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Marriage and Non-Marital Registered Partnerships

A European Perspective of Private International Law

The cross-border recognition and effect of civil partnerships and other non-marital registered partnerships is an area that continues to develop and change. The Hague Conference still has the recognition of registered partnerships on its agenda and the EU is considering private international law in relation to the effects of such relationships on property rights.

Marriage

“Marriage is understood internationally and represents the highest form of recognition for a committed relationship, described by many as the gold standard.”¹

In earlier centuries in Europe, marriage was essential for full membership of society. As society has changed, the legal and social status of marriage and that of husband and wife has developed and changed. Since 1989, whilst some societies have continued to regard same sex marriage and same sex relationships as offending public policy, others have developed differing legal statuses for such relationships. Private international law is only now beginning to develop in response.

The EU Commission is well advanced in considering the harmonisation of private international law conflicts rules in relation to succession law issues in the member states to be dealt with by a future Brussels IV Regulation. Although the issue of harmonisation of private international law conflicts rules for unmarried couples and same sex couples, and the possibility of a Brussels III Regulation may not be as high up the list on the Hague Programme, the Commission may find it easier to resolve than that in relation to succession issues².

What is marriage?

Before the twenty-fourth session of the Council of Trent on 11 November 1563, it was the general European law that a mere agreement to marry, supplemented by cohabitation, constituted marriage. The Church, however, could compel the parties to celebrate and register the marriage in church. Although, formal marriages became more common, it was only in 1754, that a formal ceremony became essential under English, but not Irish or Scottish, law. The common law

¹ *Susan Wilkinson v Celia Kitzinger, Attorney-General & Lord Chancellor* [2006] EWHC 2022 (Fam) para 6

² Studies on Matrimonial Property Regimes and the Property of Unmarried Couples in PIL and Internal Law - http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc/regimes/report_regimes_030703_fr.pdf

definition of marriage was stated by Lord Penzance in *Hyde v Hyde*³ “The voluntary union for life of one man and one woman, to the exclusion of all others.”

Scottish law continued to recognise informal marriages⁴. Irish Law also did so until 1843.

Section 11(c) of the Matrimonial Causes Act 1973 restates this common law rule that a marriage is void if the parties are not respectively male and female. This would seem to be quite straightforward. However, there are special rules for polygamous and potentially polygamous marriages, so that whilst by s.11(b) a marriage is void if, at the time of the marriage, either party is already lawfully married, a polygamous or potentially polygamous marriage is valid, provided that neither party was domiciled in England at the time.

The Matrimonial Causes Act and the common law test do not, however, address the recognition of foreign marriages. Section 14 of the Matrimonial Causes Act 1973 provides that:

“Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11 . . . above shall (a) preclude the determination of that marriage as aforesaid; or (b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules.”

Thus, for foreign marriages, the general rules of English private international law apply.

The Hague Convention on the celebration and recognition of the validity of marriages⁵ has been ratified by Australia, Luxembourg and Netherlands. The language of the convention is gender neutral and refers to ‘spouses’, rather than to husband and wife.

Article 3 states that a marriage shall be celebrated

(1) where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or

(2) where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration.

By Article 9 a marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States.

³ (1866) LR 1 P & D 130 at 133, 35 LJP & M 57

⁴ and continued to so under the doctrine of marriage by cohabitation with habit and repute, ended in respect of new cohabitation with effect from May 4, 2006 by s.3 of the Family Law (Scotland) Act 2006.

⁵ Convention XXVI of March 14, 1978

However, Article 14 allows that ‘a Contracting State may refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy (“*ordre public*”)⁶.

The Permanent Bureau of the Hague Conference still has the issues of jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples on its agenda⁷. Although, it may be premature to think in terms of developing a new convention on the subject, nevertheless, the Conference wishes to begin a more intensive consideration of the options and of the feasibility of moving towards a uniform approach in private international law.

*Grant v South West Trains*⁸ and *D v Council*⁹ are both authority that “Marriage means a union between two persons of the opposite sex”. In *Bellinger v Bellinger*¹⁰, however, the House of Lords confirmed that in relation to a same sex couple, one of whom had undergone gender reassignment, section 11(c) of Matrimonial Causes Act was incompatible with Articles 8 and 12 of European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (“the European Convention”)¹¹.

