SAME-SEX RELATIONSHIPS, CHOICE OF LAW AND THE CONTINUED RECOGNISED RELATIONSHIP THEORY

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Abstract: A clear choice of law rule should be applied to all same-sex relationships in terms of essential validity. Interest analysis allows us to look at the public policy reasons behind why a choice of law rule may be appropriate or inapposite. This technique can lead to unpredictable results. When coupled with depecage, a delineated splitting of competing policy inculcations, this allows for a more certain rules-based system. Each incapacity to marry should have its own appropriate choice of law rule. This article argues that additional public policy reasons apply to the choice of law appropriate to same-sex relationships. These include citizenship, equality and symbolism, and together require a more extended choice of law rule. It is recommended that a new theory, the continued recognised relationship theory, is suitable for same-sex relationships. This choice of law rule would apply the law where the couple is 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. This article advocates that action at the European Union level will lead to more consistent results in this sphere.

Keywords: same-sex relationships; choice of law; interest analysis; depecage; European Union

I. Introduction

International marriages, comprising a marriage between individuals of different nationalities, are a large proportion of the nuptials which take place in the European Union (EU) every year. Of the annual 2.2 million EU marriages, 350,000 involve an international couple.1 “[R]elational mobility”2 results in a greater variety of family types. There is a still greater variety of family types given the advent of same-sex

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marriage and civil partnership. Different states across Europe have had a diversity of legal responses across Europe to these new statuses. This article responds to this relatively new type of relationship and suggests how it should be treated by private international law. It is essential for a couple to know whether they are legally married. The need to settle this question is underlined by the “unparalleled importance of marriage”. Many international cases stress this factorisation. In the 2015 US Supreme Court judgment of Obergefell v Hodges, which licensed same-sex marriage across all states of the US, the majority opinion stressed that the right to marry was “fundamental”. The reasons why marriage was given this status included an emphasis upon “individual autonomy”, the unique support which marriage gives to a two-person union, the safeguarding which marriage gives to children and the fact that marriage is regarded as a “keystone of …social order”.

Marriage is often connected to citizenship and is necessary for “full membership of society”. Some authors stress the public nature of marriage. As well as being considered a fundamental right marriage also has strong symbolical importance. For many in the Western world it is seen as the “gold standard” or having a privileged status. Gay rights groups were initially reluctant to embrace marriage as a goal. However, after fully understanding the rights associated with

3 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). Following Oliari all other contracting states to the European Convention on Human Rights (ECHR) will have to recognise some form of civil partnership.


7 See Obergefell v Hodges (n.6).

8 Ibid., 11

9 Ibid., 12.

10 Ibid., 13.

11 Ibid., 14.

12 Ibid., 16.

13 A full discussion as to what is meant by the concept of citizenship in this context is included in Section IV(A) of this article.


17 Wilkinson v Kitzinger [2007] 1 FLR 295, [6].

18 See Aloni, “Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage” (n.15), p.110.

marriage and its symbolical status, these groups have engaged with marriage as a desirable status to be achieved. Marriage does undoubtedly provide the most expansive and generous recognition of rights.\(^\text{20}\) Under EU free movement law, it is essential to fall within the definition of “family member” in order to access EU benefits and move across the EU as citizens. There is a need for clear rules in this area. Despite this, the law currently stresses subsidiarity and allows individual countries in the EU to determine whether or not to recognise same-sex marriage.\(^\text{21}\) Following the recent European Court of Human Rights (ECtHR) decision of *Oliari v Italy* all contracting states will need to introduce some form of protection for same-sex couples to enter into a registered partnership or civil union.\(^\text{22}\) There continues to be no right to same-sex marriage. This will affect all members of the EU who are also all contracting members to the European Convention on Human Rights (ECHR). Yet there is no requirement as to what type of status need be enacted, leading to a wide variation in the rights granted to same-sex partners. This restrictive approach may mean that a non-EU same-sex spouse or registered partner cannot relocate to the new EU state, or will not have access to all the rights granted in their state of origin. It also represents a failure of the application of the freedom of movement.\(^\text{23}\) Non-recognition of a foreign marriage means that the right to same-sex marriage is a “meagre right indeed”.\(^\text{24}\)

Where several different jurisdictions are involved in a case it is necessary to determine which country’s law applies. The laws of several different countries may be relevant where the case involves a couple of different nationalities or where the couple relocates. The choice of law rule is the mechanism which selects the appropriate law to be applied. In domestic law, there is disagreement about which choice of law rule should be employed in relation to the validity of a marriage (both heterosexual and same-sex). Recognition of a foreign marriage is broken down into two elements: formal validity and essential validity. Formal validity on the one hand looks at the rules and requirements surrounding the actual ceremony, such as the requirement of witnesses and the vows that must be undertaken. This is usually uncontroversial and depends upon the *lex loci celebratioinis*.\(^\text{25}\) 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. Here, there is much controversy and different theories compete for attention. These are examined in

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\(^{21}\) See Directive 2004/38 art.2(2).

\(^{22}\) (Application Nos 18766/11 and 36030/11, 21 July 2015).


\(^{25}\) Place of celebration.
the next section. Most commentators agree that the current law is "baffling" and in need of "reformulation ..." Perhaps the necessity of dealing with same-sex relationships can be the "new momentum required to re-examine the subject ...".

This article considers different choice of law rules and recommends that none of the commonly suggested choice of law rules can be applied universally. The focus of this article is to determine which choice of law rule is appropriate to same-sex relationships. Interest analysis coupled with a system of rules-based depecage allows us to give each incapacity to marry an appropriate choice of law rule. It is necessary to consider further public policy arguments in relation to same-sex relationships. We consider arguments based on citizenship, equality and symbolism which call for a more extended choice of law rule for same-sex relationships. We recommend a novel choice of law for same-sex relationships, the continued recognised relationships theory, which is then explained. The applicable choice of law rule should be that of the country where the couple intends to reside, or if their marriage has been subsisting for a reasonable period of time, it should be the law of the country where they previously lived. Consideration is also given as to why it is necessary to engage with this issue at an EU level before finally examining some anticipated objections of our recommendations.

II. Choice of Law Rules

Examination of the most commonly used choice of law rules allows us to consider which is 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

28 We use this term to refer to both same-sex marriages and all types of civil partnerships and registered unions.
29 See Reed "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.450.
30 Interest analysis is the idea that the most applicable law is the one that has the most interest in being applied after consideration of public policy reasons and was originally founded in the US and applied on a case-by-case basis. Interest analysis was founded by Brainerd Currie. See Brainerd Currie, Selected Essays on the Conflict of Laws (1963) 62 Michigan Law Review.
31 Depecage moves away from having a completely ad hoc-based approach. Here, rules-based depecage is used to determine that each incapacity to marry can be governed by its own choice of law rule.
32 Interest analysis on a depecage basis is something that has been explored and promoted for other incapacities within marriage validity by Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27) and Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27).
with the *lex loci registrationis*,\textsuperscript{33} the Marriage (Same-Sex Couples) Act 2013 (M(SSC)A) provides no such rules. The position is left open for debate, leaving couples uncertain as to which of the choice of law rules will prevail. In this article, we recommend, for the sake of consistency, that the same choice of law theory is needed for all types of same-sex relationships.

