Northumbria Research Link

Citation: Clayton-Helm, Lauren (2017) Marriage and the question of validity: A comparative reformulation of essential validity precepts to establish certainty for couples via optimal choice of law rules. Doctoral thesis, Northumbria University.

This version was downloaded from Northumbria Research Link: http://nrl.northumbria.ac.uk/id/eprint/36187/

Northumbria University has developed Northumbria Research Link (NRL) to enable users to access the University's research output. Copyright © and moral rights for items on NRL are retained by the individual author(s) and/or other copyright owners. Single copies of full items can be reproduced, displayed or performed, and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided the authors, title and full bibliographic details are given, as well as a hyperlink and/or URL to the original metadata page. The content must not be changed in any way. Full items must not be sold commercially in any format or medium without formal permission of the copyright holder. The full policy is available online: http://nrl.northumbria.ac.uk/policies.html

Northumbria University NEWCASTLE

University Library

Marriage And The Question Of Validity: A Comparative Reformulation Of Essential Validity Precepts To Establish Certainty For Couples Via Optimal Choice Of Law Rules

L C Clayton-Helm

PhD

2017

Marriage And The Question Of Validity: A Comparative Reformulation Of Essential Validity Precepts To Establish Certainty For Couples Via Optimal Choice Of Law Rules

Lauren Chelsea Clayton-Helm

A thesis submitted in partial fulfilment of the requirements of the University of Northumbria at Newcastle for the degree of Doctor of Philosophy

Research undertaken in the Faculty of Business and Law

September 2017

Abstract

This thesis is concerned with the conflict of laws surrounding marriage validity, with a particular focus on essential validity. At present in England, there is a multitude of choice of law rules available to the courts when determining the applicable law, and no way of knowing which will be applied. Consequently, it is difficult for a couple to know whether their marriage is valid, and complications eschew from this. In addition to any emotional impact a finding of invalidity might have, there is the potential for significant legal consequences.

With these embryonic legal ramifications in mind, this thesis seeks to create optimal choice of law rules that are both appropriate, and provide certainty. In doing so, support is drawn from various literary sources to promulgate a dépeçage based interest analysis approach. This means that rules are selected for each of the incapacities, taking into account the relevant policy objectives they raise, making the optimal choice of law rules policy sensitive in nature. Furthermore, a new and original choice of law rule; the continued recognised relationship theory is proposed.

With much of the literature pre-dating the legal developments surrounding same-sex relationships in England, this thesis goes on to seminally include the determination of the applicable law in same-sex relationships. This is particularly important given the inconsistencies surrounding same-sex relationships; it is an area ripe for conflict disputes, making a set choice of law rule vital if certainty is to be achieved across the marriage validity spectrum.

Finally, as a result of increased migration, this thesis extends beyond the borders of England, and encompasses the EU and the US, with the aim of evaluating how certainty might be continued as couples cross state borders. To this end, harmonisation of the choice of law rules proposed herein are propounded across these jurisdictions.

Table of Contents

Table of Cases

CJEU Cases

372/02 Adanez-Vega [2004] ECR I-10761

523/07 Re Proceedings Brought by A [2009] ECR I-2805

ECtHR Cases

Buckland v UK (2013) 56 EHRR 16.

Genovese v Malta (2014) 58 EHRR 25

JM v UK (2011) 53 EHRR 5

Oliari and Others v Italy App Nos 18766/11 and 36030/11 (ECtHR, 21 July 2015)

Schalk & Kopf v Austria (2011) 53 EHRR 20

Vallianatos and Others v Greece (2014) 59 EHRR 12

X v Austria (2013) 57 EHRR 14

US Cases

Arkansas v Graves 228 Arm 378, 307 SW 2d 545 (1957)

Auten v Auten 308 NY 155, 124 NE 2d 99 (1954)

Babcock v Jackson 12 NY 2d 473 (1963)

Baehr v Lewin 74 Haw 530, 852 P 2d 44 (1993)

Bostic v Rainey 970 F Supp 2d 456 (ED Va 2014)

Bourke v Beshear 996 F Supp 2d 542 (WD Ky 2014)

Brown v Board of Education 347 US 483 (1954)

Catalano v Catalano (1961) 148 Conn 288

Cook v Cook (2005) 209 Ariz 487

Deboer v Snyder 772 F3d 388 (Mich 2014)

Devine v Rodgers 109 F 886 (DC Pa 1901)

Dym v Gordon 16 NY 2d 120 (1965)

Other Jurisdictions

Table of Legislation

Treaties

EU Regulations and Directives

Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation EEC No 1612/68 OJ L158/77

Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1

Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II) [2000] OJ L160/19

Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition of enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 (Brussels II bis) [2003] OJ L338/1

Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40

Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6

Council Regulation (EC) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10

Council Regulation (EC) 650/2012 of 4 July 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 [2012] OJ L201/107

US Legislation

Defence of Marriage Act 1996 (US)

Florida Statutes 2016

Georgia Code (2010)

Mississippi Code of 1972

New Hampshire Revised Statutes Annotated

Revised Code of Washington

United States Constitution

Violence Against Women Act (US)

Other Jurisdictions

Act 218 of 31st May 1995 (IT)

Domicile Act 1976 (NZ)

Domicile Act 1982 (AU)

French Civil Code

International Private Law Act (IPRG) 1978 (AT)

Introductory Act to the Civil Code (DE)

Marriage Conflict of Laws Act (NL)

Private International Law Act 1965 (PL)

Acknowledgements

I would like to begin by thanking my supervisors Professor Alan Reed and Professor Raymond Arthur. As my principal supervisor, Alan has provided four years of dedicated support, advice and guidance, which has made submission of this thesis possible. Throughout this time, Alan has always been a calming influence and was able to see the positives in my work when I thought there was none. He quickly learned about my 'Laurenisms', and the fact that sometimes I just had to write to prove to myself I was doing something, even if it did mean lots of extra late night reading for him. He gave me the freedom to do my PhD my way, whilst still offering his expertise, and for that, I thank him. However, the support goes back much further. Having taught me at the University of Sunderland, it was Alan who first sparked my interest in the conflict of laws, and it was he who encouraged me to apply for a studentship to undertake the PhD. It is this continued support and encouragement from 'undergrad' to this very day, that leaves me in no doubt that I would not be where I am now without Alan, and for that, I am, and will always be, truly grateful

In addition to the support received from Alan, I could not have asked for a better second supervisor than Raymond Arthur. Ray offered new perspectives on my research, feedback on my drafts, career advice and much needed humour, and for all of that I would like to thank him.

Thanks also go to the staff at Northumbria Law School. In my time as a PGR and a graduate tutor I have had so many chats, words of advice and offers of support from too many colleagues to count, they truly are a fantastic bunch. However, I am particularly grateful of the generous support received from Professor Chris Ashford, Dr Nicola Wake and Professor Michael Stockdale, who have all individually shaped my experience over the last four years and helped make it such a positive one.

Special thanks also go to all of my fellow PGRs and graduate tutors across the faculty. I was warned that doing a PhD was a lonely process, but it was certainly not the case with these by my side. They were a constant source of support and soon became excellent friends. In particular, I would like to thank Adam Ramshaw for being a great friend, sounding block, and 'go to' IT man, and Lee McConnell for his friendship and constant source of advice from the day I first walked into the PGR office.

