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RECOGNITION VS NON-RECOGNITION: THE PERILS OF CROSSING STATE LINES FOR SAME-SEX COUPLES

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Abstract: A clear choice of law rule should be applied to all same-sex relationships.² Interest analysis allows us to look at the public policy reasons behind why a choice of law rule may be appropriate. This technique can lead to unpredictable results. When coupled with depepage this allows for a more certain rules-based system. Each incapacity to marry should have its own appropriate choice of law rule. Additional public policy reasons apply to the choice of law appropriate to same-sex relationships. These include citizenship, equality and symbolism. Action at an EU level will lead to more consistent results. We recommend that the continued recognised relationship theory is suitable for same-sex relationships. This choice of law rule would apply the law where the couple are intending to live, or the law of the country where they have lived, if their relationship has been subsisting for a reasonable period of time.

Keywords: *Same-sex relationships, Choice of Law, Interest analysis, Decapage, European Union*

I. Introduction

There are a growing number of international families across Europe. Of the 2.2 million marriages which take place in the EU every year, 350,000 of these involve an international couple.³ The advent of same-sex marriage and civil partnership has added an extra

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² We use this term to refer to both same-sex marriages and civil partnerships.

³ The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (2009) 5, available at <http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJEuropeanFamilyLaw.pdf>

dimension to this issue given the wide diversity of responses across Europe to these new statuses.⁴ It is essential for a couple to know whether they are legally regarded as married.⁵

Marriage is often connected to citizenship and necessary for “full membership of society”.⁶ Other authors stress the public nature of marriage.⁷ Marriage has also been referred to as a fundamental right.⁸ Symbolically “marriage continues to be the privileged and preferred legal status in Europe and the United States”.⁹ Under EU free movement law, it is essential to fall within the definition of “family member” in order to access EU benefits and move with the EU citizen across Europe. Despite the need for clear rules in this area, the law as it currently stands stresses subsidiarity and allows individual countries in the EU to determine whether or not to recognise same-sex marriage.¹⁰ This restrictive approach may mean that a non-EU same-sex spouse or registered partner cannot relocate to the new EU state. It also represents a failure for the notion of the freedom of movement.¹¹ Non-recognition of a

⁴ Within Europe the following states recognise same-sex marriage; Belgium, Denmark, France, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, England and Wales, Scotland and Finland (effective from 2017). Another 12 European states offering civil partnership with varying degrees of protection.

⁵ In *Estin v Estin*, 334 U.S. 541, 553 (1948) Robert Jackson J commented that “one thing that people are entitled to know from the law is whether they are formally married.”

⁶ Richard Frimston, “Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law” (2006) *Private Client Business* 352.

⁷ See Erez Aloni, “Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage” (2010-2011) 18 *Duke Journal of Gender Law and Policy* 105.

⁸ Elizabeth Scott, “A World Without Marriage” (2007-2008) 41 *Family Law Quarterly* 537,541.

⁹ See footnote 7 at 110.

¹⁰ See Article 2(2) Directive 2004/38.

¹¹ Helen Stalford, “Regulating Family Life in Post-Amsterdam Europe” (2003) *European Law Review* 39.

foreign marriage, means that the right to same-sex marriage will be a “meagre right indeed”.¹²

In domestic law, there is wide disagreement about which choice of law rule should be employed in relation to the essential validity of a marriage (both heterosexual and same-sex).¹³ Many different theories compete for attention. Most commentators agree that the current law is “baffling”¹⁴ and in need of “reformulat[ion]...”¹⁵

This paper will determine what the most appropriate choice of law rule is for same-sex relationships through the assessment of those that already exist and public policy concerns. Having explored the law we will propose that the new more extensive rule of the continued recognised relationship theory should be adopted before considering why it is necessary to engage with the issue at an EU level.

II. Choice of Law Rules

Examination of the most commonly used choice of law rules allows us to consider which may be appropriate to apply to same-sex relationships. Whilst the Civil Partnership Act 2004 (CPA) sets out that essential validity is to be determined in accordance with the *lex loci*

¹² Barbara Cox, “Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are we still Married when we return home?” (1994) *Wisconsin Law Review* 1033,1040.

¹³ Recognition of a foreign marriage is broken down into two elements. Formal validity looks at the rules and requirements surrounding the actual ceremony, such as the requirement of witnesses and the vows that must be said. Essential validity on the other hand covers all aspects of a marriage which are not associated with formalities, the primary example being the capacity to marry.

¹⁴ Friedrich Juenger, “Conflict of Laws; A Critique of Interest Analysis” (1984) 32 *American Journal of Comparative Law* 1, 1 referring to Cardozo, *The Paradoxes of Legal Science* (Columbia University Press, 1928) 67.

¹⁵ Alan Reed, “Essential Validity of Marriage: The Application of Interest Analysis and Depepage to Anglo-American Choice of Law Rules” (2000) 20 *New York Law School Journal of International and Comparative Law* 387,450.

registrations¹⁶ the Marriage (Same-Sex Couples) Act 2013 (M(SSC)A) provides no such rules. The position is very much left open for debate, leaving couples uncertain as to which of the choice of law rules will win out. In this piece we recommend, for the sake of consistency, that the same choice of law theory is needed for all same-sex relationships.

i. Dual Domicile Theory and the Intended Matrimonial Home Theory

The two theories which have historically competed for the top spot when discussing the traditional treatment of heterosexual marriage are the dual domicile theory and the intended matrimonial home theory. The dual domicile theory¹⁷ is backward looking. If either of the parties' pre-nuptial domiciles would invalidate the marriage, the marriage is invalid. Alternatively the intended matrimonial home theory¹⁸ is based on the law of the husband's domicile unless, the couple intend to set up a matrimonial home in an alternative country. Where this intention is satisfied within a reasonable time, that law will prevail. The dual domicile theory seeks to protect the individual, whilst the intended matrimonial home theory seeks to protect the society of the country where the couple intend to live.