Article 14 of the European Convention states that ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ The judgment in *Secretary of State for Work and Pensions v M*¹² (*M*) sets out in great detail the links, ambit or *emprise* required to engage Article 14.

In *PM v United Kingdom*¹³, a case in which the applicant was represented by Liberty, the European Court of Human Rights did find a breach of Article 14 in conjunction with Article 1 of the European Convention and awarded damages under Article 41 in relation to income tax relief for maintenance payments made by the father of a child who was not married to the child’s mother but who had separated from her. The claimant in *M*, again represented by Liberty, was not successful however; the House of Lords deciding, with Baroness Hale

⁶ “Il est indiscutable que l’ordre public est le talon d’Achille d’une évolution ultérieure du droit international privé dans ce domaine sensible” paragraph 2.1.4 page 223 Study for the EU Commission Director General of Justice and Home Affairs Justice and Home Affairs on matrimonial property regimes and the property of unmarried couples in private international law and internal law

⁷ *Private International Law Aspects of Cohabitation outside Marriage and Registered Partnerships* Preliminary Document No 9 of May 2000 endorsed by the Special Commission on General Affairs and Policy of the Conference (April 2-4, 2007) and *Note on Developments in Internal Law and Private International Law concerning Cohabitation Outside Marriage including Registered Partnerships* Preliminary Report No 11 of March 2008 for the Council (April 2008)

⁸ [1998] ECR I-621

⁹ [2001] ECR I-4319

¹⁰ [2003] UKHL 21

¹¹ Now see the Gender Recognition Act 2004 (c.7)

¹² [2006] UKHL 11

¹³ [2005] All ER (D) 255 (Jul)

dissenting, that “States are not required to accord to the relationship between same-sex couples the respect for family life guaranteed by Article 8”¹⁴

Same Sex Marriage – the Gold Standard

Marriage between persons of the same sex is now lawful in:

Belgium¹⁵, Canada¹⁶, Netherlands¹⁷, South Africa¹⁸, Spain¹⁹, USA: Massachusetts²⁰ and Connecticut with effect from 28 October 2008 and will be lawful in Norway from 1 January 2009. Sweden may follow suit in due course. Marriage was lawful in USA: California for the period from 17 June 2008 until 4 November 2008, when proposition 8 was passed thus stopping same sex marriage.

In the European jurisdictions, there are restrictions so that one of the parties must be a national of or have an habitual residence in the place where the marriage is celebrated. The fact that the marriage may not be recognised under the personal law of the other party is no longer relevant.

In the case of Massachusetts²¹ and Connecticut, however, non residents cannot marry if same sex marriage would not be lawful in the state of their residence. My understanding is that Massachusetts and Connecticut same sex marriages may be recognised for some purposes in New Mexico, New York and Rhode Island.²²

Some other jurisdictions such as France and Israel, which themselves do not permit same sex marriage, may still recognise such a marriage performed in a state which does so recognise them, provided that the personal laws of each of the parties permits the marriage.

The issues involved with the effect of such same sex marriages on divorce, dissolution and death and development of private international law in this area accelerated until 2006. Scandinavia is continuing to develop, but the fundamental differences of view within the US are unlikely to be resolved easily.

Private International Law and Marriage

The validity of the formalities of marriage

Form has always been governed under English law (and most other laws) by the *lex loci celebrationis*. There is English authority that *renvoi* also applies²³. There are various exceptions for consular marriages and marriages of the

¹⁴ Lord Bingham, para 26

¹⁵ Loi du 13 février 2003

¹⁶ Civil Marriage Act [Bill C-38] but see Timothy Matthew's helpful article in STEP journal Volume 13 Issue 5 page 14.

¹⁷ The Same Sex Marriage Act of Dec 21, 2000

¹⁸ Civil Union Act, 2006. No. 17 of 2006. <http://www.info.gov.za/gazette/acts/2006/a17-06.pdf>

¹⁹ Ley 13/2005 de 1 julio 2005

²⁰ *Goodridge v Department of Public Health* 440 Mass 309, 798 N.E.2d.941

²¹ Massachusetts General Laws Chapter 207, Section 11

²² http://www.glad.org/News_Room/RIAttorneyGeneral_Statement.pdf

²³ *Taczanowska v Taczanowski* [1957] P301

armed forces serving abroad. Marriages aboard ships also pose some interesting issues. "Common law" marriage may then be relevant in such cases as also in cases where there may be no relevant local law.