\section*{A. Dual domicile theory and the intended matrimonial home theory}

The two primary contending theories within essential validity of heterosexual marriage are the dual domicile theory and the intended matrimonial home theory.\textsuperscript{34} The dual domicile theory\textsuperscript{35} is backward looking; if either of the parties’ pre-nuptial domiciles would invalidate the marriage, then the consequential impact is abjuration of recognition. Essentially, the rule is based on treating each party’s domiciliary law with equal respect and recognition, but, the intended matrimonial home theory\textsuperscript{36} turns to the law of the husband’s domicile unless, the couple intend to set up a matrimonial home in another country. Where this intention is satisfied within a reasonable time, that law will prevail. The dual domicile theory seeks to protect the individual. 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 common law\textsuperscript{37} and academic\textsuperscript{38} support. The dual domicile theory is propounded by the Law Commission as the most appropriate policy construct.\textsuperscript{39} The advantages include: the potential to fulfil party expectations; allowing each party’s country to be considered in terms of validity and that it is relatively easy to apply prospectively.\textsuperscript{40} Conversely, the intended matrimonial home theory considers the society that the marriage will impact upon and may also uphold party expectations.\textsuperscript{41} In addition, as

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\item[33] Similar to the *lex loci celebrationis* for heterosexual marriage, s.215(1) of the CPA sets out 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.
\item[37] 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 (No 2)* [1973] Fam 35.
\item[38] Alan Reed recognises the advantages of both the dual domicile theory and the intended matrimonial home theory whilst setting out that neither works as a universal test in Reed, “Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules” (n.27).
\item[40] For instance, in *Radwan v Radwan (No 2)* (n.37) where the couple had been living together as man and wife for nearly 20 years and the application of the intended matrimonial home theory upheld their expectations.
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only one law need be applied, more marriages are likely to be held valid. Therefore, this satisfies the policy aim attached to upholding the validity of marriage.42

Regardless of the aforementioned positives, neither theory can be applied universally. The dual domicile theory leads to more marriages being found invalid, which is caused by potentially having to satisfy the law of two countries.43 Another demerit is that the theory fails to consider the law of the country to which the marriage will belong.44 Finally, a major criticism is the foundation of the theory on the concept of domicile, which has many of its own challenges.45 Domicile may not always reflect the country to which the parties belong,46 as a result of the difficulties in obtaining a domicile of choice. 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 some time.47

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 equality”.48 It fails to reflect developments within the law, such as the abolition of the married women’s domicile of dependency rule.49 This rule meant that prior to its abolition, upon marriage a woman was stripped of her personal domicile and was instead deemed to take that of her husband. This would only change in accordance with his domicile much like the domicile of a minor. As the theory is founded on the parties’ particular intentions at the time of marriage this can also be problematic,50 application in the prospective may be difficult particularly if intentions are unclear, and it is uncertain what would happen if the couple move. It can also be argued that on occasion it is the parties’ domiciliary law that has the most interest in being applied,51 which may stem from an interest to protect the particular party involved from factors such as duress, undue influence

49 It was abolished by s.1(1) of the Domicile and Matrimonial Proceedings Act 1973.
50 Radwan v Radwan (No 2) (n.37).
51 For example the domiciliary law may be trying to protect one of the parties, for instance, as a result of their age.
or exploitation. The exploration of these two theories shows that neither should constitute a universal theory. Further alternatives are now considered.

B. Competing choice of law theories

Another option is the most real and substantial connection test. In a similar vein to the intended matrimonial home theory it focuses on the country which will be most affected by the marriage as opposed to the people.52 The primary distinction between the two theories is the way in which this country is selected. There is no longer a sole focus on the intended matrimonial home. Instead, this test draws on this categorisation along with other factors including domicile and nationality. Whilst this may create a well-rounded determination of what law should apply and attract support for the theory,53 it lacks certainty and predictability, and can thus be criticised.54 Criticism comes as a result of the lack of definition and clarity of the term “most real and substantial connection”. Its application would inevitably lead to the courtroom for matters to be assessed on a case-by-case basis.55 Consequently, this theory is not the most practical of options.

The alternative reference test is another option. The 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 as valid and therefore upholds the policy of the validity of marriage. However, 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. In essence, it endorses both the dual domicile theory and the intended matrimonial home theory, but is then able to cast aside either theory if it would result in the invalidity of marriage, which appears contrary to principle.56 It is also a time-consuming method. It may require the courts to consider up to three different laws before selecting the appropriate route.

The elective dual domicile test would apply the domiciliary law of either party.57 If either party’s domiciliary law holds the marriage valid, the law relating to the other party becomes irrelevant and the marriage is upheld. Aside from validating

55 *Ibid*.
marriages, there is little else to be commended.\(^{58}\) It is a controversial option, as it recognises the importance that domiciliary law plays in marriage validity, but rejects the law that may cause a problem, regardless of the motive behind the law. Not only does this appear to fly in the face of applying the law of the domicile, but it could also lead to limping marriages\(^ {59}\) and the ability to evade domiciliary laws. It is understandable that this theory has been subject to criticism.\(^ {60}\)

Finally, it is also important to consider the precedent already set within same-sex relationships. The CPA dictates that the *lex loci celebrationis*\(^ {61}\) is the applicable law for essential validity, making it a viable option for same-sex marriage. Its application may bring certainty and continuity of the law for the interested parties,\(^ {62}\) but it may also encourage forum shopping. If all that is required for same-sex couples to marry is to travel across the border, it may lead to an increased enforcement of public policy rules by the countries in which the parties are domiciled and resident, on the basis that attempts are being made to evade their laws. This could in turn produce more limping marriages.\(^ {63}\) Greater application of public policy exceptions would counteract any potential certainty and continuity such a rule could offer.

The law in this area is uncertain. While it is apparent that the dual domicile theory and the intended matrimonial home theory are the two main contenders, any one of the aforementioned theories could be applied by the courts to same-sex relationships. No one rule is sufficiently sophisticated enough to apply universally.\(^ {64}\) Exceptions also exist, allowing the courts in certain circumstances to deviate from these rules in order to produce the desired result.\(^ {65}\) It is, therefore, important to consider the ideas of interest analysis\(^ {66}\) and depecage\(^ {67}\) which we consider in the next section.