Despite these opposing aims it is evident that both theories receive considerable support¹⁹. The dual domicile theory is the one which the Law Commission proposes as most appropriate.²⁰ The advantages include; the potential to fulfil party expectations, allowing each party's country to be heard in terms of validity and that it is relatively easy to apply in

¹⁶ Similar to the *lex loci celebrationis* for heterosexual marriage. S.215(1) of the CPA states that formal validity and essential validity must still be satisfied in accordance with the relevant law which, is defined in s.212(2) as the place where the relationship is registered including its rules of private international law.

¹⁷ Albert Venn Dicey, *The Conflict of Laws* (8th edn, by J.H.C. Morris & Others, 1967) Rule 31 254-255.

¹⁸ Geoffrey Chevalier Cheshire, *Private International Law*, (7th edn, Oxford University Press, 1965) 227-228.

¹⁹ Cases such as *Re Paine* [1940] Ch. 46 and *Szechter v Szechter* [1971] P. 286 show support for the dual domicile theory, whilst support for the intended matrimonial home theory can be seen, albeit obiter in *Kenwood v Kenwood* [1951] P.124 and *Radwan v Radwan (No2)* [1973] Fam 35.

²⁰ Law Commission *Private International Law Choice of Law Rules* (Law Com No 89, 1985) para 3.36.

the prospective.²¹ Alternatively the intended matrimonial home theory considers the society that the marriage will impact upon, and may also uphold party expectations. In addition, as there is only one applicable law to apply, more marriages are held as valid.²²

Neither theory can however be applied universally as a result of their faults. The dual domicile theory may lead to more marriages being invalid due to the potential application of two different laws²³, it fails to consider the country in which the marriage will belong²⁴, and the concept of domicile itself has many challenges²⁵. Domicile may not always reflect the country to which the parties actually belong.²⁶ Such criticisms go to the very root of the theory as it is clear that domicile itself is in need of reform and has been for quite some time.²⁷

There are also many criticisms of the intended matrimonial home theory. Unless alternative intentions can be proven it is the law of the husband's domicile that applies. In the modern day this is recognised as sexist and "totally out of touch with modern etymologies of gender

²¹ Ibid at 93.

²² Ibid at 88-89.

²³ See footnote 15 at 395.

²⁴ Charles Taintor, "Marriage in the Conflict of Laws" (1955-1956) 9 *Vanderbilt Law Review* 607, 611-612.

²⁵ The law surrounding domicile itself is recognised as problematic by academicians; P B Carter, "Domicile: The Case For Radical reform in The United Kingdom" (1987) 36 *International and Comparative Law Quarterly* 713, Richard Fentiman, "Domicile Revisited" (1991) 50(3) *Cambridge Law Journal* 445 and by the Law Commission; Law Commission, *Private International Law the Law of Domicile* (Law Com No 88, 1985).

²⁶ Trevor C Hartley, "The Policy Basis of the English Conflict of Laws of Marriage" (1972) 53 *Modern Law Review* 571, 576.

²⁷ See for instance suggestions for reform dating back to 1954 and 1985; Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954) and Law Commission, *Private International Law the Law of Domicile* (Law Com No 88, 1985).

equality".²⁸ The theory is also problematic due to it being founded on the parties' particular intentions at the time of getting married.²⁹ It is unclear what would happen if the couple move again. It can also be argued that on occasion it is the parties' domiciliary law that has the most interest in being applied.³⁰ The exploration of these two theories shows that neither is without fault as a universal theory. Further alternatives are now considered.

ii. Competing Choice of Law Theories

Other competing choice of law rules includes: the most real and substantial connection test; the alternative reference test, domiciliary law of either party; or the lex loci. The most real and substantial connection test looks to the country that will be most affected by the marriage³¹, but in addition to that, also considers factors such as domicile and nationality. While there is support for the theory due to its more holistic approach³², the lack of definition of 'most real and substantial connection' causes criticism³³. The test fails to offer certainty and predictability, but would instead inevitably lead to the courtroom³⁴.

²⁸ See footnote 15 at 397.

²⁹ *Radwan v Radwan (No 2)* [1973] Fam 35.

³⁰ For example the domiciliary law may be trying to protect one of the parties, for instance as a result of their age.

³¹ Chris M.V. Clarkson and Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 359.

³² Which can be seen in cases such as *Vervaeke v Smith* [1983] 1 AC 145 and *Westminster City Council v C* [2009] Fam. 11. Academic support can also be seen in Richard Fentiman, "Activity in the Law of Status: Domicile, Marriage and the Law Commission" (1986) 6(3) *Oxford Journal of Legal Studies* 353.

³³ For instance see Michael Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (1994) 23 *Anglo-American Law Review* 32 and the Law Commission report; Law Commission *Private International Law Choice of Law Rules* (Law Com No 89, 1985) para 3.2.

³⁴ See footnote 20 at para 3.2.