The essential validity or capacity to marry

Essence is probably governed by the dual domicile theory; that a marriage is invalid unless at the time of the marriage each party has capacity according to the law of their respective domiciles²⁴. Some earlier writers favoured the intended matrimonial home theory; that a marriage is valid if the parties intended and did within a reasonable time establish their home in a jurisdiction and that the marriage is valid in that jurisdiction, but this is unsatisfactory, since at the time of the marriage it may not be possible to ascertain whether or not it is valid. There are also moves to consider the relevant factor as that of a real and substantive connection, in which both the questions of domicile and intended matrimonial home can play a part.

The changes to Scottish law in 2006²⁵ have addressed some private international law issues and make it clear that the formal validity of a marriage is governed by the *lex loci celebrationis* and the essential validity of a marriage is to be governed by the dual domicile theory, reconfirming it in Scottish law. The 2006 Act is silent on the question of *renvoi* so that it may well be applied in Scottish law.

Matters of status or marriage in other jurisdictions are usually governed by the law of each of the parties' nationality, even in states which use habitual residence as a connecting factor for matters of succession.

The English courts will decline to recognise or apply what might otherwise be an appropriate foreign rule of law, when to do so would be against English public policy²⁶.

The Matrimonial Causes Act 1973 does not apply to a couple with a matrimonial domicile in another jurisdiction. If, however, a same sex couple domiciled outside the UK, enter into a same sex marriage in another jurisdiction, in which such marriage is valid and if valid under the law of their domicile (whether a matrimonial domicile or some other domicile), would the English courts rule that such a marriage is manifestly incompatible with public policy?

Dicey, Morris and Collins on The Conflicts of Laws supports the view that the prohibitions of English law applicable to marriage only apply to persons domiciled in England. In 2006 we had the judgment of Sir Mark Potter in the case of *Wilkinson v Kitzinger*²⁷. His view was that English public policy in the matter is demonstrated by s 11(c) of the Matrimonial Causes Act 1973 and the relevant provisions of the Civil Partnership Act 2004.

²⁴ Marriage (Enabling) Act 1960 and s.11(d) Matrimonial Causes Act 1973

²⁵ Section 38 of Family Law (Scotland) Act 2006 effective from May 4, 2006

²⁶ *Vervaeke v Smith* [1983] 1 AC 145 at 164C

²⁷ *Susan Wilkinson v Celia Kitzinger, Attorney-General & Lord Chancellor* [2006] EWHC 2022 (Fam)

Non-marital Registered Relationships (“NMRR”) Civil Partnerships and Overseas Relationships.

Europe generally uses the term ‘registered partnership’, as compared to the North American term ‘civil union’. The UK has chosen to use the ‘civil partnership’.

Dr. Kees Waaldijk²⁸ in his classification of same sex legal relationships, divides them into Quasi-marriages and Semi-marriages, whilst Nicole LaViolette²⁹ uses the analysis of the Marriage Minus Model and the Blank Slate Plus Model. Ian Curry-Sumner³⁰ refers to these as Strong Registration and Weak Registration using either the Exclusion Method or the Enumeration Method and prefers to use the general term Non-Marital Registered Relationships (“NMRR”). He deals very fully with the problems of characterisation and argues very cogently that such relationships should be characterised separately from marriage.

The Hague Preliminary Report No 11 of March 2008 drawn up by Caroline Harnois and Juliane Hirsch³¹ is a very useful summary of the position as at that time.

Quasi-Marriages or Strong Registration – the Silver Service

Such relationships have rights, as near as may be, identical to those, which the parties would have had, if they had been married. It is only in the Netherlands, Denmark, Finland, Germany and Sweden that such relationships are also subject to matrimonial property regimes.

Same sex only:

Czech Republic: Domestic partnerships. One party must be a Czech national.