Interestingly, amidst all of the ambiguity of the applicable choice of law rule, 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.\(^ {68}\) Davis’ justification for this suggestion is that it will ensure that same-sex marriages are dealt with in the same

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59 For example, where a marriage is recognised in one country but not another, which, in the case of the elective dual domicile test could easily occur in relation to the parties and the country in which they are domiciled.
61 See works referred to in note 25.
63 A potential problem that was also recognised by Martina Melcher.
64 See eg Smart, “Interest Analysis, False Conflicts, and the Essential Validity of Marriage” (n.5), p.231 in which he discusses that the failings of the theories stem from trying to apply them universally, when instead it is a degree of flexibility that is required.
65 These exceptions are the rule in *Sottomayor v De Barros* (1879) 5 PD 94, the rule where England is the *lex loci* and public policy grounds.
66 See works referred to in note 30.
67 See works referred to in note 31.
68 Stuart Davis, Marriage (Same-Sex Couples) Bill Memorandum (2013) 2, para 3.3.
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vein as heterosexual marriages.\(^6^9\) This justification is tentative, given it has been recognised by judges for decades that the dual domicile theory is not always the most appropriate choice of law rule.\(^7^0\) This dissent from the dual domicile theory continued even after the Law Commission confirmed it as their preferred template.\(^7^1\) It, therefore, appears rudimentary to declare its application as a mere continuation of the norm.\(^7^2\) In fact, despite the Law Commission report, it is possible that any of the theories previously outlined may be adopted by the courts. In view of their application in other marriage validity cases, it is not difficult to comprehend any of the theories being applied by the judiciary. Indeed, theories surrounding interest analysis and depecage also show how developments, since the Law Commission Report, may replace a universal choice of law rule.\(^7^3\)

C. Choice of law rules considered in EU law

The concept of “automatic recognition” is considered by the European Commission\(^7^4\) 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 quite a different magnitude concerning not the actual documents themselves, but their effects”.\(^7^5\) In an attempt to find a pathway through the problem, they consider whether automatic recognition of civil status situations established in other member states could be an appropriate solution. Applying this rule to same-sex relationships would put mutual trust between Member States at the heart of the solution and would provide much needed certainty. It would reassure same-sex couples that crossing state borders would not be a cause for concern in respect of recognition of their relationship; nor would it require the other Member State “to change its substantive law or modify its legal system”.\(^7^6\) 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

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69 Ibid.
70 For instance, Kenwood v Kenwood (n.37) and Radwan v Radwan (No 2) (n.37) provide support for the intended matrimonial home theory and Vervaeke v Smith (n.53) provides support for the most real and substantial connection test.
71 Examples include Westminster City Council v C (n.53) and Minister of Employment and Immigration v Narwal [1990] 2 FC 385.
72 This is further supported by the fact that many academics are now looking at the idea of depecage and a move away from a one rule fits all approach; see for instance, Davie, “The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws” (n.27), Reed, “Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules” (n.27) and Smart, “Interest Analysis, False Conflicts, and the Essential Validity of Marriage” (n.5).
73 See Davie, “The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws” (n.27) and Reed, Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules” (n.27).
75 Ibid., para.1.
76 Ibid., para.4.3.
policy exceptions, which, prevent the other member states having to recognise the relationship. The European Commission 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”.

Alternate options also emerge in EU law. In the area of enforcement of matrimonial judgments, Rome III was proposed to bring in choice of law rules. The earlier convention (Brussels II bis) only provided rules on jurisdiction. Rome III was not agreed by all Member States. It was rejected by many, including the United Kingdom (UK), and was for that reason unsuccessful. Instead some Member States proceeded to establish enhanced cooperation between contracting parties only. This was introduced by Council Regulation EU No 1259/2010. The regulation provided that the parties could choose the applicable law on divorce, or failing that, set down a checklist of choice of law rules, which determines the most appropriate law when following the order in which they are set out in the checklist. Chapter 2, art.8, provides that the first choice 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 parties.

When considering the appropriateness of habitual residence as the applicable law, it is important to note its autonomous nature. It is an amorphous notion and therefore does not provide the unity required in a set choice of law rule. Habitual residence requires concurrence of physical residence and a mental status of having a settled purpose of remaining. The length of residence required to satisfy physical presence is difficult to determine. It is based on the facts of the individual case and, therefore, “the subjective element tends to lead to unpredictability”. The intention

77 Ibid.
80 The countries involved with the enhanced cooperation are: Spain, Italy, Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal.
81 Chapter 2, art.5.
82 Chapter 2, art.8.
83 As per Baroness Hale of Richmond, “habitual residence may have a different meaning in different statutes according to their context and purpose”. (Mark v Mark [2006] 1 AC 98, 105 [15]).
86 For instance, in Re J (Minor) (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”. In Re F (Minor) (Child Abduction) [1992] 1 FLR 548 it was suggested that a month could be 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. However, in A v A (Child Abduction) (Habitual Residence) [1993] 2 FLR 225 eight months was considered insufficient.
element on the other hand, may appear easier to satisfy, as it need only be for a fixed period of time, as opposed to indefinitely.88 This in itself is problematic as it does not take into account the connection a person may or may not have with the country. A person resident for work purposes could still be deemed habitually resident there, which would in turn make that countries’ law applicable. The concept is, therefore, “unsuitable for general choice of law purposes as it generates a link with a country that may be tenuous”.89

Similarly, habitual residence is also used in regulation (EU) No 650/2012 on dealing with succession and should be explored further as it also provides an exception to this rule, where there is a country to which the accused was manifestly more closely connected at the time of death.90 This provides no further certainty. What would be considered a manifestly close connection? Like the most real and substantial connection test, it is likely to be assessed on a case-by-case basis and would lack certainty and predictability. On the assessment of the laws created above, it would seem that EU law brings no greater choice of law rules into the mix, as they too have problems surrounding certainty and predictability. The problem of determining the most appropriate choice of law rule remains.

D. 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. Prior to the M(SSC)A, the CPA recognised foreign same-sex marriages as civil partnerships.91 This recognition was achieved by specifying foreign same-sex marriage as a form of “overseas relationships”.92 Whilst foreign same-sex marriages were downgraded to civil partnerships, they were recognised as long as the lex loci had been satisfied. This has been amended by the M(SSC)A.93 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. One positive aspect is that foreign marriages are no longer downgraded to civil partnerships94

