couples (which includes all those in registered partnerships whether intended to be an alternative or a substitute for marriage) should be treated as least as favourably as *unmarried* opposite-sex couples, with any differences in treatment on the basis of sexual orientation requiring ‘particularly serious reasons by way of justification’.⁴² The judgment concerned a surviving cohabitee’s right to continue the tenancy of the joint home after his partner’s death, and went a long way short of establishing any form of equality with heterosexual *married* couples. It still did not acknowledge that same-sex couples could be protected by the concept of ‘family life’ under Article 8, and considered instead that the difference in treatment adversely affected the right to enjoyment of the applicant’s home, clearly a matter which falls under respect for private life under Article 8.

Therefore the Court’s change of heart in *Schalk* could constitute a new beginning in the way in which the Court regards homosexuality. It acknowledged it was starting:

³⁷ *ibid*, 94, quoting Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford, Hart 2003), 23.

³⁸ Johnson (n 10), 113.

³⁹ *Mata Estevez v Spain*, no 56501/00, 10 May 2001, ECHR 2001-VI.

⁴⁰ One particular irony here is that the pension entitlement in question was also available to unmarried opposite-sex couples where they were legally unable to marry before the divorce laws were passed in 1981 – in other words, a reconstituted different-sex couple technically living in an adulterous relationship had more rights than a same-sex couple.

⁴¹ Case 40016/98 *Karner v Austria*, judgment First Section Chamber 24 July 2003, final 24 October 2003.

⁴² *ibid*, [37].

from the premise that same-sex couples are just as capable as opposite-sex couples of entering into stable committed relationships. Consequently, they are in a relatively similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.⁴³

One additional significance of the case is that, for the first time again, the ‘couple’ and their rights together are examined⁴⁴ and the evident mistreatment of same-sex couples as opposed to opposite-sex couples becomes evident. Previous cases had just looked at the protection of the individual, an approach which makes it much harder to establish discrimination, as shown in *Grant*.

In light of this the Court, almost inviting future cases to be brought, suggests that one question which remains to be answered is whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8, i.e. not so much a right to marry but a right to form a different kind of family.⁴⁵ Austria had introduced registered partnerships shortly before the judgment, so an answer was not required, and the question was only whether it should have done so sooner.⁴⁶ The answer to that question was that this was still an area of evolving rights. Whilst acknowledging the ‘emerging European consensus towards legal recognition of same-sex couples’, the Court found no established consensus, meaning States must enjoy a margin of appreciation in the timing of the introduction of legislative changes.⁴⁷

It has been claimed, optimistically, that the question is now only a matter of *when* States are required to bring in such changes, on the basis that family life cannot be enjoyed fully for the purposes of Article 8 without some form of legal recognition being offered to those in same-sex relationships in the near future.⁴⁸ A more accurate view, however, is that change will be some time coming and might not be as far-reaching as hoped. This is because the Court in *Schalk and Kopf*⁴⁹ also reserved for Contracting States a margin of appreciation on *what* status to

⁴³ *Schalk* (n 2), [99].

⁴⁴ Helen Toner, ‘Migrations Rights and Same-Sex Couples in EU Law: A Case Study’ in K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe*, (2nd edition, Intersentia 2012), 285, 292.

⁴⁵ *ibid*, 296.

⁴⁶ *Schalk* (n 2) [103] and [104].

⁴⁷ *ibid*, [105].

⁴⁸ Loveday Hodson, ‘A marriage by any other name: *Schalk and Kopf v Austria*’, (2011), 11(1) *Human Rights Law Review* 170, 177.

⁴⁹ *Schalk* (n 2), [108].

confer on same-sex couples, namely that any alternative recognition schemes they provide for same-sex partners need not be equivalent to marriage. In the meantime, differences in treatment between civil partnership and marriage are still permitted, even where same-sex couples are excluded from the latter status and where this leads to ongoing discrimination for same-sex couples.’⁵⁰

This view is modified only slightly by the Court’s judgment in *Vallianatos*. This case concerned the introduction by Greece of a new ‘non-marital’ partnership right for opposite-sex couples only. The Court once again determined that the applicants’ *de facto* same-sex relationship constituted ‘family life’ under Article 8 and that the distinction drawn by the Greek government in creating a new institution which excluded them from its ambit this was discrimination under Article 14.⁵¹