The alternative reference test is based on applying either the dual domicile rule or the intended matrimonial home theory depending on which one would recognise the marriage. It allows the courts to select the rule that will result in the marriage being recognised therefore upholding the policy of the validity of marriage. Difficulties remain, the test is based on the court's ability to cherry pick in order to get the desired result and is for that reason difficult to promote. Similarly, applying the law of only one parties' domicile, in order to have the marriage deemed valid can only really be commended for its ability to uphold marriages³⁵. While recognising the importance domicile plays in marriage validity the theory casts aside the law which may cause a problem regardless of the motive behind the law, and has been criticised³⁶.

Finally, it is also important to consider the precedent of applying the lex loci that has already been set within same-sex relationships by the CPA. Although the lex loci offers certainty and continuity of the law for the interested parties,³⁷ it may also encourage forum shopping. If all that is required for same-sex couples to marry is a hop across the border it may lead to an increased enforcement of public policy rules. This could in turn lead to more limping marriages.³⁸ Greater application of public policy exceptions would counteract any potential certainty and continuity such a rule could offer.

The law in this area is clearly uncertain. While it is apparent that there are two main contenders, each of the theories has support and any one could be applied by the courts to same-sex relationships. No one rule is sophisticated enough to apply universally.³⁹ It is for

³⁵ See footnote 31 at 360.

³⁶ See footnote 20 at para 3.38.

³⁷ Martina Melcher, "(Mutual) Recognition of Registered Relationships Via EU Private International Law"(2013) (1) *Journal of Private International Law* 149, 161-162.

³⁸ A potential problem also recognised by Martina Melcher.

³⁹ P. St. J. Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (1985) 14 *Anglo-American Law Review* 225, 231.

that reason important to consider the ideas of interest analysis and depepage which we consider in the next section.

Interestingly amidst all of the ambiguity, it has been suggested by Stuart Davis that the absence of any direction in the M(SSC)A is a nod in favour of the dual domicile theory.⁴⁰ This stance is justified on the basis that same-sex marriages are then receiving the same treatment as heterosexual marriages.⁴¹ This logic is tentative. It has been recognised by judges for decades that the dual domicile theory is not always the most appropriate choice of law rule.⁴² This dissent from the dual domicile theory continued even after the Law Commission confirmed its preference.⁴³ It therefore appears rudimentary to declare its application as a continuation of the norm.⁴⁴ In fact, despite the Law Commission report, it is perfectly possible that any one of the theories previously outlined may be adopted by the courts. Developments within marriage validity have also continued to unfold since the Law Commission report. Theories surrounding interest analysis and depepage offer speculation on how marriage validity may move away from the concept of a universal choice of law rule.⁴⁵

⁴⁰ Stuart Davis, *Marriage (Same-Sex Couples) Bill Memorandum* (2013) 2 at para 3.3.

⁴¹ *Ibid.*

⁴² For instance *Radwan v Radwan (No2)* [1973] Fam 35 provides support for the intended matrimonial home theory and *Vervaeke v Smith* [1983] 1 AC 145 provides support for the most real and substantial connection test.

⁴³ Examples include *Westminster City Council v C* [2009] Fam. 11 and *Minister of Employment and Immigration v Norwall* (1990) 26 RFL (3d)95).

⁴⁴ This is further supported by the fact that many academics are now looking at the idea of depepage and a move away from a one rule fits all approach, as will be explored later.

⁴⁵ Michael Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (1994) 23 Anglo-American Law Review 32 and Alan Reed, see footnote 15.

iii. Choice of Law Rules Considered in EU Law

The concept of 'automatic recognition' is considered by the European Commission⁴⁶ in their assessment of how free movement rights could be improved through the recognition of civil status records. The Commission observe that the failure to recognise such records raises the alarming "question of quiet a different magnitude concerning not the actual documents themselves, but their effects".⁴⁷ Instead it is considered whether automatic recognition of civil status situations established in other member states could be a solution. Applying this rule to same-sex relationships would put mutual trust between Member States at the heart of the solution, and would provide the much needed certainty. It would reassure all same-sex couples that crossing state borders would not be a cause for concern in respect of recognition of their relationship; whilst also not requiring that new member state "to change its substantive law or modify its legal system".⁴⁸ A problem arises in that it may, like the application of the *lex loci* also bring with it risks of forum shopping and increased enforcement of public policy rules. The European Commission themselves recognise when considering automatic recognition more generally, that compensatory measures to prevent abuse of public order rules may be necessary, and more importantly state that "[t]his might prove to be more complicated in other civil status situations such as a marriage".⁴⁹

⁴⁶ COM(2010) 747, "Less Bureaucracy for Citizens Promoting Free Movement of Public Documents and the Recognition of the Effect of Civil Status Records" 14 December 2010.

⁴⁷ *Ibid* para 1 discussing Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (known as *Brussels IIbis*).

⁴⁸ *Ibid* para 4.3 discussing Council Regulation (EC) No 1250/2010 Concerning Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation.

⁴⁹ *Ibid*.

Alternate options also emerge in EU law. Rome III, although unsuccessful, was proposed to bring in choice of law rules on divorce⁵⁰ and was later established between some member states through enhanced cooperation in Council Regulation EU No 1259/2010. The regulation provided that the parties could choose the applicable law on divorce,⁵¹ or failing that, set down a checklist of choice of law rules which are to be taken in turn.⁵² The checklist provides that the first port of call would be where the parties have their common habitual residence, thus making habitual residence the primary default choice of law rule in the absence of a mutual agreement by the parties⁵³.