Finally, I would like to thank all of my family, friends, and those I will affectionately name my' North Eastern family', for their support, understanding and patience throughout this journey. In particular, I would like to thank my husband Jonny and my parents. To Jonny, I know completing a PhD is not easy, but I am pretty sure living with someone doing one is no walk in the park either. You have supported me from the day I decided to apply for the studentship, and have rode the PhD rollercoaster with me. You have made me laugh and distracted me when I needed it, stayed up and kept me company on the late nights, but most importantly, you always showed me you believed in me and told me I could do it, thank you. To my mum and dad, you always made be believe I could do, and be, anything I wanted professionally and have supported me every step of the way. It is your encouragement, support and enthusiasm that gave me the drive to follow my passion for law, and for that, and so much more I am forever grateful.

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the University Ethics Committee on 10/02/14

I declare that the word count of this Thesis is 78,842 words.

Name: Lauren Chelsea Clayton-Helm

Signature:

Date:

Chapter 1

Introduction

1.1 Background

In England and Wales, over half of the population aged 16 or over are married or in a civil partnership[1], demonstrating just how prevalent marriage is within our society. This level of importance is also apparent across the European Union (EU), where like England, over half of the population aged 20 or over are married or in a civil partnership[2]. In a similar vein, in the United States[3], as of 2016, just under half of the population aged 18 and over were married[4]. Evidently, it is a status that many couples find attractive and wish to enter into across these societies and, as a result, is an aspect of the law that impacts many people. Aside from the sheer volume of people it effects, the importance of such a status to those who have entered into it must not be forgotten. Marriage, for some people, represents the ultimate commitment, or the 'gold standard'[5] in relationships, and, may have religious meaning, therefore it is an area of law many will feel heavily invested in. The status of marriage brings with it various rights as well as also creating legal obligations which can only be rescinded upon the formal legal process of divorce.

To further understand the importance of the marital status, it is helpful to consider why people marry. Historically, marriage was primarily about economics and politics, it was a way in which people could ensure a favourable financial position for

[1] These figures were up to date in 2015 as identified in Office for National Statistics – 'Population by Legal Marital Status and Cohabitate Status by Age and Sex for England and Wales' available at www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/population/estimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2002to2015 last accessed 9/12/16.
[2] These figures were accurate in 2011 of the 28 Member States in the union at the time. See Louise Corselli-Nordblad and Andrea Geoffrey, 'Marriage and Birth Statistics – New Ways of Living Together in the EU' available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_birth_statistics_-_new_ways_of_living_together_in_the_EU last accessed 9/12/16.
[3] Hereafter referred to as the US.
[4] The figure is about 48%, which is based on a figure of 60.25 million married couples in accordance with the statistics set out at www.statista.com/statistics/183663/number-of-married-couples-in-the-us/ last accessed 24/07/17 and the statistics at www.census.gov/quickfacts/ last accessed 24/07/2017, that state that the population of the US in 2016 was around 323.1 million of which 22.8% were aged under 18.
[5] *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295 [6].

themselves and their family[6]. In what was a patriarchal society, the financial security and societal position for women, was advanced through marrying a man that had a good job and was financially stable[7]. Likewise, for wealthy men, marriage was still a means of increasing their assets, as a wife would come with a dowry, and upon marriage a woman's personal property would become her husband's to do with as he pleased[8]. Thus, marriage was of vital importance and was something families were heavily invested in to ensure future financial and economic security. This, however, is something that has changed over modern times. In modern society marriage is usually associated with love and is less about economics: "By the end of the nineteenth century love had won its battle along the whole line in the upper middle class. It has since been regarded as the most important prerequisite to marriage."[9] Cherlin, in exploring this shift in attitude, describes a two-stage process[10]. The first step, he states, was a transformation from marriage as an economic institution to a companionship, in which the relationship was about being each others partners and lovers, with emotion playing a more central role. However, at this stage, much satisfaction is still emanated from being part of the nuclear family, and playing the role of the spouse. Stage two, was the move from the companionship model, to what Cherlin called the "individualized marriage"[11], in which marriage was about self-development and emotional fulfilment rather than playing the role of the spouse. This idea of love, romance and sexual attraction now playing a more central role, is also echoed by other authors:

"If marriage was once a means for economic stability and the production of society that had a latent function of providing personal fulfilment for the individuals involved, the personal fulfilment is now seen as the main purpose of marriage and economic stability and raising a family may be seen as latent functions."[12]

---

[6] Ana Carolina Fowler, 'Love and Marriage Through the Lens of Sociological Theories' [2007] Human Architecture: Journal of the Sociology of Self-Knowledge 61.
[7] Ibid 68.
[8] Diana Gittins, *The Family in Question Changing Households & Familiar Ideology* (2nd edn, Palgrave Macmillan 1993) 76.
[9] Hugo G Beigel, 'Romantic Love' (1951) 16(3) American Sociological Review 326, 330. See also Diana Gittins, *The Family in Question Changing Households & Familiar Ideology* (2nd edn, Palgrave Macmillan 1993) 84 and Liz Steel, Warren Kidd & Anne Brown, *The Family* (2nd edn, Palgrave Macmillan 2012) 116-118.
[10] Andrew J Cherlin, 'The Deinstitutionalization of American Marriage' (2004) 66(4) Journal of Marriage and Family 848.
[11] Ibid 852.
[12] Ana Carolina Fowler, 'Love and Marriage Through the Lens of Sociological Theories' [2007] Human Architecture: Journal of the Sociology of Self-Knowledge 61, 69.

In supporting his theory Cherlin also looked at a study conducted by Whitehead and Popenoe in 2001[13], in which, the attitudes of 20-29 year olds towards marriage was explored. In the study it was found that most participants were of the view that marriage was based on love and intimacy, more so than practicalities like finances[14]. Interestingly, what was also found in the study by Whitehead and Popenoe was that marriage, and its focus on romantic love and emotional connections, had become somewhat of a relationship goal for couples: "while marriage is losing much of its broad public and institutional character, it is gaining popularity as a Super-Relationship, an intensely private spiritualized union, combining sexual fidelity, romantic love, emotional intimacy and togetherness."[15] With terminology like "Super-Relationship" marriage appears to have gained a symbolic status, "it has evolved from a marker of conformity to a marker of prestige."[16] This idea of symbolism is explored by Fowler, and she asserts that since marriage has become centred around personal satisfaction and emotional needs, in marrying, couples are making a public declaration of their ability to maintain a romantic and emotionally fulfilling relationship, in turn, "elevating them to a privileged status."[17] This perceived symbolic status and hierarchical position of marriage amongst relationships, appears to stem from the change to marriage being based on love, as marriage appears to represent the ultimate demonstration and commitment of love, and could, explain Wilkinson and Kitzinger's reference to marriage as the 'gold standard' in relationships.