One area of interest is in relation to the proportionality test, as also used in *Karner*, which lays down a significant limitation on the margin of appreciation left to states where this discriminates against same-sex couples. In *Karner* this had been set out following the much quoted maxim that ‘protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment’.⁵² The test essentially requires that measures used to implement such so-called protection need to be proportionate. Differences in treatment based on sex or sexual orientation afford only a narrow margin of appreciation to States. The principle of proportionality requires States not only to show that the measure chosen is suitable for realising the aim sought, but also that it is necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a same-sex relationship – from the scope of the legislation in question.⁵³

This test was again used in *Vallianatos*, although this time it follows the rather less strident assertion that ‘aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it’.⁵⁴ Further, the Court makes explicit reference to developing social changes, where it adds:

⁵⁰ Loveday Hodson, ‘Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR’ (2012) 20 *International Journal of Children’s Rights* 501, 513.

⁵¹ *Vallianatos* (n 12), [73].

⁵² *Karner* (n 41), [40]

⁵³ *ibid*, [41].

⁵⁴ *Vallianatos* (n 12), [84].

‘[T]he State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life.’⁵⁵

Now the proportionality test can be seen as being made harder. The Contracting State, with its narrow margin of appreciation when dealing with treatment based on sex or sexual orientation, must show that the measure it chooses is not just suitable for the achievement of the [now modified] aim sought, but also that it was necessary, to achieve that [now modified] aim, to exclude a whole category [those living in a same-sex relationship] from the measures.

This appears to me to be potentially far-reaching, and should make it easier for same-sex couples to achieve recognition of their status as a couple whether or not they have entered into a marriage or partnerships. It does not mandate equal treatment with married couples but seems to draw a dividing line between marriage, which, so far, can be preserved as an opposite-sex institution, and other family relationships which must not be discriminatory. This development is also likely to be of interest to the ‘Equal Marriage’ campaign to open civil partnerships in the UK to opposite-sex couples.

III. Right to Recognition of a Foreign Relationship?

The final section of this Chapter shows why there might be a human right, either under the Convention or the Charter, for a same-sex marriage (or registered partnership intended to have similar status) formed in one jurisdiction to be recognised in another. I approach this topic with caution, because I believe it is too soon, even ten years on, to agree with Murphy that ‘[i]t is inconceivable that a current-day ECtHR could deny family status to a same-sex married couple from Belgium or the Netherlands.’⁵⁶ It is, however, increasingly *possible* that the Court might accord family status to such relationships. If so, the question then arises as to how this would affect the recognition of relationships within the EU.

⁵⁵ *ibid.*

⁵⁶ John Murphy, ‘Some Wrongs and (Human) Rights in the English Same-Sex Marriage Debate’ (2004) *BYU J Pub L* 543, 563.

1. A Convention Right to Cross-Border Recognition?

If Article 12 were interpreted so as to require a form of relationship recognition to be accorded to same-sex couples, one might suppose the lack of recognition across borders would in any event disappear. This is because Article 14 ECHR provides:

The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Thus, if same-sex marriage or partnership is recognised as a right and freedom set forth in the Convention, Article 14 will then ensure that the enjoyment of that right can be secured without discrimination. In other words, if Contracting States were required to offer same-sex marriage or equivalent partnership status to their own citizens and residents, they would need to accord the same privileges of marriage or partnership to those couples who have married or registered elsewhere.

However, it would not necessarily solve the problems of assimilation or conversion discussed in Chapter 1. Assuming Contracting States were first obliged to offer same-sex registered partnerships, rather than marriages, Article 14 would not necessarily require those partnerships to be treated as marriages in those States which had introduced marriages. Similarly those couples in a same-sex marriage might not necessarily be entitled to be treated as registered partners in every other Contracting State, evoking the problems experienced in France prior to 2007 by same-sex married couples who were not treated automatically as being in a PACS. Thus the question of cross-border recognition needs to be addressed separately even under the Convention, just as it does under EU Law.