89 See Clarkson and Hill, The Conflict of Laws (n.52), p.341. This problem was also recognised by the Law Commission, along with the fact that it is under developed (Law Commission Report, Private International Law: The Law of Domicile (n.45) para 2.4).
90 Chapter III, art.21.
91 See Wilkinson v Kitzinger (n.17).
92 See ss.212(1)(a), 213 and Sch.20 M(SSC)A.
93 Schedule 2 Pt.3 s.5(2) of M(SSC)A inserts s.213(1A) into the CPA which states: “But, for the purposes of the application of this Act to England and Wales, marriage is not an overseas relationship”.
94 Such a change in Status from same-sex marriage to civil partnership was often considered as a downgrade in Wilkinson v Kitzinger (n.17) 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.
which were perceived by many as a lesser status.\textsuperscript{95} The CPA and M(SSC)A apply different choice of law rules, creating a gap in the law that engulf some marriages. This loophole within the law means that a foreign same-sex marriage may not be recognised. Under the CPA, a foreign same-sex marriage would have been recognised as a civil partnership, if it satisfied the \textit{lex loci}. Now the foreign same-sex marriage would need to be recognised as a marriage under the M(SSC)A. It is the subject of debate as to which choice of law theory would apply. If it is the dual domicile theory as Davis asserts, the domiciliary laws of both parties would need to be satisfied, otherwise the marriage would not be recognised.\textsuperscript{96} Although s.10(1)(b) of M(SSC)A allows a discretion for the courts to recognise a marriage, Davis argues that they may not go so far.\textsuperscript{97} This could mean that the foreign same-sex marriage is not recognised. Amidst the emotional stress and anguish such a scenario would impact upon some couples,\textsuperscript{98} significant legal implications may also follow. Such implications may arise from couples not fully understanding their legal position until a matter arises and it has become too late, for instance, upon the death of one of the parties when matters of inheritance and intestacy arise. This is another example of why clarity is needed. The same choice of law should be applied to all types of same-sex relationships in order to avoid such problems. The difficulty to be faced is that of selecting the appropriate choice of law rule.

\textbf{III. Interest Analysis, Depecage and Public Policy Factors}

Theorists, such as Michael Davie, suggest that the very fact that none of the choice of law theories have assumed dominance of essential validity of marriage, suggests that there are flaws with each of the competing theories.\textsuperscript{99} Using any of them as a universal choice of law rule is inappropriate.\textsuperscript{100} Having one inflexible choice of law rule would mean that rules are selected “without regard to the underlying specific

\textsuperscript{95} This concept of it being considered as a lesser status, a form of second-class citizenship is an area that many academics have considered, see for instance, Kerry Abrams, “Citizen Spouse” (2013) 101(2) California Law Review, 407; Michael Dorf, “Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings” (2011) 97 Virginia Law Review 1267 and Angela Harris, “Loving Before and After the Law” (2007–2008) 76 Fordham International Law Review 2821.

\textsuperscript{96} A problem that was also considered by Stuart Davis in his memorandum, which he explored through setting out a scenario which could potentially unfold; see Davis, Marriage (Same-Sex Couples) Bill Memorandum (n.68), pp.3-4.

\textsuperscript{97} \textit{Ibid.}, p.4.

\textsuperscript{98} See \textit{Wilkinson v Kitzinger} (n.17).


\textsuperscript{100} See Smart, “Interest Analysis, False Conflicts, and the Essential Validity of Marriage” (n.5), p.231.
issue at hand”. In other words, one inflexible choice of law rule means that the rule is applied without looking at the public policy interests behind the rule, which may of course be crucial to the outcome of the case itself. Interest analysis seeks to remedy this by enabling us to look at the “purposes for which the law was created”. It is the idea that the most applicable law is the one that has the most interest in being applied, based upon public policy considerations. Interest analysis was originally founded in the US for tort law selectivity and applied on a case-by-case basis.

Interest analysis is seen as beneficial as it analyses the public policy reasons behind the choice of law rule, allowing courts to select the rule that results in the fairest overall result to the case. Friedrich Juenger explains that, in choosing the applicable law, the court is “determining a controversy”, and needs to understand how the choice made will reflect the overall outcome of the case. In the US interest analysis has been used in the fields of contract and tort. However, it is has not been commonly applied to family law. It has been suggested that it is appropriate to apply this to the incapacities of marriage. Supporters of interest analysis argue that it produces fair solutions in each of the different cases it is used in because of its flexibility. Richard Fentiman outlines the importance of having a test which can respond to the needs of particular cases. This is demonstrated by a case where the commonly used choice of law rules provide no consistently accepted answers. An example is a couple who have separate domiciles and no intended matrimonial home, or a couple who move around Europe for work reasons. The fact that courts have not been able to respond to these problems in a uniform fashion demonstrates the need for flexibility in a test. Interest analysis, in contrast to endorsing just one choice of law rule which may be unsuitable to certain cases, has sufficient flexibility as the public policy reasons behind each choice of law rule can be examined.

103 See Currie, Selected Essays on the Conflict of Laws (n.30).
106 See Radwan v Radwan (No 2) (n.37), Cummings-Bruce J 51.
107 See Juenger, “Conflict of Laws: A Critique of Interest Analysis” (n.26), p.48 states that this is what supporters of interest analysis claim, although he strongly disagrees with interest analysis arguing that: “[I]n Currie’s methodology supplies a subterfuge to promote the very result-orientation that he deplored” (p.49).
109 Ibid.
110 Ibid.
Criticisms of interest analysis remain. Critics argue that if applied alone it could lead to confusion, lack of consistency and limited predictability. The US experience of interest analysis in the field of contract and tort is illustrative, as a separate analysis was potentially required for each given set of facts. It has therefore been criticised as resulting in an “ad hoc case-by-case approach”. Interest analysis can therefore lead to confusion. US judges acknowledge the lack of consistency. Other writers have also commented upon difficulties with certainty and being unable to predict the conclusion of a case, where each case is essentially determined by its particular factual circumstances. Critics of the US experience therefore conclude that other jurisdictions should not follow the same approach, especially in the field of marriage where it is so necessary to know how each case will be treated. A further criticism of interest analysis is that it can result in a balance towards the forum determining the case. These criticisms show that interest analysis alone cannot be a solution. Instead a system of rules-based depecage balances the competing interests of flexibility and certainty.

A. Rules-based depecage

Depecage applies interest analysis not on a case-by-case basis, but on an issue-by-issue basis. When applied to the incapacities to marry, each of the incapacities to marry would be governed by its own choice of law rule. The advantages of interest analysis are therefore maintained as the public policy reasons remain crucial to the choice of law rule. At the same time there is certainty as to the result to be achieved as each incapacity to marry has its own firm choice of law rule. Critics argue that this further complicates an already “complex methodology” by further “issue splitting”, but we argue that this approach offers the right...
balance between the competing concerns. Reed suggests that a rules-based theory should avoid “excessive judicial particularistic intuitionism”. Theorists have suggested looking at each incapacity to marry in turn. 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 in terms of appropriate utilisation. We consider here which choice of law rule should be applied to same-sex relationships. It is useful first to look at existing precedents as to which public policy factors have been deemed important.