With such a significant impact, it is important that the applicable law is clear and easy to understand[18]. A couple should be able to ascertain for themselves whether they have entered into a valid marriage, and whether the country in which they live will recognise the marriage: "Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and if necessary of dissolving the marriage contract."[19] For many, this may be entirely straight-forward, if

[13] David Whitehead & Barbara Popenoe, 'Who Wants to Marry a Soul Mate? In *The State of Our Unions*, 2001 (National Marriage Project) as discussed by Andrew J Cherlin, 'The Deinstitutionalization of American Marriage' (2004) 66(4) Journal of Marriage and Family 848.
[14] Ibid 856.
[15] David Whitehead & Barbara Popenoe, 'Who Wants to Marry a Soul Mate? In *The State of Our Unions*, 2001 (National Marriage Project) 13, as discussed by Andrew J Cherlin, 'The Deinstitutionalization of American Marriage' (2004) 66(4) Journal of Marriage and Family 848, 856.
[16] Andrew J Cherlin, 'The Deinstitutionalization of American Marriage' (2004) 66(4) Journal of Marriage and Family 848, 855.
[17] Ana Carolina Fowler, 'Love and Marriage Through the Lens of Sociological Theories' [2007] Human Architecture: Journal of the Sociology of Self-Knowledge 61, 70.
[18] A point that was recognised by Lincoln J in *Lawrence v Lawrence* [1985] Fam 106, 112.
[19] *Shaw v Gould* (1868) LR 3 HL 55, 82 (Lord Westbury).

a couple marry in the country they were both born in and continue to live in, the likely outcome is that they would simply need to comply with the laws of that country, and problems and issues would be unlikely. This, however, may not always be the case, as a marriage may have an international aspect to it, and may, therefore, require greater consideration. When marrying, there are various rules that must be complied with in order for the marriage to be valid, and where more than one country is involved in that marriage it needs to be determined which law applies.

Within the EU alone, of the 2.2 million marriages every year, 350,000 of these involve an international couple[20]. As a consequence of such high figures, it appears likely that there will be occasions where the law surrounding the marriage, and its validity in the involved countries, conflict with one another, and require a determination of which law applies. The rules could conflict on a whole host of matters, such as how old the parties must be to enter into a marriage, or whether couples of the same-sex can marry, and without clarity in the law setting out which country's law applies, couples are left uncertain of whether their marriage is valid. Furthermore, couples may fall victim of limping marriages, whereby their marital status is recognised in one country but not in another.

The applicable law is determined through the application of choice of law rules. These rules are designed to do exactly as they suggest, choose which law will apply, and are subject matter specific[21]. Their purpose is to provide "predictability, administrability, rationality and uniformity of decisions."[22] However, despite academic assertions as to the applicable choice of law rule[23], this is not a settled area from which definitive conclusions can currently be drawn. Marriage validity is broken down into two aspects; formal validity and essential validity, and though formal validity is largely agreed upon, there are various choice of law rules that could be applied to the essential validity of marriage, and it is this aspect where this thesis will focus it's consideration.

Essential validity covers important issues such as whether the parties had the capacity to marry. This looks at matters such as age, consanguinity and affinity,

[20] The Centre for Social Justice, 'European Family Law: Faster Divorce and Foreign Law' (2009) 5, available at http://www.centreforsocialjustice.org.uk/UsterStorage/pdf/pdf%20reports/CSJEuropeanFamilyLaw.pdf last accessed 9/12/16.
[21] Maebh Harding, *Conflict of Laws* (5th edn, Routledge 2014) 3.
[22] Symeon C Symeonides, 'The Choice of Law Revolution Fifty Years After Currie: An End and a Beginning' (2015) 5 University of Illinois Law Review 1847, 1921.
[23] Jonathan Hill & Marie Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 20 suggests that essential validity is generally governed by the dual domicile theory.

polygamy, consent and re-marriage after divorce, and despite assertions that the dual domicile theory is the applicable choice of law rule[24], further analysis is required. The dual domicile theory applies the law of the domicile of each party prior to the marriage[25], and while its prevalence as the preferred choice of law rule may be as a result of it being endorsed by the Law Commission[26], this is far from the sole potential choice of law rule, and other options will be explored herein.

This analysis will include evaluation of alternative choice of law rules such as the intended matrimonial home theory[27], the most real and substantial connection test[28] and interest analysis[29]. With the potential for any of these to be applied, and a level of judicial and academic support for each of them, the applicable law remains uncertain. Academics have recognised the state of the law as being problematic[30], however, no resolution has ever been achieved. Though other matters within the conflict of laws, such as contract and tort precepts[31], have been the subject of extensive review, with the hope of achieving greater certainty, marriage validity appears to have been left behind. This wane in actual legal development does not, however, mean that we are in the same position as we were in when the Law Commission produced its reports back in 1985, or when academics such as Reed[32] and Davie[33] analysed the area. In reality, since then, society has continued to develop and so too has the requirement for legal reform, and what we are now confronted with are laws that are uncertain and outdated. Such developments that have since

[24] Jonathan Hill & Marie Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 20.
[25] John Morris, *Dicey and Morris on the Conflict of Laws* (8th edn, London: Stevens 1967) Rule 31 at 254-255.
[26] Law Commission and Scottish Law Commission *Private International Law: Choice of Law Rules* in Marriage (Law Com No 89, 1985) para 3.36.
[27] GC Cheshire, *Private International Law* (7th edn, Oxford University Press 1965) 227-228.
[28] As discussed by CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 359.
[29] The theory was established by Brainerd Currie in Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1863), but has since been further developed.
[30] See for instance Richard Fentiman, 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Law Journal 353, AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' [1978] Modern Law Review 38 and Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rues' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[31] For instance; in contract Rome I was established in a bid to achieve certainty regarding choice of law rules, Rome II was established in relation to tort, and whilst many Member States failed to ratify it, Rome III was at least proposed in a bid to achieve certainty within divorce, and while England is not one of them, some Member States did enter into an enhanced cooperation.
[32] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rues' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[33] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32.

occurred include the creation of laws allowing for Civil Partnerships[34], and marriage between same-sex couples in England[35]. Across the world this is an area of law that has proved to be contentious within some countries, and, thus, it is possible to see how conflict of laws issues might arise. In the EU alone there are a variety of legal relationships offering various legal rights and responsibilities to same-sex couples[36], and with the right to free movement it is apparent how different legal systems with different relationship types could come into conflict. This thesis will, therefore, not only address the matters of uncertainty and unpredictability essential validity is permeated by, but will also bring the law in line with the modern day.