In any event Article 14 does not solve the intermediate problem that, for the foreseeable future, Contracting States do not have to offer civil status to same-sex couples, but are still faced with couples who already enjoy such a status elsewhere. One interpretation which might provide a solution is that the right to marriage under Article 12 is not at issue if a Contracting State refusing to celebrate same-sex marriages or partnerships, but that Article 8 provides a right to portability of status. In other words, if a couple are already married or partnered, it could be an infringement of their right to respect for their private and family law under Article 8 not to be allowed to enjoy the effects of that status in another Contracting State. Again Article 14 would

be relevant to ensure the right applied regardless of nationality, and could have the effect of overriding restrictions arising from lack of personal capacity. For example, if it is first found that a Contracting State has an obligation to recognise and give effect to the existing same-sex marriages or partnerships of couples of other nationalities, Article 14 could then be used by nationals of that state to demand the same treatment for any same-sex marriage they had themselves concluded in another country. Article 14 ECHR could succeed in setting aside constraints as to personal capacity and connecting factors where Article 18 TFEU has failed. For example, providing the marriage of two Poles celebrated in the Netherlands was lawful under Dutch law (which would imply one of the spouses was resident in the Netherlands) Article 14, in combination with Article 8, would prevent Poland applying Polish law (on the basis of nationality under Polish conflicts rules) or the public policy exception in order to refuse recognition of that marriage in Poland.

This is a difficult scenario to imagine, however. It supposes that there are circumstances where a right might be available to a ‘foreigner’ or ‘incomer’ that is not available to a native or resident. Most understandings of human rights are that these are rights found ‘at the very core of our understanding of humanity’ and are, as such, available to any person regardless of extraneous factors such as nationality or wealth.⁵⁷ By their very nature fundamental rights are supposedly universal, capable of being enjoyed by all human beings.⁵⁸ This differs from the situation under EU Law discussed in Chapter 5, where connecting factors and differences in nationality can be used to differentiate claims for same-sex marriage recognition for some whilst not for others. Even within the EU a difference in interpretation as to citizenship rights, including the human rights applicable to EU citizens, cannot be envisaged if one follows Advocate General Léger’s view that ‘every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations.’⁵⁹

There is another way of looking at human rights, however, which does allow for a different treatment between what might be called ‘incomers’ versus ‘locals’. This entails viewing the right in question not as the right to marry itself, but the right to have an existing marriage and hence one’s civil status, identity and legitimate expectations respected as one moves across

⁵⁷ Eleanor Spaventa, Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU, Chapter 14 in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties* (Hart 2009) 341, 355. For a further discussion on the interface between normative human rights and EU citizenship rights see Roy Davis, ‘Citizenship of the Union ... Rights For All?’ (2002) 27 *ELRev* 121.

⁵⁸ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013), 435.

⁵⁹ Case C-214/94 *Boukhalfa v. Germany* [1996] ECR. I-2253, at 2271, [63].

borders. Beitz claims ‘A theory of human rights is not a theory of ideal global justice’ but that human rights can instead be defined as ‘standards for domestic institutions whose satisfaction is a matter of international concern’.⁶⁰ Seen in this way, the international community has a claim to demand that a particular jurisdiction behaves in a certain way when faced with a particular set of circumstances. One could then separate out the particular set of circumstances which arises when two people of the same-sex wish to marry in a particular jurisdiction, and conclude (for the sake of argument) that it is not a matter of international concern for the jurisdiction in question to deny the right to marry to that couple. However, if the set of circumstances in question is different, namely where a same-sex couple, with or without children, have already married in another country and now wish to be treated as married in that jurisdiction, the international concern at maintaining appropriate standards of recognition becomes more obvious. Whether seen as part of a notion of comity, or a reinvention of the personal status approach, the state which accorded the married status now has a claim in promoting or even demanding the recognition of that status in other jurisdictions. The claim is even more pressing when the conferment of the status in question is seen as the fulfilment of a human right in the home state.

One case which might support such a view is the ECtHR decision in *Wagner*.⁶¹ This concerned the refusal by Luxembourg to recognise the adoption in 1996 by Ms Wagner in Peru (effected by means of a judgment of a Peruvian court) of a Peruvian child. Luxembourg law had different types of adoption processes, one of which, ‘full adoption’, severed the rights with the natural parents and granted greater inheritance rights for the child (principally from its grandparents), but was not available to unmarried couples.