B. Public policy factors

When considering which public policy factors would be relevant to apply to the choice of law for same-sex relationships, it should first of all be pointed out that some types of public policy factors apply in relation to all the incapacities to marry. The parties to a marriage have a legitimate expectation that they have entered into a valid marriage. For this reason, several authors comment on the importance of validating a marriage. A marriage should therefore not be easily invalidated. Simplicity is also essential as non-lawyers, such as marriage registrars, immigration officers and social security staff are involved with important tasks concerning the validity of a marriage. Another important issue, which is of particular relevance to the EU is to have uniformity internationally as to the validity of a marriage. The parties to the marriage should also be protected. This can be shown from the purpose of a minimum age restriction or where there are concerns about a lack of consent as a result of some fraud, duress or mistake. Objections to different types of marriage based on “sociological, religious and moral grounds” can also be relevant. These can be seen from the rules prohibiting consanguinity and

123 See Ibid. and Cox, “Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?” (n.24).
126 Eg Davie, “The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws” (n.27), p.54 stated that in relation to lack of consent that the “purpose behind the law will generally be to protect the person form the consequences of their misapprehension or weakness”.
128 Where there is a blood relationship between the parties, for example uncle and niece.
In relation to consanguinity there is another relevant concern about preventing marriage between those who are too closely related, in order to prevent the increased risk of the birth of disabled children.

**C. Polygamous marriages**

When selecting a choice of law rule for same-sex relationships, a review of how polygamous marriages have been treated by the courts is particularly interesting. 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 prohibition on polygamous marriage, it is argued, is supported by religion and society as a whole.\(^{130}\) Despite this line of argument, these have not been the determining factors as to how polygamous marriages are treated by English courts. Simon J in *Cheni v Cheni* explained that “common sense” and a “reasonable tolerance”\(^{131}\) were also relevant. The prohibition on a polygamous marriage under English law remains in place. However, the law has now developed to recognise a polygamous marriage conducted in a foreign jurisdiction unless there are strong reasons against doing so.\(^{132}\) 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”.\(^{133}\) In taking a tolerant approach that English courts respect the traditions of other countries rather than imposing their own view as to what constitutes a valid marriage. This can be demonstrated from the polygamous marriage which was under consideration in *Hussain v Hussain*.\(^{134}\) The husband was a domiciled Englishman and the wife was domiciled in Pakistan. Ormrod LJ recognised the validity of the marriage. The reasons for his decision included concerns about “repercussions on the Muslim community” and the fact that we are now “an increasingly pluralistic society”.\(^{135}\)

Several authorities state that the choice of law theory in relation to polygamous marriages is that of the intended matrimonial home of the couple.\(^{136}\) In practice, case law\(^{137}\) has extended the choice of law beyond that of the intended matrimonial

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129 Where the parties to the marriage are already related through marriage, for example step-mother and step-son.
130 See eg in *Hyde v Hyde* (1865–1869) LR 1 P & D 130, Lord Penzance described “[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”.
135 Ibid., 32 (Ormrod LJ).
136 See *Radwan v Radwan (No 2)* (n.37). This is supported by Davie, “The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws” (n.27) and Reed, “Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules” (n.27).
137 See *Hussain v Hussain* (n.134).
Same-Sex Relationships and the Choice of Law Rule

home. This means that a polygamous marriage conducted abroad is recognised in England even though the couple now reside here. 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”.\(^{138}\) English courts therefore do not apply a simple intended matrimonial home test to polygamous marriages. Instead they also consider other factors as well and apply a tolerant approach to how polygamous marriages are treated. This leads to the validation of polygamous marriages conducted abroad, even where the couple are residing in this jurisdiction. The English courts are applying in practice an extended intended matrimonial home test. This makes an interesting precedent of a country recognising a form of marriage which cannot be conducted in their own jurisdiction. In this article 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 article 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 society,\(^{139}\) religion\(^{140}\) and public morality. In determining the choice of law to be applied to same-sex relationships, we suggest a novel and more extensive suggested choice of law rule which we term the continued recognised relationship theory. 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. This goes beyond the intended matrimonial home test as the intended place of domicile is not the only relevant factor; instead consideration is also given to where the couple have already resided. Equally, the dual domicile theory is not being utilised as we consider that past factors are not the only relevant ones; the couples’ future intentions also being equally valid. 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 apply when


\(^{139}\) See eg Cox, “Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?” (n.24) and Brian Bix, “Choice of Law and Marriage: A Proposal” (2002–2003) 36 Family Law Quarterly 255.

\(^{140}\) 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, 225 argues that “[r] eligiosity is also an ‘exceptionally strong determinant’ of opposition to gay marriage”. In *Bellinger v Bellinger* [2003] 2 AC 467 Lord Nicholls described “[m]arriage … as an institution, or a relationship deeply embedded in the religious and social culture of this country”.
considering same-sex relationships, which all argue in favour of a more extended choice of law rule. In turn, we will discuss each of the public policy concerns of citizenship, symbolism and equality. Although these arguments are often most appropriate to recognition of same-sex marriage, for the sake of consistency we argue that the same choice of law should be applied to all same-sex relationships, including civil partnerships.

A. Citizenship

Citizenship is one of the public policy concerns which argue strongly in favour of a more extensive choice of law rule in relation to same-sex couples. It is important to understand what is meant by citizenship in this context. There are clear connections between citizenship and equality. All citizens who have the status are regarded as equals.\textsuperscript{141} Equal citizenship involves inclusion, enfranchisement and equity and justice.\textsuperscript{142} “Sexual citizenship” has been recognised by a number of authors, who see the right to enter into marriage for same-sex couples as having a “constitutional character”.\textsuperscript{143} Marriage involves not only the personal relationship between the two individuals involved but also puts the relationship on a public footing. This is because of the number of public rights it involves and it “participates in the public order” concerned.\textsuperscript{144} In turn because of the public nature of marriage this has constitutional importance. The right to marriage is given protection by international conventions\textsuperscript{145} and leading cases,\textsuperscript{146} and many countries have legalised same-sex marriage.\textsuperscript{147} Same-sex couples who cannot access the status of marriage will not

\begin{itemize}
  \item \textsuperscript{143} Ibid., p.478 referring to Brenda Cossman, Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging (Stanford: Stanford University Press, 2007) p.27.
  \item \textsuperscript{145} See eg art.12 of the European Convention on Human Rights which states 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.” Another example is art.23(2) of the UN Covenant on Civil and Political Rights which states that “the right of men and women of marriageable age to marry and to found a family shall be recognized”.
  \item \textsuperscript{146} See eg Goodridge v Department of Public Health (n.6) and Loving v Virginia (n.6).
have the full level of constitutional protections and can therefore be regarded as partial citizens only.\textsuperscript{148}

This article argues for a solution with regards to having a uniform choice of law for same-sex relationships at an EU level. The EU has embraced the concept of citizenship. This can be seen from the extensive rights granted to citizens under the Citizenship Directive 2004/38. For example, citizens and family members of citizens are given extensive rights of residence,\textsuperscript{149} access to Member State’s social assistance scheme\textsuperscript{150} and equality in relation to employment\textsuperscript{151} and self-employment.\textsuperscript{152} Alison O’Neil argues that the EU’s free movement provisions entail the right of same-sex couples to move around Europe.\textsuperscript{153} If an EU citizens’ family cannot move along with the EU citizen, it is going to deter and may prevent an EU citizen moving entirely. Citizenship is therefore a strong public policy factor in favour of having a more extensive choice of law rule.