1.2 Aims and Objectives of the Thesis

At present, there are multiple choice of law rules that could be applied when assessing the essential validity of a marriage, and determining which one a couple might be assessed against seems virtually impossible. The aim of this research is to correct this, by establishing the optimal choice of law rules under a dépeçage[37] based system. Under dépeçage, the laws of different countries may be applied to the different issues within a case[38], to ensure that the most appropriate law is applied in relation to the specific issue raised, whilst providing couples with certainty regarding their marital status. As a consequence of the high levels of migration in the modern day, this aim expands beyond the borders of England and Wales[39] by considering how harmonisation of choice of law rules could be accomplished in the EU, and the US, to continue to provide couples with this certainty when they cross state borders. In order to achieve these aims, the thesis is compartmentalised into a series of objectives, which will, if satisfied, lead to the end goal of optimal choice of law rules that provide certainty within marriage validity. These objectives are as follows:

[34] Civil Partnership Act 2004.
[35] Marriage (Same-Sex Couples) Act 2013.
[36] For instance countries such as England and Belgium allow same-sex marriage, Germany and Switzerland have relationships analogous to a civil partnership, and France and Germany in addition to allowing same-sex marriage, offer an alternative to civil partnership that carries less legal responsibilities.
[37] "Dépeçage is the application of the substantive laws of different states to different issues of the same cause of action" (Symeon C Syemonides, 'Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect' (2013-2014) 45 University of Toledo Law Review 751, 755).
[38] Symeon C Symeonides, 'Issue-by-Issue Analysis and Dépeçage in Choice of Law: Choice and Effect' (2013-2014) 45 University of Toledo Law Review 751, 755.
[39] Hereafter referred to as England.

1) To analyse and suggest reforms to the law on domicile, to ensure the connecting factor is developed to make it more reflective of modern society.
2) To evaluate and analyse the various choice of law rules and policy objectives within essential validity, to begin working towards a reformulation of the law. Within this reformulation, a new and original choice of law rule will be created that will be instrumental in establishing a policy sensitive selection, within a dépeçage based system, that looks at the incapacities of; age, consanguinity and affinity, polygamy, consent and re-marriage after divorce as separate issues to allow for a tailored, and therefore more flexible approach, whilst also achieving the certainty desired.
3) To tackle essential validity as a whole by considering same-sex couples and the choice of law rule that should govern their relationships.
4) Critically evaluate the concept of harmonisation to see how the certainty sought in England could, through the application of unified choice of law rules, be replicated at an EU level.
5) Reflect on the rules proposed for England and the EU, and assess whether they could be of assistance, or an example to the US on how certainty and unification of optimal solutions could be achieved across the states, to alleviate the problems caused by high levels of state migration and various substantive laws. Of course, whilst looking at the US, it will also be considered what England and the EU is able to learn from the US approach to marriage recognition, particularly same-sex marriage.

Each chapter will primarily focus on one of these objectives whist also acting as a springboard for the proceeding one, to ensure that collectively this research achieves the aims set out above.

1.3 Original Contribution

Issues with the law on domicile and marriage validity have been confronted by some scholars over the years, and indeed some have proposed ways in which the law on these areas could be reformed[40]. The approach of any previous works have tended

[40] For instance when looking at the law on domicile the following scholars have all suggested how the area might be reformed; PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713, Richard Fentiman, 'Domicile Revisited' (1991) 50(3) Cambridge Law Journal 445. Likewise scholars have focused on the need for Reform Within Marriage Validity, Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and Alan Reed,

to analyse certain focused aspects of the law in isolation. For example, a particular piece of research has tended to focus on domicile or marriage validity, and sometimes a particular choice of law rule within marriage validity[41]. This research, on the other hand, recognises the interlocutory nature of domicile and marriage validity, and offers a holistic analysis of the law in order to demonstrate how the law could be reformulated. In commencing this holistic reform, attention is first turned to domicile and how this area could be reconceptualised. This reformulation inevitably includes reforms suggested in previous literature, however, as a consequence of the time that has lapsed since domicile was last considered, and the significant legal developments around same-sex relationships that have occurred in that time, this thesis offers an up-to-date and complete recast of the law not offered in previous literature.

In developing the reformulation of essential validity of marriage, the prevalent choice of law rules on the area are critically analysed, and thus, the existing literature is critically reviewed and discussed. It is, therefore accepted, that in building the optimal choice of law rules for the essential validity of marriage, aspects of the approach will have already been analysed and proposed, however, the proposal established herein also includes a new and original choice of law rule. This choice of law rule, devised by this author, not only brings originality to the literature in this area, but also provides a degree of certainty and equality arguably not established in other recommendations for a capacity specific choice of law rule approach.

This research adds to existing knowledge in this area, in that it also considers same-sex relationships. The literature that informs the debate on choice of law within marriage validity pre-dates both the Civil Partnership Act 2004 (CPA), and, the Marriage (Same-Sex Couples) Act 2013 (M(SSC)A), and, therefore, this thesis contributes to the literature on the area by analysing how choice of law rules effect the status of same-sex relationships, and, thus, what choice of law rules should govern them. Unlike in previous literature, same-sex is considered as an incapacity just as age and polygamy, and the relevant policy concerns and objectives are evaluated in order to determine the most appropriate choice of law rule.

'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rues' (2000) 20 New York Law School Journal of International and Comparative Law 387.

[41] Such as; Richard Fentiman, 'The Validity of Marriage and the Proper Law' (1985) 44(2) Cambridge Law Journal 256 in which he focuses on the most real and substantial connection test or CMV Clarkson, 'Marriage in England: Favouring the Lex Fori; (1990) 10 Legal Studies 80. However Richard Fentiman, 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Journal of Legal Studies 353 looks at the need for reform within both domicile and marriage validity.

Finally, this study differs from other contributions in that it considers how this certainty could be achieved outside of the confines of England. Other commentators have explored other jurisdictions, albeit, there has been a tendency for this to be in relation to a specific issue, such as same-sex relationships[42], or has been for analysis purposes as opposed to proposing harmonisation[43]. Therefore, while a comparative approach in itself, is not unique within this area, the originality stems from encompassing other jurisdictions within the actual reformulation of the area as a whole. This author recognises that if certainty for couples when they cross state borders is the primary aim, research must not be limited to those in England, and so offers proposals as to how unity could be achieved on an EU level. This concept of unity between states is then analysed to suggest how this might also be feasible in the US. Consequently, the thesis is original in its consideration of how such optimal choice of law rules can continue to provide couples with certainty when they cross state borders. Such movement is particularly frequent across the EU as a result of the right to free movement, and throughout the US as a consequence of the ease of moving from one state to another, emphasising the relevance and importance of creating such certainty across these jurisdictions. This research takes the various extant laws from the different legal territories, and determines how they as legal systems can learn from one another to create the optimal choice of law rules for the essential validity of marriage at a national, supranational and federal level.

1.4 Striving for Certainty

It is apparent that, in aiming to provide the optimal choice of law rules for the essential validity of marriage, this research aims to create rules that will provide couples with certainty regarding their marital status. Although this is an area that requires a level

[42] For instance Silberman looked at what choice of law rules should be in place for same-sex marriage across the US prior to the recognition of same-sex marriages across all states, in; Linda Silberman, 'Same-Sex Marriage Refining the Conflict of Laws Analysis' (2004-2005) 153 University of Pennslyvania Law Review, 2195 and in, Ian Curry-Sumner 'Interstate Recognition of Same-Sex Relationships in Europe' (2009-2010) 13 The Journal of Gender, Race & Justice 59, Curry-Sumner looks at three European countries and how each would recognise the relationships, before discussing the need for unification.