Denmark³², Finland³³, Greenland, Iceland³⁴, Norway³⁵ and Sweden³⁶: Registered Partnerships. One of the two parties must be a citizen of and a resident of the state where the partnership is to be registered, or both parties must have been resident for at least two years. Citizens of other Nordic states or of a foreign state which also have registered partnerships with similar legal effects, may also be permitted.

²⁸ Dr Kees Waaldijk of Leiden University - “Taking Same-Sex Partnerships Seriously - European experiences as British perspectives?” 5th Stonewall Lecture March 6, 2002

²⁹ Law Commission of Canada paper *Registered Partnerships: A Model for Relationship Recognition* - August 2001 - http://www.lcc.gc.ca/research_project/01_partnership_1-en.asp

³⁰ Ian Curry-Sumner - “All’s well that ends registered?” ISBN 90-5095-532-0 Intersentia 2005

³¹ *Note on Developments in Internal Law and Private International Law concerning Cohabitation Outside Marriage including Registered Partnerships*

³² Registered Partnership Act of June 7, 1989

³³ Act on Registered Partnerships (950/2001 and amendments up to 1229/2001)

³⁴ Registered Partnership Law of June 12, 1996

³⁵ Registered Partnership Act of April 30, 1993 nr 40

³⁶ Registered Partnership Act of June 23, 1994

Switzerland³⁷: The Federal Registered Partnerships Act entered into force on January 1, 2007. One party must be a Swiss national or have an habitual residence there. Foreign same sex marriages and quasi marriages, but possibly not semi marriages, are recognised as registered partnerships.

United Kingdom³⁸: With only the same limited residence requirements as for marriage. Most quasi and semi marriages are automatically recognised as civil partnerships.

USA: Vermont and Connecticut³⁹ and New Jersey⁴⁰(since February 19 2007) and New Hampshire (since January 1 2008) Civil unions. New Jersey and New Hampshire have no residence requirements.

Mixed and Same sex:

Australia: Australian Capital Territory (ACT)⁴¹: The Civil Union was to have been available to both same sex and mixed sex couples, but the Governor-General intervened on the instructions of the Federal Government to disallow the legislation.

Canada: Alberta - adult interdependent relationship, Manitoba⁴² - common-law relationship, Nova Scotia⁴³ - registered domestic partnership, and Quebec⁴⁴ - civil union. There are no nationality, domicile or residence requirements.

Hungary: Registered partnerships will be available in Hungary from 1 January 2009

Netherlands⁴⁵: Registered partnerships. One party must be a national of or resident in the Netherlands.

New Zealand⁴⁶: Civil Unions. There is no requirement as to nationality or residence.

Semi-Marriages or Weak Registration – the Bronze Medal

Such relationships give some rights, but less than if the parties were actually married, and are usually modelled on the contractual blank slate or enumeration method.

³⁷http://www.ofj.admin.ch/bj/en/home/themen/gesellschaft/gesetzgebung/eingetragene_partnerschaft.html

³⁸ Civil Partnership Act 2004 ('CPA 2004') c.33

³⁹ File No. 379

<http://hartford.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=hartford&zu=http%3A%2F%2Fwww.ct.gov%2F2005%2Ffc%2F2005SB-00963-R000379-FC.htm>

⁴⁰ New Jersey Public Law 2006, c.103

⁴¹ Civil Unions Act 2006

⁴² The Common-Law Partners' Property and Related Amendments Act SM 2002, c.48.

⁴³ Sections 52-55, Vital Statistics Act 2003

⁴⁴ Article 521 Quebec Civil Code

⁴⁵ Law of July 5, 1997

⁴⁶ Civil Union Act 2004 - 2004 No 102

http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes&jump=a2004-102

Same sex only:

Germany⁴⁷: *Eingetragene Lebenspartnerschaft*, A matrimonial property regime applies, and since 2005, the regime is the same as that for marriage.

Slovenia⁴⁸: The *ZRIPS* only deals with property relations, the obligation to support an economically weaker partner, and limited inheritance rights. One party must be a Slovenian national.

Spain: Regions of Andalusia, Aragon, Asturias, Catalonia, and Navarre.

Switzerland: Canton of Zürich.

Mixed and Same sex:

Argentina: Buenos Aires: 2 year residence is required.

Australia: Tasmania⁴⁹: Significant Relationships. Both parties must be domiciled or ordinarily resident.