Ms Wagner had travelled to Peru specifically to carry out an adoption, in full knowledge of the fact that Luxembourg law did not permit ‘full adoption’ for unmarried individuals, and having been refused the right to adopt in Luxembourg. She had been told that she could adopt in Peru (and obtained the appropriate paperwork from Luxembourg to be able to do so) and had been led to believe the adoption would be recognised in Luxembourg. The ECtHR court was therefore not asked to take into account any ‘evasive’ nature of the transaction -unsurprising in an ECHR based claim, although more consideration could have been given to this point in the judgment because it was the private law aspects of Luxembourg’s actions which gave rise to the

⁶⁰ Charles Beitz, *The Idea of Human Rights*, (OUP 2009), 128.

⁶¹ *Wagner and JMWL v Luxembourg*, 72240/01 judgment 28 June 2007.

claim. In the end, the Court makes no comment on her contention that she was not cynically trying to evade a prohibition under her national law (although arguably she was doing just that).

The Peruvian court making the adoption judgment was considered by the Luxembourg government to have been in breach of the relevant international convention in failing to apply Luxembourg law, which was the applicable law under the convention using the nationality of the proposed adopter. However, the ECtHR reproached Luxembourg for relying solely on its conflicts rules rather than considering the impact on the family. The Court found a breach of Article 8 ECHR because of Luxembourg's insistence on adhering to its own conflicts laws. These had the effect that Luxembourg law was to apply to determine the validity of the adoption, based on the nationality of the adopter. The Court decided, however, that this meant that Luxembourg had failed to take sufficient account of the child's interests or the 'social reality of the situation'.⁶² The Court found that a legal status had been validly created abroad which corresponded to family life within the meaning of Article 8 of the ECHR.⁶³

Occasionally cited in support of a human right to recognition of same-sex relationships formed abroad, the case is somewhat lacking in authority. I suggest it cannot be taken as a precedent, given certain technicalities surrounding the facts. Whilst full adoption rights were not available to unmarried mothers, adoptions carried out in Peru, following the procedure used by Ms Wagner, had been given automatic effect in Luxembourg until a change in administrative practice in 1994. Ms Wagner's case was the first to be subject to judicial scrutiny following the change in rules.⁶⁴ She was therefore found by the Court to have a legitimate expectation that her case would be treated the same way as earlier ones.⁶⁵

This is an unfortunate distinguishing factor. It means that the case might well have been decided differently if it had been proven that she knew the adoption would be treated as defective in Luxembourg. I think the case is helpful, but it does not go as far as to constitute a new form of vested rights or recognition theory sufficient, for example, to require Belgian same-sex marriages to be recognised in Russia. The 'unique' legitimate expectation situation makes it distinguishable from other cases. I also agree with Kinsch that, even without this

⁶² *Wagner* (n 62) [132].

⁶³ *ibid*, [133].

⁶⁴ *ibid*, [106].

⁶⁵ *ibid*, [130].

aspect, the judgment does not serve as a rule that the law of the state of origin must prevail over the law of the state of recognition.⁶⁶

In determining the bearing this case has on a right to obtain recognition of a marriage or partnership, it obviously will not help evasive marriages. In other cases, for so long as reserving marriage to opposite-sex couples is not a breach of Article 12, the ‘legal status corresponding to a family life’ formed by celebrating a marriage abroad cannot be ignored, but the rights it will engender are uncertain. Only a determination that the relationship has a ‘legal status corresponding to marriage’ under Article 12 would require the host state to assimilate it to a marriage in its own legal system.

A more likely finding, recognising it as a form of ‘family life’ under Article 8, in conjunction with Article 14, will require the same treatment that the host state gives to its own forms of ‘non-marital family life’ such as civil partnerships or *de facto* couples. This might have implications for Lithuania, for example, which has civil partnerships similar to those Greece wanted to create, namely, a status reserved for opposite-sex couples.⁶⁷ It may now be required to recognise foreign same-sex partnerships on the same basis. Similarly Ireland and Finland may have to recognise the legal status created by a French PACS. In other countries foreign marriages may also have to be treated the same way as domestic same-sex partnerships if these, but not same-sex marriages, exist. This is unlikely to be a problem, as those countries with same-sex partnerships will (now) usually already recognise same-sex couples from elsewhere.