[43] Such as Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rues' (2000) 20 New York Law School Journal of International and Comparative Law 387, in which Reed explored both England and the US in relation to marriage validity as a whole and comparisons were made between the jurisdictions, but the creation of federal choice of law rules was not discussed. Similarly, in Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, parallels were drawn between England and America in terms of interest analysis, but imitation of a set systems of choice of law rules was not proposed.

of flexibility so as to account for the various familial relationships, it is submitted that certainty must still be accomplished: “the search for certainty in the law is an essential function of the law as such, and therefore cannot be supressed for any length of time.”[44] The juxtaposition between certainty and flexibility was recognised and explored by Neuhaus when he provided the following explanation:

> “The struggle between legal certainty and equity is as old as the law itself. Only the labels have changed … Whatever terms are used, they refer to two different aspects of the law. One is the public interest in clear, equal and foreseeable rules of law which enable those who are subject to them to order their behaviour in such a manner as to avoid legal conflict or to make clear predictions of their chances in litigation. The other is the need for deciding current, concrete disputes adequately, by giving due weight to the special and perhaps unique circumstances of each case. The former aspect calls for legislation, the latter for judicial decision.”[45]

While Neuhaus sets out that both aims require a different legal approach, this research whilst aiming for certainty, also seeks a degree of flexibility, and plans to achieve this by breaking the capacity element of essential validity down into various components, and providing a rule for each, as opposed to an inflexible one rule fits all approach. Though the same level of flexibility may not be achieved as a case-by-case approach, this author concludes that flexibility cannot be gained at the cost of certainty. Certainty for couples is vital for various reasons; primarily as a result of the subsequent legal consequences of finding a marriage valid or invalid, but also because of the emotional impact of the decision on the couple, the rule of law, and the Article 8 European Convention on Human Rights (ECHR) right to respect for one’s private and family life. In addition, it is also noted that in a time of uncertainty for England as a consequence of Brexit and the triggering of Art. 50 of Treaty of the European Union, any certainty that can be established for people in respect of their personal lives is to be pursued.

Firstly, when exploring the legal consequences of a couples’ marital status it is possible to see how important the determination might be. The status of marriage brings with it various rights, such as succession where a person dies intestate, tax and rights to free movement that they might not otherwise have[46], amongst other things. It is, thus, possible to see how determining a marriage to be invalid could have

[44] Paul Henrich Neuhaus, ‘Legal Certainty Versus Equity in the Conflict of Laws’ (1963) 28 Law and Contemporary problems 795, 802.
[45] Ibid 795.
[46] As provided under Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation EEC No 1612/68 OJ L158/77, (Citizenship Directive) art 2(2)(a).

a dramatic impact on the parties involved[47]. For instance, in a succession matter the surviving party may not discover that the marriage was not valid until after the death of their partner, by which point it is too late to deal with the fact that they are no longer entitled to the inheritance they were expecting. Alternatively, a married couple may plan on relocating and one of the spouses may be reliant upon the other for their ability to reside in the intended host state[48]. If they are then not considered to be married by that state, such ability to relocate may be lost[49], and the couple may be forced to make some difficult decisions depending on the reason for the relocation. Both of these examples show how important it is that a couple are able to understand and predict the validity of their marriage, it allows them to plan their lives and act accordingly.

Second, is the emotional, and for some, religious connections that come with the status of marriage. For those that enter into the union, it is something that they hold dearly and cherish, and so to strip them of their status could be deeply upsetting. This emotional impact is evident in the case of *Wilkinson v Kitzinger*[50]. The couple had validly entered into a same-sex marriage, but were labelled as being in a civil partnership in England. This upset the couple as they felt that their marital status had been demoted, and that they were being offered a "consolation prize"[51]. Surely such emotion would only be exacerbated if a couple were to discover their relationship was not going to be recognised at all. Likewise, for some couples' whose faith and religion plays a central role within their marriage, religious consequences may eschew from such a change in status.

Thirdly, certainty is an important element of the rule of law. The rule of law is the idea that people should obey the law and be ruled by it, in order to do this though, people must be guided by the law. Raz states that one way in which the rule of law may be violated is by uncertainty. He sets out that if people are unable to foresee future developments, or to form definite expectations, the rule of law is violated[52]. Essentially, it could be suggested that in not providing couples with certainty

[47] Maebh Harding, *Conflict of Laws* (5th edn, Routledge 2014) 212.
[48] For instance, utilising their marital status to accompany their EU spouse to an alternative Member State under Citizenship Directive art 2(2)(a).
[49] Such risks could be particularly likely in instances of same-sex marriage around the EU, since not all member states recognise same-sex marriages.
[50] [2006] EWHC 2022 (Fam), [2007] 1 FLR 295.
[51] Ibid [5].
[52] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979).

regarding their marital status the rule of law is violated[53]: "[A]bsence of clarity is destructive of the rule of law, it is unfair."[54]

Futhermore, one's right to respect for his private and family life under Art 8 must not be forgotten. The European Court of Human Rights case of *Oliari and others v Italy*[55], that will be discussed further in chapter 4, reinforces the argument that people's family lives need to be respected. However, the shortcomings of the case were that it did not extend to include protection of marriage but stopped at ensuring and permitting civil partnerships. Thus, while Art 8 offers some protection of family life it does not ensure marriage recognition. In fact, in the case of *Vallianatos and others v Greece*[56], it was made clear that the ability to determine the validity of a marriage rests with the states themselves as a consequence of the margin of appreciation, thus while Art 8 offers some protection of family life, a more radical uniform solution is needed to provide this certainty for couples.

When reflecting upon these collective points it is evident that there is a need for certainty surrounding the essential validity of marriage. This has also been recognised in scholarly comment specifically focused on marriage validity. Symeonides, in discussing the American revolution on the conflict of laws, and the various approaches that were introduced to bring an element of flexibility to the area, stated that, "A correction is needed, and a new equilibrium should be sought between these two perpetually competing needs."[57]It is time for certainty to step back in to the forefront of the conflicts agenda.

1.5 Methodology

This thesis adopts a 'black letter' doctrinal methodology in that it analyses statute and common law to determine the relevant choice of law rules, and uses academic comment in support[58]. A doctrinal approach, "involves rigorous analysis and creative

[53] This idea was also discussed by Trevor Allan, 'The Rule of Law' in David Dyzenhaus and Malcom Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).
[54] *Mirkur Island Shipping Corp v Laughton* [1983] 2 WLR 778, 790.
[55] Application Nos 18766/11 and 36030/11, 21 July 2015.
[56] (2014) 59 EHRR 12.
[57] Symeon C Symeonides, 'The Choice of Law Revolution Fifty Years After Currie: An End and a Beginning' (2015) 5 University of Illinois Law Review 1847, 1906. This same need for certainty was also expressed by Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rues' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[58] See Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh 2007) 4.

synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials."[59] This methodology was chosen as extant choice of law rules across the jurisdictions will be explored in order to establish the optimal choice of law rules, and in turn provide the certainty needed.