**B. Symbolic status of marriage**

Marriage also has a symbolic status. Zvi Triger argues that marriage has been used as a weapon against gays.\textsuperscript{154} Marriage is viewed by many as the preferred status which gives many legal privileges in countries across Europe as well as the United States.\textsuperscript{155} To be denied recognition of this status is to be demoted to a second-class status. Michael Dorf discusses the “symbolic impact” that results.\textsuperscript{156} 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 many of the legal rights of civil partnership. France, England and Wales and Denmark are all examples of jurisdictions that went on to introduce same-sex marriage legislation even after the prior introduction of civil partnership. This was despite the fact that in England civil partnerships were given almost equivalent legal protections to that of married

\begin{itemize}
\item $^{149}$ Citizenship Directive 2004/38 art.14(1).
\item $^{150}$ Ibid., art.14(3).
\item $^{151}$ Ibid., art.24.
\item $^{152}$ Ibid., art.23.
\item $^{156}$ See Dorf, “Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings” (n.95), p.1275.
\end{itemize}
couples. Symbolism is therefore another strong public policy argument which favours a more extensive choice of law rule.

C. Equality arguments

Equality arguments are vital in relation to success of the recognition of same-sex marriage. In many international cases where arguments in relation to same-sex marriage have been made successfully, equality has often been the deciding argument. This can be seen from the latest cases in the US Supreme Court as well as leading decisions from Canada and South Africa. 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. Other marriage reforms which demonstrate the changing nature of marriage concern the reversal of laws which did not allow women to own property during marriage and recognition of transsexuals in their new sex. Some authors argue that public policy factors should be weighed, and that some factors such as equality concerns should be given greater weight on the scales.

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158 See eg Goodridge v Department of Public Health (n.6) 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. See also Obergefell v Hodges (n.6).

159 United States v Windsor, 570 US ___, 133 S Ct 786 (2013) and the US Supreme Court decision of 6 October 2014 denying certiorari in appeals from five states. The cases were Bogan v Baskin (Indiana) No 14-277 (7th Cir); Walker v Wolf (Wisconsin) No 14-178 (7th Cir); Herbert v Kitchen (Utah) No 14-124 (10th Cir); McQuigg v Bostic (Virginia) No 14-251 (4th Cir); Rainey v Bostic (Virginia) No 14-153 (4th Cir); Schaefer v Bostic (Virginia) No 14-225 (4th Cir) and Smith v Bishop (Oklahoma) No 14-136 (10th Cir).


161 Minister of Home Affairs v Fourie [2006] (1) SA 524 (CC).


Cox is one such author. She considers that equality should be given greater weight on the scale and that there should be recognition of same-sex marriage because this would end “age-old discrimination and prejudice and misunderstanding”. It also demonstrates the importance of equality as a public policy factor tending towards a more extensive choice of law rule. This argument has received much criticism with Scott Fruehwald arguing that there are no “substantively neutral” or “objective criteria” to weigh the competing public policy concerns. As this article is proposing that the choice of law should be determined at an EU level, there is an interesting point to make about how these public policy issues may be weighted. The EU is committed to join the ECHR. The ECHR has long had a policy of weighing competing arguments. Human rights arguments are given greater weight than those of commercial interests, for example. An argument could therefore be made that equality-based human rights concerns should be given greater weight than other competing public policy arguments. This argument has been given a considerable boost by the July 2015 decision of the ECHR in Oliari v Italy. All ECHR contracting states have to introduce either civil partnership/registered partnership although it remains open to their discretion as to the exact form this will take. There is no requirement to introduce same-sex marriage where the ECHR continues to be bound by the margin of appreciation (as will be explored further in the next section), currently allowing Member States discretion on this policy. 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 recognised relationship theory is appropriate. The next section looks further at why it is necessary to tackle this matter at an EU level.

166 See Cox, “Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?” (n.24), p.1033.
168 EU states make up 28 of the Council of Europe’s 47 member states. Following the Lisbon Treaty the EU has also agreed to accede to the ECHR. Treaty on European Union (TEU) art.6(2) provides that “The Union shall access to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.
169 This is known as the doctrine of proportionality. See Steve Foster, Human Rights and Civil Liberties (Cambridge: Pearson, 3rd ed., 2011) 65 who explains that “Restrictions should be strictly proportionate to the legitimate aim being pursued and the authorities must show that the restriction in question does not go beyond what is strictly required to achieve that purpose.”
170 For example, in the area of freedom of expression, the ECHR has given less protection to commercial free speech. Eg in Hachette Filipacchi Associates v France (2009) 49 EHRR 23 there was no violation of art.10 when the applicant companies were prosecuted for advertising cigarettes contrary to French law. In contrast, press free speech is given much greater protection as being essential to democracy. See Sunday Times v United Kingdom (1979–80) 2 EHRR 245.
171 See Oliari v Italy (n.22).
V. European Union

The 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”, and this is particularly acute in the area of same-sex relationships. Many Member States now have some legal form of same-sex relationship, but there is wide diversity on how this has been introduced. Even following Oliari v Italy this will not change as Member States will be able to determine what form of same-sex relationship they introduce.

It remains controversial as to whether the EU should be involved. Some authors stress what can be learnt from other regimes, but others argue that international comparisons are not appropriate in family law. This is because of the heavy influence which religious and other racial and political considerations have had on the shaping of family law. There are legitimate concerns that a single European approach would result in unnecessary homogeneity. Political reality also has to be faced. It remains controversial as to whether Member States will support further expansion of free movement laws.

173 See works referred to in note 59.
175 See works referred to in note 3. For discussion, see also Kate Spencer, “Same-Sex Couples and the Right to Marry: European Perspectives” (2010) 6(1) Cambridge Student Law Review 155.
176 See Oliari v Italy (n.22).
181 See for discussion, Spencer, “Same-Sex Couples and the Right to Marry: European Perspectives” (n.175). This problem is particularly controversial following the re-election of the Conservative government in 2015.
A. EU emphasis on subsidiarity

The EU recognises the strength of these arguments and continues to emphasise subsidiarity. The EU has to act within and cannot exceed the bounds of its competency. Both the EU and the ECtHR have followed a policy of subsidiarity or margin of appreciation in this area. Although the ECtHR has now recognised the right of same-sex couples to some form of civil partnership, or registered partnership, these policies allow a “degree of discretion” afforded to Member States who can continue to determine the extent of rights given to same-sex couples. There is no requirement to enact same-sex marriage. This was refused in Schalk and Kopf v Austria where the right to same-sex marriage was denied due to a lack of consensus between contracting states. The EU’s traditional position which determined that gender discrimination did not cover sexual orientation has been reformed, but the EU Citizenship Directive continues to have a narrow interpretation of family members. Spouses are included within the category of family members, but this does not include same-sex spouse. The term is gender-neutral and some argue that it should include same-sex partners, yet it remains

182 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.” Also art.2(2) of Directive 2004/38 provides that “family member means (a) spouse, (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State”.