When considering the appropriateness of habitual residence as the applicable law, it is first important to note its autonomous nature. It is a notion without a consistent definition and thus still does not provide the unity sought in a set choice of law rule.⁵⁴ Habitual residence requires concurrence of physical residence and a mental status of having a settled purpose of remaining there.⁵⁵ The length of residence required to satisfy physical presence is difficult to determine⁵⁶, and the intention element may be satisfied by a stay for a fixed period of time, meaning a person resident for work purposes only, may still be deemed habitually

⁵⁰ COM (2006) 399 “Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters” 17 July 2006.

⁵¹ Chapter 2, Article 5.

⁵² Chapter 2, Article 8.

⁵³ Regulation (EU) No 650/2012 on dealing with succession also provides another example of where the default rule turns to the law of habitual residence.

⁵⁴ Aude Fiorini, “Rome III - Choice of Law in Divorce: Is the Europeanization of Family Law Going too Far?” (2008) 22(2) International Journal of Law, Policy and the Family 178.

⁵⁵ *Shah v Barnet London Borough Council* [1983] 2 AC 309, 344.

⁵⁶ For instance in *Re J (Abduction: Custody Rights)* [1990] 2 AC 562, 578 it was stated that it would not be achieved in a day “but an appreciable period of time”, and in *Marinos v Marinos* [2007] 2 FLR 1018 it was said that it could be measured in weeks not months, and in appropriate cases days.

resident. The concept is therefore, “unsuitable for general choice of law purposes as it generates a link with a country that may be tenuous”.⁵⁷

iv. Loophole created by the M(SSC)A

Another issue with the M(SSC)A is the loophole that has been created in the recognition of foreign same-sex marriages in England. Prior to the M(SSC)A, the CPA recognised foreign same-sex marriages as civil partnerships.⁵⁸ This recognition was achieved by specifying foreign same-sex marriage as a form of “overseas relationships”.⁵⁹ Whilst foreign same-sex marriages were downgraded to civil partnerships, they were at least recognised as long as the *lex loci* had been satisfied. This has been amended by the M(SSC)A.⁶⁰ Foreign same-sex marriages can no longer be recognised as civil partnerships under the CPA. Instead they would need to be recognised as a marriage in accordance with the M(SSC)A. While it may be seen as a positive that marriages are no longer downgraded⁶¹, the use of different choice of law rules between the Acts may create a gap in which some marriages fail to be recognised. If, as asserted by Davis, the applicable rule is that of dual domicile, the domiciliary laws of both parties would need to be satisfied, otherwise the marriage would receive no recognition at all.⁶²

⁵⁷ See footnote 31 at 341. This was a problem also recognised by the Law Commission, along with the fact that it is under developed (see footnote 20 at para 2.4).

⁵⁸ *Wilkinson v Kitzinger* [2007] EWHC 2022 (Fam).

⁵⁹ See ss 212(1)(a), 213 and Schedule 20 M(SSC)A.

⁶⁰ Schedule 2 part 3 s.5(2) M(SSC)A inserts s.213(1A) into the CPA.

⁶¹ Such a change in Status from same-sex marriage to civil partnership was often considered as a downgrade, in the case of *Wilkinson v Kitzinger* [2007] EWHC 2022 (Fam) where the couple argued, albeit unsuccessfully, that it was a violation of their rights not to have their relationship recognised in the capacity of marriage into which they had entered.

⁶² A problem that was also considered by Stuart Davis; see footnote 40 at 3-4.

III. Interest Analysis, Depepage and Public Policy Factors

For the reasons outlined above, the use of any of the aforementioned options as a universal choice of law rule is not appropriate⁶³ and fails to consider the underlying issues⁶⁴. Interest analysis enables us to look at the “purposes for which the law was created”.⁶⁵ It is the idea that the applicable law should be the one that has the most interest in being applied.⁶⁶ In the US interest analysis has been applied within contract and tort, however, it has also been suggested that it is appropriate to apply this to the incapacities of marriage.⁶⁷

i. Rules Based Depepage

A rules based system of depage balances the conflicting concerns of a need for predictability with that of flexibility.⁶⁸ Depepage is a system in which specific issues are governed by specially selected laws. In relation to marriage theorists have suggested looking at each incapacity to marry in turn.⁶⁹ Age, consanguinity and affinity, polygamy, consent and marriage after divorce are each examined. An appropriate choice of law is assigned by determining what the law in each of these areas is designed for. We consider here which choice of law rule should be applied to same-sex relationships. It is useful first of all to look at existing precedents as to which public policy factors have been deemed important.

⁶³ See footnote 45 at 32.

⁶⁴ See footnotes 14 and 15 at 390.

⁶⁵ Barbara Cox, “Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are we still Married when we return home?” (1994) *Wisconsin Law Review* 1033, 1090 referring to Gregory Smith, “Choice of Law in the United States” (1987) 38 *Hastings Law Journal* 1041, 1047.

⁶⁶ Interest analysis was founded by Brainerd Currie see Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press, 1963).

⁶⁷ See footnote 29 at 51.

⁶⁸ See footnote 15.