Van Gestel and Micklitz set out what they assert as being the three core features to doctrinal research:

Firstly, "In doctrinal work, arguments are derived from authoritative sources such as existing rules, principles, precedents and scholarly publication." Secondly, "the law somehow represents a system. Through the production of general defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstraction" and thirdly, "decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit into the system. Deciding in hard cases implies that existing rules will be stretched or even replaced but always in such a way that in the end the system is coherent again."[60]

When considering each of these in turn, it is apparent that they resonate with the method and aims of this research; this author explores the existing choice of law rules and analyses them in order to create a coherent system of choice of law rules, to determine the essential validity of a marriage in a way that provides couples with certainty, as opposed to the arbitrariness of the current position. With the intention of reformulating the law, a doctrinal methodology is well suited for these works as, "it provides a pathway to explore the way forward through the plethora of common law cases."[61]

While a doctrinal methodology is common within the legal paradigm to the extent that it is often not discussed within the research itself, but is considered to be implicit[62], this author recognises that there are other methodological approaches that might have been taken. One such option that is particularly prevalent in modern research is

[59] Council of Australian Law Deans, Statement of the Nature of Legal Research (May and October 2005, 2005); cited at Terry Hutchinson and Nigel Duncan, 'Defining and Describing What we Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 105.
[60] Rob VanGestel and Hans-W Micklitz, 'Revitalising Doctrinal Legal Research in Europe: What About Methodology?' (2011) European University Institute of Working Papers Department of Law 2011/05, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824237 last accessed 26/01/17.
[61] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' 1, 28 in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013).
[62] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What we Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 99.

a socio-legal approach. In making the decision as to what methodology would be selected, it was necessary to consider the aim of the research. If it were about the emotional impact on couples whose marriages are deemed invalid, and therefore striving for validity of marriages; a socio-legal approach might have been appropriate. This is not the aim of this study. Rather, the thesis aims to provide certainty within the law on marriage validity so that a couple can make an informed choice. This quest for certainty has of course been inspired by an awareness of the social implications, in addition to the legal consequences of the current position of the law, and these have been contributory factors in the determination of the approach proposed by this research. For example, throughout the research the importance of upholding the validity of marriages is recognised, but this is recognised as running parallel to other policy objectives, such as the policy concerns of the most effected state and the protection of the parties to the marriage. The emotional impact of invalidating a marriage, at best, only has a small impact upon such decisions, and if one accepts that there are set choice of law rules, it has no impact at all, and so a socio-legal approach would be inapposite in achieving the aim particularised within this research.

In selecting the most appropriate choice of law rules, policy factors such as upholding the validity of marriage, party expectations and societal cultural norms are considered. However, in addition to the aforementioned policy factors recognising the social inculcations of the determination of marriage validity, they have been identified as relevant policy objectives in the Law Commission reports[63], and are contributory factors to the judicial decisions, and therefore are not taken from a strictly socio-legal standpoint. Likewise, there are various reasons why achieving certainty is important, but this research focuses on the need due to the potential legal consequences that might arise, whilst recognising the emotional impact as a secondary motive, as the emotion is linked with the marriage being held valid, which this work does not guarantee[64]. Therefore, despite other methodologies that might be adopted, and the clear reference to external factors, this is not to the degree of socio-legal research. Instead, a doctrinal approach informed by sociological implications is adopted. Such a method allows for a primary focus on black letter law and the need for certainty as a result of the legal consequence, but recognises the emotional consequences

[63] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules* in Marriage (Law Com No 89, 1985) para 2.35.

[64] This focus on the legal implication again demonstrates that a doctrinal approach was the appropriate methodological stance for this research; "'Black-letter law' focuses heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside the law." (Mike McConville & Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1).

associated with this area. In considering why people marry and the symbolic status of marriage this author acknowledges that for some individuals the need for certainty will not be about anything other than the importance of their marital status.

With a clear aim of reforming the law in England, and other jurisdictions, it was apparent that a comparative method should be adopted, as "'comparative law' is the comparison of the different legal systems of the world." [65] It is argued that such an approach is vital for both establishing the optimal choice of law rules, and the suggestion of harmonisation. Wilson recognises that quite often comparative research is undertaken for national benefit[66], but also notes that in other instances it has a more international dimension, and may be used where a common solution is desired, or where there is a want to reduce choice of law problems within the conflict of laws[67]. Comparative law, "offers the scholar of critical capacity the opportunity of finding the 'better solution' for his time and place."[68] In evaluating the laws, or specifically the choice of law rules within different legal systems, it is possible to identify what works and what does not, in order to establish a pathway to reform:

"[T]he method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative juris who was corralled in his own system."[69]

Therefore, in this study, the choice of law rules on the essential validity of marriage will be explored and critiqued within England, the EU and the US, with the aim of establishing the optimal choice of law rules for England, before exploring to what extent they could be proposed at an EU and US level. Alongside England, the EU and the US were selected for the proposal of harmonisation, and thereby as comparative jurisdictions for a variety of reasons. Primarily, both jurisdictions are subject to a high volume of movement of persons, meaning the need for reform is more pressing. In respect of the EU this was heightened by England's membership of the EU at the time of proposal, as it would be in the best interests for English domicilaries moving around the EU to be able to determine the validity of their

[65] K Zweigert & H Kotz, *An Introduction to Comparative Law* (Translated by Tony Weir, 3rd edn, Oxford University Press 2011) 2.
[66] Geoffrey Wilson, 'Comparative Legal Scholarship' 87-88 in Mike McConville & Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).
[67] Geoffrey Wilson, 'Comparative Legal Scholarship' 87-88 in M. McConville & W. Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).
[68] K Zweigert & H Kotz, *An Introduction to Comparative Law* (Translated by Tony weir, 3rd edn, Oxford University Press 2011) 15.
[69] Ibid.

marriage, and for the English courts to have clear rules for cases involving EU citizens. Whilst Art 50 of the Treaty of the European Union was triggered during the research, and Brexit is expected by March 2019, it is still felt that the EU and the associated right to free movement across Member States is too important to ignore; it is an area that would benefit dramatically from harmonisation, and so, to cast it aside on the basis that England may no longer be a part of it was not an option. Similarly, in the US with the ease at which people can move from one state to another, or even live and work in different states, it was considered that harmonisation would have a significant impact. Furthermore, the US, like England, is a common law jurisdiction at a state level, making comparisons easier to make, and finally, as will be seen in later chapters, some of the approaches to essential validity that are utilised stem from American theorists and case law development across the US, and thus, it appeared, like the EU, to be a natural selection.

While comparative law will play an essential role throughout this thesis, it is considered to be of particular importance in the suggestion of harmonisation of choice of law rules within the EU and the US. It has been suggested that while a comparative approach may be desired for various reasons, when seeking harmonisation, it is said to be predetermined[70]. Zweigert and Kotz state that in order to determine the best solution between multiple interested states, it is necessary to know the points of agreement and contention in order to work through them[71]. When aiming to achieve harmonisation of the law on a particular matter, "preparatory studies in comparative law are absolutely essential … without them one cannot discover the points of agreement or disagreement in the different legal systems of the world, let alone decide which solution is the best."[72] This point was recognised by this author, and thus, with the aim of achieving certainty through establishing the optimal choice of law rules in England, but also seeking to extend this certainty across the EU and the US through harmonisation of these choice of law rules, a comparative approach is considered essential in order to determine how this could be achieved.