Belgium⁵⁰: Statutory Cohabitation is a category additional to marriage. The parties must have a common residence in Belgium, but there are no consanguinity rules.

France⁵¹: *Pacte Civile de Solidarité* ('PACS') and Andorra⁵²: *Unió estable de parella*. These NMRRs are similar, with very limited rights. Since August 2007 the French PACS has similar succession tax benefits to marriage. One party must be a national or habitually resident in France and the relationship ends automatically on marriage or by declaration.

A French "Reponse Ministerielle" of 21 October 2008 indicates it is intended to introduce into French law (presumably in 2009) a rule of Private International Law fixing the conditions in which foreign registered "partenariats" (to the exclusion of any other type of union) may be recognised in France.

Luxembourg⁵³: *Partenariat enregistré, Eingetragene partnerschaft*.

Spain: the autonomous communities of the Balearic Islands, the Basque Country, Cantabria, the Canary Islands, Extremadura, Madrid and Valencia. A connection between one of the partners and the autonomous community is

⁴⁷ 9 Bundesgesetz Blatt 266 of 16th February 2001

⁴⁸ The Law on Registered Same-Sex Partnership (ZRIPS) came into force on July 23 2006

⁴⁹ Relationships Act 2003 (No 44 of 2003)

http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=44%2B%2B2003%2BAT%40EN%2B20041101000000;histon=;prompt=;rec=-1;term=

⁵⁰ Law of November 23, 1999

⁵¹ Law 99-944 of November 15, 1999

⁵² Llei 4/2005, 21 February, qualificada de les unions establides de parella.

<http://www.bopa.ad/bopa.nsf/b84c2e9d2d34fe50c1256ad9003b8903/9559566b4feb8d3dc1256fcd002754ea!OpenDocument>

⁵³ Loi N°.4946 relative aux effets légaux de certains partenariats

required, either residence or another connection such as *vecindad civil* (regional citizenship) or *empadronamiento* (residence registered at the town hall).

Switzerland: Cantons of Genève⁵⁴ and Neuchâtel – PACS.

Uruguay: since 1 January 2008 couples have been permitted to register once they have cohabited for 5 years and obtain some rights

USA: California⁵⁵, Maine⁵⁶ and New Jersey⁵⁷: Domestic Partners, sharing a common residence – if mixed sex, one party must be over 62. As a result of the introduction of Civil Unions for same sex couples in New Jersey, Domestic Partnerships are now only available to mixed sex couples over 62 and no longer to same sex couples. California recognises equivalent registered partnerships which are validly formed elsewhere.

USA: Hawaii⁵⁸: Reciprocal Beneficiary. There are no residency or nationality requirements. The parties must be prohibited by state law from marrying one another, such as a brother and sister or two persons of the same sex.

Private International Law and Non-marital Registered Relationships

Characterisation or Classification (Qualification)

Ian Curry-Sumner⁵⁹ deals very fully and cogently with these issues. In the UK the Civil Partnership Act 2004 does not expressly deal with questions of characterisation. There are a number of possibilities.

Firstly, is a NMRR classed as a type of personal or civil status similar to marriage or as a matter of pure contract, whether or not subject to the Rome Convention? French experts are divided on this issue in relation to the PACS.

Secondly, if as in most jurisdictions they are characterised as a matter of status, it is possible to classify in any number of different ways:

- all NMRRs as being within the character of marriage – the Nordic states, Switzerland, and Vermont and Connecticut in the USA.
- all NMRRs as being within a new character entirely – the Netherlands
- only same sex NMRRs as being within a new character entirely – the UK⁶⁰

⁵⁴ <http://www.geneve.ch/chancellerie/partenariat/>

⁵⁵ Family Code - Section 297-297.5

⁵⁶ P.L. 2003, c. 672

⁵⁷ New Jersey Domestic Partnership Law N.J.S.A. 26:8A-6

⁵⁸ Reciprocal Beneficiaries Act 1997 HB 118

⁵⁹ Ian Curry-Sumner - "All's well that ends registered?" ISBN 90-5095-532-0 Intersentia 2005

⁶⁰ Sir Mark Potter [2006] EWHC 2022 (Fam), para 121

- same sex marriage and all quasi-marriage NMRRs as being within the character of marriage, but all semi-marriage NMRRs as being within a new character entirely – Belgium
- same sex marriage as being within the character of marriage and some NMRRs as being within a new character entirely (or a matter of contract law) – France

In States that characterise some or all NMRRs as a new class, it is necessary to establish whether the existing connecting factors for marriage or different connecting factors such as the *lex loci registrationis* will be employed.