⁶⁹ See footnote 45.

ii. Public Policy Factors

Some types of public policy factors apply in relation to all the incapacities of marriage, such as: the importance of validating a marriage⁷⁰; party expectations; simplicity to allow non-lawyers such as marriage registrars, immigration officials and social security staff to administer the law⁷¹; and uniformity of decisions⁷². Other public policy issues may relate to certain incapacities such as protection of the parties in relation to age or consent⁷³, and “sociological, religious and moral grounds”⁷⁴ in respect of consanguinity⁷⁵ and affinity⁷⁶.

iii. Polygamous Marriages

It is worth while looking in more detail at how polygamous marriages have been treated with regards to choice of law. This is because the justifications for prohibiting such unions are often similar to reasons given by courts and governments who prohibit same-sex relationships. The prohibitions on polygamous marriage, it is argued are supported by religion and society as a whole.⁷⁷ In practice, however in relation to polygamous marriage English courts have “exercise[d] common sense, good manners and a reasonable

⁷⁰ See Ibid and footnote 12.

⁷¹ See footnote 45 at, 47.

⁷² See footnote 12.

⁷³ See footnote 45 at 53.

⁷⁴ See footnote 15 at 430.

⁷⁵ Where there is a blood relationship between the parties; for example uncle and niece.

⁷⁶ Where the parties to the marriage are already related through marriage for example; step-mother and step-son.

⁷⁷ See *eg Hyde v Hyde* (1856) L.R. 1 P & D 130, 133 per Lord Penzance “[m]arriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others.”

tolerance”.⁷⁸ Although in England we would not allow a polygamous marriage to take place, the law has now developed to recognise foreign polygamous relationships unless there are strong reasons against doing so.⁷⁹ Arguably this can be justified on the basis that while the object of English law is to protect monogamous marriage it does not mean that there is any “justification for invalidating a polygamous marriage”.⁸⁰ The choice of law theory in relation to polygamous marriages is therefore the intended matrimonial home.⁸¹ In practice case law has extended the choice of law beyond that of the intended matrimonial home. A polygamous marriage conducted abroad continues to be recognised in England even though the couple now reside here⁸². Smart explains that whilst the intended domicile as “a connecting factor serves its purpose well,... in exceptional cases it may have to yield to other circumstances”.⁸³ The English treatment of validation of polygamous marriages by means of an extended intended matrimonial home test, makes an interesting precedent of a country recognising a form of marriage which cannot be conducted in their own jurisdiction. In this paper we make the case for an extended choice of law in relation to same-sex relationships.

IV. Choice of Law in Relation to Same-Sex Relationships

The main focus of this piece is to determine which choice of law provision should be applied in relation to same-sex relationships. Any law preventing same-sex relationships is usually justified on the grounds of protection of society⁸⁴ religion⁸⁵ and public morality. In

⁷⁸ *Cheni v Cheni* [1965] P. 85, 99 per Simon J.

⁷⁹ *Mohammed v Knott* [1969] 1 Q.B. 1.

⁸⁰ See footnote 39 at 234.

⁸¹ See footnote 29. This is supported by Michael Davie, see footnote 45 and Alan Reed, see footnote 15.

⁸² *Hussain v Hussain* [1982] 3 W.L.R. 679

⁸³ See footnote 39 at 237 referring to *Ibid* per Ormrod LJ.

⁸⁴ See footnote 12.

determining the choice of law to be applied to same-sex relationships, it is argued that a more extensive suggested choice of law rule (the continued recognised relationships theory) be applied. The applicable rule to be applied would be the law where the couple are intending to live, or the law of the country where they have lived, if their relationship has been subsisting for a reasonable period of time. There is nothing in this rule which requires individual countries to allow same-sex marriage to take place within their own jurisdiction. This more extensive choice of law rule can be justified because of concerns surrounding upholding marriage validity, consideration of the view of the parties to the marriage and the example of how polygamous marriages have been treated. We also argue that additional public policy issues surrounding citizenship, symbolism and equality apply when considering same-sex relationships.

Marriage is connected closely with citizenship as a marriage involves a “relationship not simply between two people but also with government”.⁸⁶ Many authors have commented upon the constitutional character of marriage.⁸⁷ Angela Harris views marriage as a “right central to citizenship”⁸⁸. International conventions⁸⁹ protect the right to marriage and leading judgments recognise the connection between citizenship and marriage.⁹⁰ It is

⁸⁵ In *Bellinger v Bellinger* [2003] UKHL 21 per Lord Nicholls described “[m]arriage ... as an institution, or a relationship deeply embedded in the religious and social culture of this country.”

⁸⁶ Mary Dunlap, “The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties” (1991) 1 *Law and Sexuality Review Lesbian and Gay Legal Issues* 63.

⁸⁷ See eg Nicholas Bamforth, “Sexuality and Citizenship in Contemporary Constitutional Argument” (2012) 10(2) *International Journal of Constitutional Law* 477; Jeffrey Weeks, “The Sexual Citizen” (1998) 15 *Theory, Culture and Society* 38 and David Bradley (2003) “Comparative Law, Family Law and Common Law” (2003) 33(1) *Oxford Journal of Legal Studies* 127.

⁸⁸ See eg Angela Harris, “Loving Before and After the Law” (2007-2008) 76 *Fordham International Law Review* 2821, 2822.

⁸⁹ See eg Article 12 of the European Convention on Human Rights.