Finally, it has also been recognised that comparative law might be helpful when foreign legal models are imitated[73]. When proposing that harmonisation could be achieved at a federal level across the US, it is argued that though there are obvious

[70] Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method 1, 2-3.
[71] K Zweigert & H Kotz, *An Introduction to Comparative Law* (Translated by Tony Weir, 3rd edn, Oxford University Press 1998) 24-25.
[72] Ibid.
[73] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 American Journal of Comparative Law 1, 3-4.

differences between the two legal systems, if it can be achieved at an EU level, it can also be done at a federal level. In essence, a form of imitation is promulgated, however, this is only possible as a result of the comparative method adopted throughout, it allows the author to draw the relevant comparisons that are necessary for such a proposal.

It is for all these reasons combined that a comparative method within a doctrinal approach is argued to be essential for the accomplishment of the aims of this research. In looking at the extant choice of law rules, and the recognised policy objectives, it is possible to analyse a reform that can achieve the certainty desired through an optimal choice of law system. The ability to create this system of rules is aided further through the comparisons with other legal systems, and it is then this comparative approach that allows this certainty to be continued when couples cross state borders, as it provides the platform for suggesting how harmonisation could be achieved across the EU and the US.

1.6 Methodological Limitations

As with any method there are limitations to the comparative approach taken. When examining choice of law rules within the EU, it is choice of law rules and connecting factors on an EU level that the research particularly focuses on, as opposed to each of the Member states. Although some Member States and their rules are addressed, this is limited as accessing such information from outside the legal systems themselves is challenging. Likewise, when examining the law in the US, it is the general choice of law rules that are used that are discussed rather than setting out each individual state's preferred choice of law rule. This approach reflects not only the number of states that would have to be addressed, but also the fact that the preferred choice of law rule, particularly within marriage validity, is not always apparent. Instead, case law of various states, along with the substantive law surrounding the incapacities, is propitiously analysed and deconstructed to determine the use and justification of the choice of law rules, to then compare them with their counterparts in England.

Despite such limitations, the analysis gained from these comparisons provides vital information in the establishment of the optimal choice of law rules, whilst also opening the gateway to harmonisation.

1.7 Architecture of the Thesis

The structure of this thesis is guided by the aims set out above. The primary focus is to produce choice of law rules that will provide certainty within the essential validity of marriage, by comparing and contrasting the choice of law rules alongside the academic commentary that both advocates and opposes the various rules. Following from the general research parameters established in this chapter, chapter 2 analyses the law on domicile. In doing so it identifies the problems with the law on domicile as a whole, and how it should be reformed. This is an important advancement within the law on domicile itself to bring the law in line with the modern day, whilst also being central to the thesis in light of the important role domicile plays within the essential validity of marriage. It is a connecting factor heavily relied upon under the current system, and will maintain some of its importance in the reforms predicated in this study. For that reason it is vital that any issues are dealt with to ensure that the overarching aims of certainty can be achieved. If domicile itself is left uncertain it will have a ripple effect throughout the research.

Chapter 3 provides a comprehensive analysis of the law on marriage validity, with a specific focus on essential validity. This entails a detailed examination of the various choice of law rules and the arguments raised for and against their application. In this chapter it is vital that the various choice of law rules, and the literature surrounding them, are analysed, as it provides the context needed for the suggested reform, and the original choice of law rule established later in the chapter. This analysis, and the reform promulgated as a result of it, ultimately provides an original model of the 'continued recognised relationship theory' that can be utilised in the remaining chapters to determine whether the same certainty can be achieved for same-sex couples and for couples in the EU and the US. This new theory will be drawn upon extensively throughout the thesis in order to evaluate alternative choice of law rules across the other jurisdictions, to ensure the optimal choice of law rules are propounded across all three legal systems.

Having critically discussed the essential validity of marriage and the incapacities therein, it becomes apparent that the literature does not treat same-sex as an incapacity, despite it being a capacity based issue that prevents some couples from marrying across the world, and did so, until recently, in England. The result of this is that there is no consideration of what choice of law rule should be applicable in cases involving same-sex relationships. Chapter 4, therefore, critically analyses civil

partnerships and same-sex marriages, and aims to identify the most appropriate choice of law rule for these relationships. In order to make this determination, the chapter considers the relevant policy concerns prevalent when dealing with same-sex relationships, and draws comparisons with the EU and the US to finally set down the most appropriate choice of law rule for same-sex relationships in England.

With marriage validity explored within England, chapter 5 assesses the position within the EU. The chapter initially considers the concept of harmonisation within the essential validity of marriage and why this might be desirable, before looking at what choice of law rules should be put in place if it were to be achieved. In addition to considering the framework established for England, choice of law rules in place in some of the Member States and connecting factors used by the EU are put under the microscope, to ensure that the optimal choice of law rules are selected. Regardless of Brexit, this is still an important aspect of the reformulation because, whether England remains a part of the EU or not, it should be addressed for the sake of the many couples that do move around the EU.

Chapter 6 then examines the US jurisdiction. The key choice of law rules are first explored before analysing to what extent they can be compared with those selected for the reform in England and the EU. The concept of interest analysis[74] was first established in the US, and so this is examined in detail to determine to what extent the theory has developed, and is able to be used within the area of marriage. Upon exploring some of the more controversial incapacities it is established that the reform suggested for England and the EU could also be utilised at a federal level in the US to provide the much needed certainty for couples as they move between states. Despite the fact that family matters are traditionally dealt with at a state level, the decision in *Obergefell v Hodges*[75]*,* surrounding the requirement to recognise and allow same-sex marriages across all states, is, amongst other legal developments, a sign that unification in aspects of family law can be achieved through federal rules. With this in mind, and given the uncertainty that currently reigns as a result of the various choice of law rules adopted across the states[76], chapter 6 of this research

[74] This is a theory based on the applicable law being the most interested state in the matter and was established by Brainerd Currie in, Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963) and will be explained in greater detail in chapter 3, before further discussion in chapter 6.
[75] 135 S Ct 2071 (2015).
[76] Walter Wadlington & Raymond C. O'Brien, *Family Law in Perspective* (2nd edn, The Foundation Press 2007) 19.

asserts that the reformulation of the choice of law rules for the essential validity should be done on a federal level.

Chapter 7 provides the conclusion for this work. It reviews the analysis undertaken throughout the research, and the proposals for reformulation across England, the EU and the US. In doing this, the chapter demonstrates how the thesis achieves its aim of providing certainty for couples surrounding the validity of their marriage when they cross these state borders, before acknowledging potential areas for further research.

1.8 Concluding Remarks

The aim of this chapter has been to broadly introduce the field of research this thesis will focus on, and to set out the aims and objectives of the study, and the methodology adopted to achieve these prioritisations. The material aim of this research is to create optimal choice of law rules for the essential validity of marriage, so as to provide couples with certainty regarding their marital status when they cross state borders. While this cannot be achieved on a worldwide scale at this stage, it is hoped that in addressing the choice of law rules in England, the EU and the US, this study goes a long way towards achieving this harmonisation. Beyond analysing the existing choice of law rules across the particularised jurisdictions, this piece will also set out an original choice of law rule, that it is hoped will play an important role in the optimal choice of law rules for the essential validity of marriage. Though criticism of the approaches selected is anticipated and discussed, this author accepts that a 'perfect' solution can never be achieved, but strongly asserts that the reforms promulgated in this research will provide the optimal reformulation of the law in this area, and attain the aim of providing couples with the certainty they need and deserve.