183 Article 5(2) of the Treaty on European Union provides that the Union shall act “only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. For discussion, see Stalford, “Regulating Family Life in Post-Amsterdam Europe” (n.23).

184 See Oliari v Italy (n.22).


186 Schalk and Kopf v Austria (n.172), [105].

187 Grant v South-West Trains Ltd [1998] 1 CMLR 993. See also the domestic decision of R v Ministry of Defence, ex p Smith [1996] QB 517 which applied the same interpretation of the EU directive. See also Advocate-General v MacDonald 2003 SC (HL) 35; Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920 decided under the then existing Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment.


189 For discussion, see Stalford, “Regulating Family Life in Post-Amsterdam Europe” (n.23) and Spencer, “Same-Sex Couples and the Right to Marry: European Perspectives” (n.175).

190 See Directive 2004/38 art.2(2)(a). Determined by Netherlands v Reed [1987] 2 CMLR 448 to be genuine marital relationships only.

clear that the EU system of subsidiarity does not require member states to recognise same-sex marriages conducted in other states.192 The principle of subsidiarity is made explicit in relation to registered partnership where Citizenship Directive 2004/38 expressly includes registered partners as family members under art.2(2), but this is only “if the legislation of the host Member State treats registered partnerships as equivalent to marriage”.193 As all EU Member States are also contracting members of the ECHR they will be bound by the ruling of Oliari v Italy and will need to introduce some form of same-sex relationship, although they have discretion as to what form this takes.194 The likelihood of marked differences between the varying statuses granted to same-sex partners is a clear restriction on the ability of a non EU same-sex spouse or partner to relocate to another EU country.195

Many authors believe that the margin of appreciation is necessary in international law.196 A negative result of this approach is that the matter is left to the individual states’ discretion. Critics have argued that this may not adequately safeguard the position of minority groups in society.197 Action at an EU level may improve this position. It is argued here that the EU is the appropriate forum 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 according to the imperative of its free movement provisions. In the past the EU and the ECtHR have taken differing approaches to their treatment of same-sex couples but over time the two organisations are growing closer. Each of these points is dealt with in turn.

**B. European family law**

Peter McEleavy reports on the “rapidly emerg[ing]” area of EU family law.198 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

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192 See works referred to in note 182.
194 See Oliari v Italy (n.22).
195 For discussion, see Grigolo, “Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject” (n.2).
countries. The Brussels II legislation has been referred to as a “watershed in the evolution of EU law”. Other developments include those concerning succession laws. The Commission on European Family Law 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 for Regulations concerning the property consequences for unmarried couples, and registered partnerships, but these have not been introduced. Further proposals concerning recognition of public documents, and on the free movement of citizens, have not progressed. Any further EU conventions will need to be carefully negotiated. This is because of the current political climate and criticisms about the way Brussels II and successors were negotiated. There are clear precedents for EU involvement in family law.

C. EU allows for greatest coordinated action

It is also argued that the EU as compared to other sources of European family law allows for greatest co-ordinated action. Other bodies such as the Council of Europe, Hague Conference and the United Nations have all done important work, but the EU system offers the easiest approach to bringing forward legislation in this area. This is because of the closer level of involvement between Member States meaning that the EU can “secure a deeper form of agreement, relatively unscarred by compromise”. This advantage is less since the growth in size of the EU, other bodies often struggle to secure agreement to conventions. This can


201 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.


be demonstrated by the lack of progress of the International Commission on Civil Status’ Convention on the Recognition of Registered Partnerships. Despite being opened for signature in 2007 this has only attracted two signatories, resulting in a limited level of success.207

D. EU free movement imperative

EU free movement provisions are also another reason for the EU to act in this area.208 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.209 European integration is, therefore, “no longer purely economic”.210 Some commentators view harmonisation of private international laws as essential in order to guarantee free movement.211 This is because an EU citizen is unlikely to move country to take up work elsewhere in Europe if their family members cannot move with them. As the rules of private international law determine (amongst other important roles) if a marriage is valid, these are a key ingredient to ensure free movement of persons. The Centre for Social Justice also argues that there is a need for international involvement as individual states are not capable of dealing with increased mobility of persons between states by themselves.212 Allowing each individual country in Europe to determine their own choice of law rules only adds to complexities for couples who may move several times across different European borders. There is a key role for the EU to play in this area.

E. Growing closeness between EU and ECtHR

A further important argument surrounding EU involvement is despite past divergences, there is a growing closeness between the EU and the ECtHR. The EU is now concerned with the “protection of fundamental rights” within the European legal order.213 Some writers argue that the EU is engaging in a “rights revolution”214

207 Portugal in 2008 and Spain in 2009.
208 For discussion, see Stalford, “Regulating Family Life in Post-Amsterdam Europe” (n.23).
209 See Ibid., and also Spencer, “Same-Sex Couples and the Right to Marry: European Perspectives” (n.175).
but it remains important to avoid over generalisations as the EU is continuing to carry out and develop key economic functions. The growing closeness between the ECtHR and the EU is demonstrated by the enactment of the EU Charter on human rights, the fact that all EU states are also members of the ECHR and that under the Lisbon Treaty the EU has agreed to accede to the ECHR. The EU and the ECtHR also work together and cross-reference to each other’s judgments. These points draw us to conclude that the EU is the appropriate institution to bring forward a new choice of law mechanism in relation to recognition of same-sex relationships. The continued recognised relationship theory would mean that a same-sex relationship would be valid where this is recognised in the new state where the couple intend to reside, or where the relationship has been subsisting for a reasonable period of time. There is no requirement for individual countries to allow same-sex relationships to be enacted within their own jurisdiction. The final section deals with some anticipated criticisms of this proposed choice of law.

VI. Anticipated Criticisms of the Continued Recognised Relationship Theory

Firstly, an anticipated criticism of the continued recognised relationship theory is that it is going too far too fast. Secondly, is 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. Thirdly, is its application to the varying types of civil partnerships across the EU and finally is the recognition of a relationship that a member state would not allow its own domiciliaries or nationals to enter into. Turning to the first point, there is a concern that recognising a same-sex relationship in a country which does not allow domestic same-sex couples to marry could lead to a backlash in public opinion. It was suggested that this was a matter that should be handled with thoughtful consideration and that there should be “patience in reform”. There are examples of backlash occurring within the recognition of same-sex marriages. In the US although the first states began


216 TEU art. 6(2) provides that “The Union shall access to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.


recognising same-sex marriage in 2003,²²⁰ this led to a backlash and within six months, eleven states amended their constitutions to prohibit same-sex marriage.²²¹ It was not until 2014 that public opinion in the US could be seen to have developed sufficiently, to declare in United States v Windsor²²² that s.3 of the Defence of Marriage Act 1996 was unconstitutional in its restriction of the terms “marriage” and “spouse” to heterosexual couples, and recognition of same-sex marriages had extended to 36 states. These developments were further added to when, in 2015, it was held by the US Supreme Court in Obergefell v Hodges,²²³ that the fundamental right to marry is also guaranteed to same-sex couples and thus required all states to issue marriage licenses to same-sex couples and to recognise those marriages validly entered into in other states. It is, therefore, argued that enacting legislation too far in advance of public opinion delayed action in favour of same-sex marriage.