⁹⁰ See eg *Goodridge v Department of Public Health* [2004] 440 Mass. 309 per Marshall C.J. 322.

argued that where same-sex couples' relationships are not recognised they are being denied "full citizenship"⁹¹ and regarded as "partial citizens, in so far as they are excluded from certain of these rights".⁹² At an EU level citizenship has been promoted, as the EU has advanced beyond the protection of economic rights alone.⁹³

Marriage also has a symbolic status, and is viewed by many as the "privileged and preferred legal status in Europe and the United States"⁹⁴. To be denied recognition of this status is to be denoted to a second-class status⁹⁵. The strength of the symbolism argument, can also be seen in same-sex couples continuing to fight for same-sex marriage, even after being given most of the legal rights of civil partnership.⁹⁶

Equality arguments are vital in relation to success of the recognition of same-sex marriage.⁹⁷ In many international cases where arguments in relation to same-sex marriage have been

⁹¹ See footnote 88 at 2822.

⁹² Nicholas Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument"(2012) 10(2) *International Journal of Constitutional Law* 477, 483 referring to Diane Richardson, (1998) 32 *Sexuality and Citizenship* 83, 88.

⁹³ See eg Helen Stalford, "Concepts of Family under EU Law – Lessons from the ECHR" (2000) 16(3) *International Journal of Law Policy and the Family* 410.

⁹⁴ See footnote 7 at 110.

⁹⁵ Michael Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings" (2011) 97 *Virginia Law Review* 1267, 1275.

⁹⁶ France, England and Wales and Denmark are all examples of jurisdictions who went on to introduce same-sex marriage legislation even after the prior introduction of civil partnership.

⁹⁷ See eg Kathryn Marshall "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (2010) 2 *William and Mary Policy Review* 194.

made successfully, equality has often been the deciding argument.⁹⁸ This can be seen from the latest important cases from the US Supreme Court⁹⁹. Recognition of same-sex marriage is seen by many as the latest in the chapter of historical debates regarding marriage laws, following the abolition of miscegenation and Nazi anti-Jewish legislation.¹⁰⁰ Some authors would even argue that public policy factors should be weighed, and that some factors such as equality concerns should be given greater weight on the scales.¹⁰¹ What can be concluded however is that the important public policy concerns of citizenship, symbolism and equality do have to be born in mind when determining which choice of law should be applied to same-sex relationships. We argue that the more extensive continued recognition relationship theory is appropriate.

V. European Union

The imperative right to free movement across the EU and the need to avoid “limping marriages” advocates in favour of EU involvement. Problems are caused by “divergences between Member States”¹⁰² and this is particularly acute in the area of same-sex relationships. Many Member States now have some form of legal same-sex relationship, but

⁹⁸ See eg *Goodridge v Department of Public Health*, 798 N.E. 2d 941 (Mass 2003) as discussed by Jonah Crane “Legislative and Constitutional Responses to *Goodridge v Department of Public Health*” (2003-2004) 7 New York University Journal of Legislation and Public Policy 465.

⁹⁹ *USA v Windsor*, 570 U.S. (2013) (Docket No. 12-307) and the US Supreme Court decision of 6 October 2014 denying certiorari in appeals from 5 states. See also *Obergefell v Hodges*, 576 U.S. (2015).

¹⁰⁰ See eg David Richards, “Carl F. Stychin Book Review: *Governing Sexuality: the Changing Politics of Citizenship and Law Reform*: Hart Publishing: Oxford and Portland, Oregon” (2004) 2(3) *International Journal of Constitutional Law* 727; Elizabeth Scott, “A World Without Marriage” (2007-2008) 41 *Family Law Quarterly* 537; and Michael Dorf, see footnote 95.

¹⁰¹ See eg Barbara Cox, “Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are we still Married When We Return Home?” (1994) *Wisconsin Law Review* 1033 referring to Arthur von Mehren and Donald Trautman, *The Law of Multistate Problems*(Little, Brown and Co 1965) 342-375 and Arthur von Mehren, “Recent Trends in Choice-of Methodology” (1975) 60 *Cornell Law Review* 927.

¹⁰² Gordon Moir and Paul Beaumont, “Brussels Convention II: a New private international law instrument in Family matters for the European Union or the European Community” (1995) 20(3) *European Law Review* 268, 269.

there is wide diversity on how this has been introduced.¹⁰³ It remains controversial as to whether the EU should be involved. Whilst some writers stress what can be learnt from other regimes¹⁰⁴ others argue that international comparisons are not appropriate in family law.¹⁰⁵ This is because “[f]amily law is so largely moulded by racial or religious and political considerations”.¹⁰⁶ Political reality also has to be faced. It remains controversial as to whether Member States will support further expansion of free movement laws.¹⁰⁷

i. EU Emphasis on Subsidiarity

The EU recognises the strength of these arguments and continues to emphasise subsidiarity.¹⁰⁸ The EU has to act within the bounds of its competency and cannot exceed

¹⁰³ Following the recent ECHR case of *Oliari and Others v Italy*, Application Nos 18766/11 and 36030/11, Judgement of 21 July 2015 ECHR contracting states (including all EU Member States) will have to introduce some form of registered partnership/civil union, but contracting states still have discretion as to what form this will take and there is no requirement to introduce same-sex marriage and therefore diversity will remain in the rights given to same-sex couples.

¹⁰⁴ See eg David Richards, see footnote 100 and William Eskridge Jr., *Equality Practices, Civil Unions and the Future of Gay Rights* (Routledge, 2002).

¹⁰⁵ See eg Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Clarendon Press, 1998) and David Bradley, “Comparative Law, Family Law and Common Law” (2003) 33(1) *Oxford Journal of Legal Studies* 127.

¹⁰⁶ David Bradley, “Comparative Law, Family Law and Common Law” (2003) 33(1) *Oxford Journal of Legal Studies* 127 referring to HC Gutteridge, *Comparative Law* (Cambridge University Press, 1946) 31-32.