2. The role of ECHR arguments for EU citizens

Returning to the CJEU I now consider whether the human rights claim to cross-border recognition adds anything to the rights of EU citizens.⁶⁸ An example of how the ECHR might have an impact on interpretations of EU law can be seen in Advocate General Warner’s Opinion in the 1993 case *Konstantinidis v. Stadt Altensteig-Standesamt*.⁶⁹ The CJEU was asked

⁶⁶ Patrick Kinsch, ‘Recognition in the Forum of a Status Acquired Abroad: Private international Law Rules and European Human Rights Law’, in K Boele-Woelki et al (eds) *Convergence and Divergence in Private International Law, liber amicorum Kurt Siebr* (Schultheiss, Zurich, 2010), 259, 266.

⁶⁷ *Vallianatos*, (n 12).

⁶⁸ See generally Giacomo Biagioini, ‘On Recognition of Foreign Same-Sex Marriages and Partnerships’, Chapter 15 in D Gallo et al (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, Berlin 2014), 359.

⁶⁹ Case C-168/91 *Konstantinidis v. Stadt Altensteig-Standesamt* [1993] ECR I-1191.

whether there was a breach of the free movement provisions of the Treaty⁷⁰ when German rules on the transliteration of a Greek name into the Latin alphabet caused Christos Konstantinidis' name to be inaccurately transliterated as Konstadinidis or Hrestos Konstantinides in official documents.

AG Warner argued that Konstantinidis was not just entitled to national treatment, but also that European fundamental rights applied to limit any unjustified interference with his name as source of 'identity, dignity and self-esteem', notwithstanding the absence of any express right to a name and personal identity in the ECHR. Arguing in favour of 'the existence of a principle according to which the State must respect not only the physical well-being of the individual but also his dignity, moral integrity and sense of personal identity',⁷¹ the Advocate General added an additional argument based around European citizenship:

In my opinion, a Community national who goes to another member-State as a worker or self-employed person under Articles 48, 52 or 59 EEC is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say '*civis europeus sum*' and to invoke that status in order to oppose any violation of his fundamental rights.⁷²

This argument was not expressly taken up by the CJEU in its judgment. The Court instead started with a principle of equal treatment with nationals of the host state, but with a proviso that national rules could still breach Article 52 EEC where, as here, they caused a national of another Member State 'such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that article.'⁷³ This is because he was liable to be confused with others and the confusion created over his true identity would make it harder for him to exercise his profession in the host Member State. Hence, had Konstantinidis been German, he might well have been subject to certain rules on the construction and spelling of his name, but these were to be disapplied in his case as they unduly interfered with free

⁷⁰ On the facts, Article 52 EC, as Konstantinidis was exercising his rights of establishment to set up in business in another Member State.

⁷¹ *Konstantinidis* (n 61), Opinion, [39].

⁷² *ibid*, Opinion, [46].

⁷³ *ibid*, Judgment, [15].

movement. Thus the only difference between the judgment and the Opinion was the AG's additional emphasis on the human rights implications inherent in interfering with those rights, but the Opinion has rightly been seen as over-optimistic where it seeks to conflate citizenship rights with fundamental rights.⁷⁴

The problem, however, is equating free movement and citizenship rights, or even status and legitimate expectations, with human rights in the sense understood in the ECHR. As mentioned in Chapter 6, the right to a name as part of one's identity and private life was later taken up by Advocate-General Jacobs in the CJEU in *Standesamt v Stadt Niebüll*,⁷⁵ a position which provokes comparisons that being in a same-sex marriage or partnership is equally as fundamental to a person's identity and private life and no less worthy of protection.⁷⁶ But the CJEU, despite its broad control over obstacles in free movement rights outlined in Chapter 6, has not so far seen those obstacles as also constituting an interference in private life under Article 8 ECHR. Doing so might not have made much difference. The binding effect of the Charter since 1 December 2009, as already mentioned, gives extra impetus to discrimination claims on grounds of sexual orientation, outlawed under Article 21 of the Charter, whenever dealing with EU law, and will be of particular interest in dealing with free movement rights or the application of harmonised PIL Regulations. Other than that, however, the Convention and the caselaw of the ECtHR do not, currently, seem to add much to the arguments for cross-border recognition which already exist under the EU Treaties.

In short, the human rights aspects provide a useful toolkit for the future, but one whose tools need sharpening. I have described in Chapter 6 how EU free movement rights require strengthening under Article 21 TFEU by the CJEU before they can constitute a real driver to same-sex relationship recognition. In the same way same-sex marriage as a human right will also not become truly portable without further developments as to the interpretation of Articles 8 and 12 ECHR.