The validity of the formalities of registration

Form will be governed under English law and most other jurisdictions by the *lex loci registrationis*. There is uncertainty as to the position in France.

The essential validity or capacity to register

Questions as to *capacity* are much more difficult. Ian Curry-Sumner argues that essential validity is usually also governed by the *lex loci registrationis*. His authority in the United Kingdom, is s.1(1)(a) of the CPA 2004.

The parties in *Wilkinson v Kitzinger* claimed a declaration under s.55 of the Family Law Act 1986 that their same sex marriage made in British Columbia on August 26, 2003 was valid. The parties were again represented by Liberty and were both English domiciled at the relevant times, although Susan Wilkinson was resident in British Columbia at the time of the marriage. The claim was founded on Articles 8, 12 and 14 of the European Convention. They failed in their claim and Sir Mark Potter's judgment clearly supports s.215 CPA providing that both formal and essential validity of NMRRs are governed by the *lex loci registrationis* and that therefore the doctrine of *renvoi* for both would be admitted⁶¹.

Sir Mark's judgment was that same-sex marriage is manifestly incompatible with English public policy.⁶²

This is at odds with the statement set out on the European Union Commission European Judicial Network website. "In the case of same sex marriages, where the place of celebration defines the union as marriage, and the parties have personal capacity to marry, this is likely to be accepted. Where it is not recognised as a marriage, it is likely to take effect by giving rise to contractual rights."⁶³

⁶¹ Section 212(2) CPA

⁶² [2006] EWHC 2022 (Fam), para 130

⁶³ http://ec.europa.eu/civiljustice/applicable_law/applicable_law_eng_en.htm#III.5.

Commission Internationale de l'Etat Civil International Commission on Civil Status (CIEC /ICCS)

The ICCS has proposed a model convention 32 at its Munich meeting opened for signature on 5 September 2007. This would provide a framework for civil status recognition⁶⁴, dealing with formation, dissolution and annulment, but does not deal with non civil status matters such as the applicable law and property regimes. The convention provides an opt out in relation to mixed sex partnerships.

NMRRs ,Same sex Marriage and “Matrimonial” Property Regimes

Same sex marriage in Belgium, Canada (Quebec), Netherlands, South Africa and Spain may raise issues of the property rights of the couple. As has been noted, it is only in the Netherlands, Denmark, Finland, Germany and Sweden that NMRRs can also be subject to matrimonial property regimes.

How to establish the relevant connecting factor for a property regime in each jurisdiction is of course, very complex. In the UK the CPA 2004 does not set out any private international law in relation to the connecting factor for the matrimonial or perhaps it is better described as the family, property regime. Cheshire North and Fawcett⁶⁵ state that the same rules should apply as for married couples, whilst Dicey Morris & Collins disagrees⁶⁶.

Mixed-sex NMRRs

The UK Government's view has been that the definition of marriage remains unchanged by the introduction of civil partnerships and that they are only available to same sex couples.

However, if a mixed sex couple domiciled outside the United Kingdom enter into a NMRR in another jurisdiction, in which such NMRR is formally valid (whether by virtue of the *lex loci registrationis* or otherwise) and if that NMRR is essentially valid under the law of their domicile (however that may be defined) would the English courts rule that such a relationship is manifestly incompatible with public policy?

Does the fact that Sir Mark Potter has held that same sex marriage is manifestly incompatible with English public policy, imply that mixed sex NMRRs are also similarly incompatible? In *Wilkinson v Kitzinger* he held:

“**[119]** The belief that this form of relationship is the one which best encourages stability in a well regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals or any other persons who by reason of their sexual orientation or for other reasons prefer to form a same-sex union.

⁶⁴ <http://www.ciec1.org/>

⁶⁵ 14th Ed. p1308

⁶⁶ 14th Ed. Para 28-005.