¹⁰⁷ See for discussion Kate Spencer, “Same-Sex Couples and the Right to Marry: European Perspectives” (2010) 6(1) *Cambridge Student Law Review* 155. This problem is particularly controversial following the re-election of the Conservative government in 2015.

¹⁰⁸ The Commentary on art 9 of the Charter of Fundamental Rights of the European Union provides that “There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples.”

this.¹⁰⁹ Both the EU and the ECHR have followed a policy of subsidiarity or margin of appreciation in this area. These policies allow a “degree of discretion” afforded to Member States.¹¹⁰ Many authors believe that the margin of appreciation is necessary in international law,¹¹¹ but arguably in “majority-minority conflicts... democratic decision-making might inadequately safeguard the interests of the minority groups...”¹¹² The ECtHR position can be seen from *Schalk and Kopf v Austria* where the right to same-sex marriage was refused due to a lack of consensus between contracting states.¹¹³ This allowed individual states to continue to determine whether to recognise same-sex marriage.¹¹⁴ The EU Citizenship Directive¹¹⁵ continues to have a narrow interpretation of family members¹¹⁶, and whilst spouses are included within the category of family members¹¹⁷ this does not include same-sex spouse. While the Citizenship Directive 2004/38 expressly includes registered partners as family members under Article 2(2), this is only “if the legislation of the host Member State treats registered partnerships as equivalent to marriage”.¹¹⁸ This is a clear restriction

¹⁰⁹ See Art 5(2) Treaty on the European Union and for discussion see footnote 11.

¹¹⁰ For discussion see Emily Wada, “A Pretty Picture. The Margin of Appreciation and the Right to Assisted Suicide” (2005) 27 *Loyola Los Angeles International and Comparative Law Review* 275.

¹¹¹ See eg Yuval Shany, “Toward a General Margin of Appreciation Doctrine in International Law?” (2005) 16(5) *European Journal of International Law* 907 and Eyal Benvenisiti, “Margin of Appreciation, Consensus and Universal Standards” (1998-1999) 31 *New York University Journal of International Law and Policy* 843.

¹¹² Yuval Shany, *ibid* at 920-921.

¹¹³ *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at paragraph 105.

¹¹⁴ Following *Oliari and Others v Italy* despite developments regarding civil partnerships there is still no requirement to allow same-sex marriages, see footnote 103.

¹¹⁵ Directive 2004/38.

¹¹⁶ For discussion see footnotes 93 and 107.

¹¹⁷ See Directive 2004/38 art 2(2)(a). Determined by *Reed v Netherlands* (Case C-59/85) to be genuine marital relationships only.

¹¹⁸ Directive 2004/38 art 2(2)(b).

on the ability of a non EU same-sex spouse or partner to relocate to another EU country, if that country does not recognise such relationships.¹¹⁹

It is argued here that the EU is the appropriate place within which to bring forward the proposed choice of law rule. This is because of the already existing and growing area of European family law. The EU as compared to other sources of European family law allows for greater co-ordinated action. There is also a necessity of the EU to act due to the imperative of its free movement provisions.

ii. European Family Law

The area where the EU has been most active in terms of family law includes that of enforcement of matrimonial judgments on divorce between different EU countries.¹²⁰ Other developments include those concerning succession laws.¹²¹ The Commission on European Family Law (CEFL) was also established in 2001, with funding in part from the EU to consider laws on the basis of voluntary harmonisation. There have also been proposals concerning recognition of public documents¹²² and on the free movement of citizens¹²³ but these have

¹¹⁹ While this position will improve with the new requirement of Member States to introduce a form of civil partnership, with no requirement to introduce same-sex marriage restrictions on freedom of movement will remain.

¹²⁰ See *eg* Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters, September 26, 1968; Council Regulation (EC) No 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of both Spouses of 29 May 2000 (known as Brussels II); and Brussels IIbis (see footnote 47).

¹²¹ Regulation (EU) NO. 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession will apply from 17 August 2015, to the succession of persons who die on or after that date. Denmark, Ireland and the United Kingdom did not take part in the adoption of the instrument.

¹²² See footnote 46.

¹²³ COM (2013) 228, "Proposal for a Regulation on Promoting the Free Movement of Citizens", 24 April 2013.

not been introduced. Any further EU conventions will need to be carefully negotiated, due to the current political climate and criticisms about the way Brussels II and successors were negotiated.¹²⁴ However, there are clear precedents for EU involvement in family law.

iii. EU Free Movement Imperative

There is also the imperative of the EU to act due to its free movement provisions.¹²⁵ The reality is that many European citizens will exercise their right of free movement to take up work in other countries, or marry nationals from other countries.¹²⁶ European integration is therefore “no longer purely economic”.¹²⁷ Some commentators view harmonisation of private international laws as essential in order to guarantee free movement.¹²⁸ As all EU states are also members of the ECHR, this means they all have to comply with the ECHR judgements. Following *Oliari v Italy*, the ECHR has introduced civil partnership/ union across contracting states. The growing closeness between the EU and the ECHR is another reason why the EU is best placed to act in this area.