⁷⁴ Jan-Jaap Kuipers, 'Cartesio and Grunkin-Paul: Mutual recognition as a vested rights theory based on party autonomy in private law' (2009) *European Journal of Legal Studies*, vol. 2 (2), 66, 85.

⁷⁵ [2006] ECR I-3561, [55].

⁷⁶ Tim Corthaut, *EU Ordre Public* (2012 Kluwer), 404.

Conclusion

This thesis set out to prove the validity of a statement made by Commissioner Reding to the European Parliament in September 2010. Her assertion was that, if the status of a legally-recognised same-sex partnership or marriage has been acquired in one Member State, there exists a fundamental right under EU law to take that status to any other Member State.

This turns out to have been an ambitious claim. The EU has no competence to harmonise substantive family law, and attempts to provide for universal recognition in the Free Movement Directive were unsuccessful. Proposals for an Equal Treatment Directive have also not progressed. Chapter 3 showed how non-recognition is primarily due to the application of private international law, particularly when the forum state uses the connecting factor of nationality to apply domestic law to those of its nationals who have sought to form same-sex marriages and partnerships abroad. Chapter 5 showed how, despite caselaw to the contrary, the use of nationality as a connecting factor can fall within the scope of the Treaty, and that its application could amount to unjustifiable discrimination. However, this depends on the circumstances, such as whether the couple in question have now become resident elsewhere in the EU. Purely ‘evasive’ marriages and partnerships, even if recognised in their place of celebration and elsewhere, will not command recognition in the couple’s home state on this basis. Couples who lawfully marry or register a partnership in their state of origin will similarly not establish discrimination on grounds of nationality if a ‘non-recognition’ State accords them ‘national treatment’ but consequently fails to recognise their status. It is only where a jurisdiction judges the validity of a marriage by the nationality of its spouses (the classic conflicts approach previously used by France, for example) that discrimination occurs.

For same-sex couples not linked to the forum state through nationality or residence, the issue of non-recognition is more likely to arise through the application of a public policy exception. I showed in Chapter 4 how, despite appearances, recourse to public policy is frequently based on political will rather than doctrinal justification, and may lead to misuse. Outside the limited scope of various PIL harmonisation Regulations, EU competence to regulate the use of public policy in its PIL sense is not explicit. The proposals for the Matrimonial Property and Registered Partnership Property Regulations would provide new competences to control the misuse of public policy, including by incorporating general principles of EU Law and

protections of the Charter of Fundamental Rights, but, possibly for this reason, these proposals have yet to be adopted.

The fundamental right of portability of civil status therefore shows itself to be elusive. Chapter 6 showed how EU secondary legislation currently provides no such right outside of employment relationships where discrimination on grounds of sexual orientation is prohibited. Treaty interpretations concerning discrimination on grounds of sex or sexual orientation provide a potential solution, and whilst not successful in *Grant* they may well enjoy more success in future, particularly given developments in the ECtHR in *Schalk* and *Karner*. However, an explicit right to cross-border recognition is not easily identified.

CJEU cases concerning citizenship rights provide a more promising line of argument. The CJEU has been prepared to categorise certain conflicts rules, and public policy exceptions, as unjustifiable obstacles to free movement rights. Despite warnings to the contrary by AG Sharpston, analogies can be drawn so as to interpret these cases as requiring the recognition of civil status, as otherwise there is an impediment to free movement. This is particularly the case if the rights of the couple are considered together (as, incidentally, the ECtHR was prepared to accept in *Karner*) rather than simply the free movement rights of the couple as individuals. It would also be the case if *Carpenter* were widened so that financial and emotional inconvenience was recognised as an obstacle as much as physical separation.

It is possible, therefore, that the CJEU will confirm that cross-border recognition is required, at least under certain conditions. The US Supreme Court may well reach a similar conclusion, based on US constitutional protections, in the near future. Recognition in the EU, however, will need further clarifications from the CJEU before a requirement to do so is established, given the divergences of its existing caselaw. I conclude that a fundamental right to cross-border recognition of same-sex marriages and registered partnerships *does* exist, but, as is often the case with fundamental rights, it is one which is not yet fully acknowledged.⁷⁷

⁷⁷ John Eekelaar, *Family Law and Personal Life* (Chapter 1, n 1).

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