Fears of a backlash would, however, be minimalised as progress would be made on an incremental basis. This involves making change on a step-by-step approach²²⁴ in order to secure “real and sustainable equality”.²²⁵ Incremental steps promote public opinion to change and become desensitised.²²⁶ Civil partnerships encouraged public opinion to adjust, before moving on to strive for same-sex marriage. Experience demonstrates that countries that first recognised civil partnership, before introducing same-sex marriage managed to reach sustainable solutions, without experiencing any backlash.²²⁷ Equally the suggested choice of law rule would be another incremental step, allowing public opinion to become desensitised. Nothing in our theory requires EU states to introduce domestic legislation to conduct same-sex relationships.

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

²²⁰ See Goodridge v Department of Public Health (n.6).
²²¹ For further discussion see Robert Verchick, “Same-Sex and the City” (2005) 37 Urban Law 191.
²²² See United States v Windsor (n.159).
²²³ See Obergefell v Hodges (n.6).
²²⁵ See Marshall, “Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed” (n.140), p.199.
²²⁶ See Eskridge, Equality Practices, Civil Unions and the Future of Gay Rights (n.177), p.119. See also Marshall, “Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed” (n.140), pp.199–200 who explains that such slow change, although frustrating at the time, allows “public opinion to adjust gradually to the changes sought by social movement”.
²²⁷ England and Wales, France and Denmark are examples of this experience.
would be negotiated between EU Member States. We do not advocate setting a particular time scale, such as a fixed number of years, as there is no way of making such a determination. A fixed period of time would also fail to recognise the individuality in relationships, or provide the necessary flexibility to take into account the many differing familial arrangements. 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 of the straightforward instances it will be obvious to the Member States involved that the relationship is one of a solid and durable nature due to some of the above-mentioned factors. In respect of the more challenging cases, it should be remembered that the EU already uses the durable relationship test for heterosexual co-habitees.228 Similarly, this criticism could be applied to many of the other choice of law rules. For instance, the intended matrimonial home requires that the couple move to the intended matrimonial home within a reasonable time, without defining reasonable time. Likewise the most real and substantial connection test does not define how the most real and substantial connection is determined. The list of factors would at least provide clarity in many of the straightforward cases.

Thirdly, 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: “[T]he major international difference between marriage and civil partnerships is the territorial limitations of the latter”.229 Civil unions come in many different forms around the EU, and 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.230 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.231 Alternatively, if that is not possible, the relationship should be upgraded. Even though this could mean couples are left with greater obligations than they had intended,232 it would
at least provide them with the same, if not better minimum levels of protection and recognition. Downgrading a couple’s status may lead to problems surrounding second-class citizenship if couples feel they are being stripped of their elected relationship status.233

Finally, the choice of law rule could be criticised as it would require Member States to recognise existing same-sex relationships if a couple move there, that they would not permit their own domiciliaries or nationals to enter into. It may be argued that it is creating one rule for one but not for another. This criticism could be levelled at other incapacities. When considering age in England, in accordance with s.2 of the Marriage Act 1949 the parties must be at least 16, and any marriage involving a party below that age is void. Regardless of this, as it is the dual domicile rule that often applies to the incapacity, marriages between parties not domiciled in England are still held valid in England, despite English domiciliaries being prevented from entering such marriages.234 Likewise, as previously mentioned within the article, similar respect is shown to foreign polygamous marriages even upon moving to England.235 It is, therefore, argued that this is something the courts are already accustomed to, and could require similar application and tolerance demonstrated within other incapacities.

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 to what extent to recognise same-sex relationships. The examination of the choice of law rules within marriage validity highlighted the competition amidst the theories. It is apparent that no one theory is appropriate for universal application. Instead, it is our suggestion that a rules-based approach to interest analysis would provide a more appropriate option. By applying depegage, 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 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 marriages236 it is essential that this matter is dealt with at an EU level. With the high volume

233 See for instance Wilkinson v Kitzinger (n.17) where the couple felt that being demoted to the status of civil partners was like being offered a “consolation prize”.
234 Alhaji Mohamed v Knott (n.132).
235 Radwan v Radwan (No 2) (n.37).
236 See works referred to in note 59.
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of migration and marriages involving international couples, it is not difficult to see the benefits that would be gained from the harmonisation of this matter. 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. Irrespective of the fact that the EU and the ECtHR have taken divergent approaches in this area, over time the two organisations converge.

The continued recognised relationship is a choice of law rule which could lead to a more extensive protection of same-sex relationships. 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 in England and Wales. We also argue that additional public policy concerns of citizenship, symbolism and equality apply. All of these are compelling arguments in favour of a more extensive choice of law rule. While these arguments are often most appropriate to recognition of same-sex marriage, for the sake of consistency we argue that the same choice of law should be applied to all same-sex relationships, including civil partnerships.

We have also dealt with anticipated criticisms of the continued recognised relationship theory. Firstly, these include objections that this theory is receiving accelerated promotion. Secondly, is 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. Thirdly, is its application to the varying types of civil partnerships across the EU, and finally that Member States would be required to recognise a relationship that it would not permit its own domiciliaries to enter into. We have suggested how these criticisms can be best dealt with. There is no requirement for Member States to legalise same-sex marriage in their own jurisdiction. A marriage subsisting for a reasonable period of time can be defined by looking at all factors, not just the length of marriage. The relationship to be recognised is that which is most similar to the one where the parties originated. If that is not possible the relationship should be upgraded. This tolerance and acceptance of existing relationships already occurs within other incapacities.

238 For instance, certainty and predictability can be achieved through community action, as was identified in relation to divorce by Fiorini, “Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going too Far?”(n.84), p.185 in stating: “It is clear that, of the four objectives identified by the Commission (increasing legal certainty and predictability, preventing ‘rush to court’, increasing flexibility and ensuring access to court) the first two can only be achieved by community action, no Member States acting alone being able to solves problems that the lack of uniform rules in Europe give rise to.”
There is no perfect solution. The aim is not to achieve the unachievable, but to identify and advance the best possible answer. This needs to be subject to further debate amongst EU nations. This article also develops an area of law that has been neglected. Marriage validity and the choice of law rules therein is an area of law in need of attention.\textsuperscript{239} There is only space to tackle same-sex relationships within this work, but, this could be the starting point for a consideration of the choice of law rules applicable to other incapacities to marriage.

\textsuperscript{239} See Reed, “Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules” (n.27), p.450.