[120] If marriage, is by longstanding definition and acceptance, a formal relationship between a man and a woman, primarily (though not exclusively) with the aim of producing and rearing children as I have described it, and if that is the institution contemplated and safeguarded by art 12, then to accord a same-sex relationship the title and status of marriage would be to fly in the face of the Convention as well as to fail to recognise physical reality.”

The implication of Sir Mark’s decision is that a valid foreign “formal relationship between a man and a woman, primarily (though not exclusively) with the aim of producing and rearing children” even if not called marriage should be safeguarded by Article 12 and accorded the title and status of marriage.

A NMRR that would be recognised as a civil partnership, if made between a same sex couple, if made between a mixed sex couple, must be recognised as marriage. Even if same sex NMRRs remain outside the ambit of Article 12, a mixed sex NMRR must surely be within.

In my opinion, the current correct English analysis is to characterise *all* relationships (whether marriages or NMRRs) either as

- marriages - consensual unions between a man and a woman - with essential validity governed by the dual domicile theory or
- civil partnerships - consensual unions between two men or between two women – with essential validity governed by the *lex loci registrationis*.

Thus all qualifying mixed sex relationships must be marriages and all qualifying same sex relationships must be civil partnerships.

Which relationships should qualify as marriages? Should only silver quasi-marriages qualify or should any relationship, which if between a same sex couple qualifies as a civil partnership, qualify as a marriage if between a mixed sex couple? This would bring consistency and avoid discrimination. It would also enable the courts to have jurisdiction and find a solution if it is required to dissolve a foreign mixed sex NMRR. It would solve issues relating to the Dutch ‘Flash Divorce’ and the conversion of a mixed sex marriage to a registered partnership, since this latter would then be a non-event for English law purposes. Logically, it would be helpful to have an amendment to the Foreign Marriage Act 1892.

The problem it would not resolve is the French PACS and other bronze semi-marriages. Many believe that these should not have been included in Schedule 20 to the CPA 2004 as specified overseas relationships, qualifying as a civil partnership if between a same sex couple. But if bronze qualifies as a civil partnership it would be discriminatory if it did not qualify as a marriage.

The other issue that is not resolved is the fundamental discrimination in using different connecting factors for questions of essential or material validity for mixed sex and for same sex relationships;

- domicile for mixed sex and

- *lex loci registrationis* for same sex.

Other jurisdictions, have precisely the same issues. The uncertainties in the UK as to recognition of a mixed sex NMRR, are reflected in France as to the recognition of a same sex marriage or in Netherlands or Switzerland as to the non recognition of a bronze semi-marriage.

Private International Law Conflicts

To restate the differences in legal characterisation between States, in another way:

- Unitarians: All NMRRs in the same legal class as marriage – the Nordic states, Switzerland (possibly), and Vermont and Connecticut in the USA.
- Schismatics:
 - Marriage Schismatics:
 - Marriage as one class and all NMRRs (whether mixed or same sex) as being within a new class entirely – the Netherlands
 - Marriage (including same sex marriage) as one class and some NMRRs as being within a new class entirely (or a matter of contract law) – France
 - Sex Schismatics: Marriage and all (possibly) mixed sex NMRRs as one class and all same sex NMRRs as being within a new class entirely – the UK
 - Strength Schismatics: Marriage (including same sex marriage and all quasi-marriage NMRRs) as one class, but all semi-marriage NMRRs as being within a new class entirely – Belgium

The prospects for complete harmonisation seem to be poor at the moment. Even though Spain has joined the club, the divisions within Europe may be unbridgeable for another generation⁶⁷. Private international law will, however, need to catch up fast, in an aspect of human relationships still inextricably caught between Church and State, where the issues of politics, religion, sex and the rights of children meet - the definition of the family - marriage as sacrament or contract, and its availability to all EU citizens without contravention of Articles 12 and 14 of the European Convention. Like it or not, mixed sex and same sex life gets more complicated.

⁶⁷ See for example Cristina González Beilfuss *Parejas de hecho y matrimonios del mismo sexo en la Unión Europea* ISBN 84-97-68111-8 and Emanuele Caló *Le convivense registrate in Europa* ISBN 88-14-08144-1