VI. Anticipated Criticisms of the Continued Recognised Relationship Theory

The anticipated criticisms of the continued recognised relationship theory are; that it is going too far too fast, that it would be difficult to operate in practice due to difficulties in defining what is meant by the relationship having been subsisting for a reasonable period of time, and finally its application to varying types of civil partnerships across the EU. Turning to the first point, there is a concern that recognising a same-sex relationship in a country

¹²⁴ For discussion see Peter McElevy, “The Communitarization of Divorce Rules: What Impact for English and Scottish Law?” (2004) 53(3) *International and Comparative Law Quarterly* 605.

¹²⁵ See footnote 11.

¹²⁶ See *Ibid* and footnote 107.

¹²⁷ Alegria Borrás, Official Journal C221, “Explanatory Report on the Brussels II Convention ... on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters”, 16 July 1998, paragraph 1.

¹²⁸ See footnote 124.

which does not allow domestic same-sex couples to marry could lead to a backlash in public opinion. There are examples of backlashes occurring in this area, for instance, in the US the first states began recognising same-sex marriage in 2003,¹²⁹ and within six months, eleven states amended their constitutions to prohibit same-sex marriage.¹³⁰

Fears of a backlash would however be minimized as progress would be made on an incremental basis. This involves making change on a step by step approach, allowing public opinion to change and become de-sensitized.¹³¹ Nothing in our theory requires EU states to introduce domestic legislation to conduct same-sex relationships, and is therefore incremental in nature.

Turning to the second issue, the continued recognised relationship theory requires a new Member State to recognise the relationship when it has been subsisting for a reasonable period of time. Without a definition of 'reasonable period of time' the theory is open to criticism. However, this is something that would be negotiated between EU Member States. We would not advise setting a particular time scale, such as a fixed number of years, as there is no way of making such a determination. Instead, we would recommend that reasonable time be based upon a series of factors including; duration of civil status, duration of relationship prior to obtaining the status in question, whether there are children involved, and type of property and joint commitments entered into. This test should not prove difficult, as in many instances it will be obvious to the Member States involved that the relationship is one of a solid and durable nature, and it should be remembered that the EU already uses the durable relationship test for heterosexual co-habitees.¹³² Similarly this

¹²⁹ *Goodridge v Department of Public Health*, 798 N.E. 2d 941 (Mass 2003)

¹³⁰ For further discussion see Robert Verchick, "Same-Sex and the City" (2005) 37 *Urban Law* 191.

¹³¹ William Eskridge Jr, *Equality Practices, Civil Unions and the Future of Gay Rights* (Routledge, 2002) 119. See also footnote 97 at 199-200.

¹³² In EU law, co-habitees are not directly included as family members under Citizenship Directive 2004/38 art 3(2). They have to prove a "durable relationship duly attested".

criticism could be applied to many of the other choice of law rules¹³³. The list of factors would at least provide clarity in many of the straight forward cases.

Finally, criticism could be directed at the theory when considering its application to civil partnership type relationships as opposed to same-sex marriages. A marriage is a universally recognised status and thus would not produce difficulties when expecting a fellow Member State to recognise it. Civil unions come in many different forms around the EU, and thus there must be some consideration of whether the new Member State would be required to recognise the version attached to the couple from their previous Member State, or their own version. This is important as it could lead to an upgrade or downgrade in the relationship status and the legal consequences that come with it.¹³⁴ It is our suggestion that the general rule should be to apply the status which is most similar to that which the couple are in.¹³⁵ Alternatively, if that is not possible, the relationship should be upgraded.

VII. Conclusion

The law surrounding same-sex relationships and the appropriate choice of law rule is evidently unclear. Despite the need for clear choice of law rules, as a result of subsidiarity, countries in the EU are able to determine for themselves to what extent to recognise same-sex relationships. It is evident that no one theory was appropriate for universal application. Instead, it is our suggestion that a rules based approach to interest analysis would provide a more appropriate route. By applying depeceage a rule could be chosen to apply to all same-sex relationships. Our recommendation is that this rule should be the continued recognised relationship theory, which provides that the applicable law is that of the country where the

¹³³ For instance, the intended matrimonial home and the most real and substantial connection test both use undefined terms.

¹³⁴ For instance if a couple from France with a French Pacte Civil De Solidarite were to move to England and have their relationship recognised as an English civil partnership their status and legal obligations would be upgraded.

¹³⁵ This idea of equivalence was explored by Hillel. Y. Levin, 'Resolving Interstate Conflicts Over Same-Sex Non-Marriage' (2011) 63 Florida Law Review 47 in respect of same-sex relationships.

couple intend to reside, or if their relationship has been subsisting for a reasonable period of time, it should be the law of the country where they previously lived.

For the purposes of free movement, and the prevention of limping marriages it is essential that this matter is dealt with at an EU level. With the high volume of migration and marriages involving international couples,¹³⁶ it is not difficult to see the benefits that would be gained from the harmonisation of this matter.¹³⁷ It is argued here that the EU is the appropriate place within which to bring forward the proposed choice of law rule. This is because of the already existing and growing area of European family law. There is also a necessity of the EU to act due to the imperative of its free movement provisions.

The continued recognised relationship is a choice of law rule which could lead to more extensive protections of same-sex relationships. This more extensive choice of law rule can be justified on the basis of the public policy concerns outlined. While we have also raised what we anticipate to be the criticisms of the theory, we have dealt with each one in turn, and recognise that there is no perfect solution. The aim was not to achieve the unachievable, but to suggest the best possible answer.

¹³⁶ See footnote 3.

¹³⁷ For instance certainty and predictability can only be achieved through community action, as was identified in relation to divorce by Aude Fiorini, see footnote 54 at 185.