Chapter 2

Wherefore Art Thou Domiciled? Reformulating The Law On Domicile: A New Conceptualisation For The Modern Day

2.1 Introduction

Domicile is what is known as a connecting factor. Connecting factors are designed to assess the extent to which a person is connected to a particular country or countries, so as to decide whether the law of that country should apply to them, and be considered as the applicable law. This is of particular importance in the modern day given people have become "more internationally mobile"[1], as it is essential that regardless of mobility, the law applicable to an individual is able to be ascertained. Domicile, by way of loose translation, refers to where a person has his permanent home, as "people are deemed to 'belong' to the community in which they have made their home."[2] Evidently, this suggests quite a personal connection, and therefore domicile is a connecting factor which is used primarily in personal affairs, and allows a person to carry that law with them around the world so that it governs their status and personal relationships[3]. Other connecting factors that can be utilised include: habitual residence; and nationality, and these will be explored later in the chapter.

It is accepted that within English law domicile is the preferred connecting factor when dealing with matters of personal status[4]. As a result, domicile is an important aspect in various areas of law such as; succession, taxation, jurisdiction in divorce proceedings, and marriage validity. Of particular significance for this research is the latter reference to marriage validity. Domicile is a crucial constituent of essential

[1] Maebh Harding, *Conflict of Laws* (5th edn, Routledge 2014) 15.
[2] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 317.
[3] Ibid 316.
[4] James Fawcett, Janeen M. Carruther and Sir Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 154.

validity as the pre-nuptial domiciliary law of each of the parties' is often applied to assess the essential validity of a marriage, as a result of the dual domicile theory. With an intention to create optimal choice of law rules within marriage validity, and, in turn, provide couples with certainty, it is vital that domicile, or indeed any other choice of law rule selected, is capable of being applied with cohesion. For that reason it is important that any problems within the law on domicile are addressed. In confronting the uncertainties or complications in ascertaining a person's domicile, this chapter is a necessary adjunct before attention is able to be turned to marriage validity itself.

This chapter will, therefore, set out the law on domicile as it currently stands before highlighting some of the potential problems with this connecting factorisation. In discussing these problems, the chapter will focus on how the law could be reformed so as to ensure that the most appropriate place is selected as a person's domicile, whilst also achieving a greater level of certainty. In accordance with the common law rules on domicile there are three distinct types of domicile: domicile of origin; domicile of choice; and domicile of dependency[5]. However, under the current provisions there is a heavy reliance on a person's domicile of origin through primordial importance attached to the doctrine of revival, and also the difficulties in assessing if, and at what point, a domicile of choice is achieved. This chapter will analyse these issues in greater detail in order to propose solutions. In doing so, the need for the doctrine of revival will be assessed to see if it could be replaced by the rule of continuance. This could potentially be an important step in the law on domicile, to ensure it reflects a modern, more migratory society. It will also become apparent that this is not the only aspect of domicile in need of modernisation. In recent years, laws in England have developed, and the law on domicile has failed to keep up. What were already outdated laws reflecting colonial inculcations, appear to be falling even further behind extant times, failing to keep up to date with the developments surrounding same-sex couples and their ability to marry. The gender specific roles that the determination of the domicile of origin and the domicile of dependency are couched in, fail to provide for children of same-sex couples, and are discriminatory. Therefore, the objective herein will be to analyse the law in order to propose a holistic reformulation of the law on domicile. This analysis will involve the examination of other jurisdictions, and other connecting factors, such as habitual residence and nationality to act as comparators to ensure the reforms promulgated provide the optimal solutions. Such reforms will play a vital role in achieving the aims of certainty and predictability within marriage

[5] All of which will be set out in greater detail in the succeeding section.

validity, but, as domicile is generally the preferred connecting factor for matters of personal status, the reforms suggested in this chapter are an important development for the law of domicile itself, and, would have a significant impact on other areas, in addition to marriage validity.

The law on domicile is far from problem free. With the previously recognised, yet unaltered, problems surrounding the doctrine of revival, and ascertaining a domicile of choice, combined with the more recent issues around the rules for determining a domicile of origin, it is apparent that the law on domicile is ripe for a fresh reconsideration. This chapter will, therefore, scrutinise the law, to evaluate how to achieve the best possible reformulation. This reform will be focused on providing rules that are: inclusive of all family types, transparent; and provide certainty, to ensure that domicile is an appropriate connecting factor, both for marriage validity purposes, and any other area of law.

2.2 Determining One's Domicile

As developments have occurred within the conflict of laws, domicile has come to have a variable meaning both within English law, and within the conflict of laws more specifically. Throughout this thesis the concept of domicile that will be referred to is the traditional common law precept, that is utilised as a connecting factor to determine which state has an interest in regulating a person's affairs and, is used for the selection of choice of law[6]. This is not to be confused with the partial statutory definitions we see for compartmentalised jurisdiction and enforcement of judgments, such as that under the Civil Jurisdiction and Judgments Order 2001. These rules provide that a person is domiciled in the UK if he is a resident in the UK, and the nature and circumstances of this residence indicate a substantial connection with the UK, which, will be presumed to be the case if he has been resident in the UK for the last 3 months, unless evidence to the contrary is proved[7]. This definition is for the purpose of the Brussels I Regulations[8] which, deal with jurisdiction and the recognition of judgments in civil and commercial matters. This definition was thought necessary for the purposes of Brussels I because of the permanency required to

[6] See generally David McClean & Kisch Beevers, *Morris: The Conflict of Laws* (7th edn, Thomson Reuters (Legal) Limited 2009) & James Fawcett, Janeen M. Carruthers & Sir Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008).
[7] Civil Jurisdiction and Judgement Order 2001, SI 2001/3929, sch 1, para 9.
[8] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1 (Brussels I).

establish a domicile of choice under the traditional approach; a long-term association not needed when merely determining a state's jurisdiction for a breach of contract[9]. The definition provided under statute is also much closer to the mainland European concept of domicile as "the Brussels I Regulation, dealing with civil and commercial matters, utilises the continental concept of 'domicile' which is markedly different from the traditional English one." [10] Consequently, when determining one's domicile it is first important to ensure that it is the English common law rules on domicile that are being employed.

Secondly, as alluded to within the previous section, in English common law the meaning of domicile is multi-faceted as there is the domicile of origin, domicile of choice and domicile of dependency. While a propositus can never be without a domicile, nor can they have more than one, and so it is important that it can be established what type, and hence where, a propositus was domiciled at any given time. The domicile of origin is acquired at birth and if the child is legitimate it will take the domicile the father has at that date, alternatively if the child is illegitimate it will take the domicile that the mother has on that date[11]. Domicile of dependency is designed for children under the age of sixteen and those suffering a mental impairment, as a consequence of their inability to form the necessary intent for a domicile of choice, as set out below. A child's domicile follows that of the parent up until the child attains the age of sixteen or marries[12]. Those suffering a mental impairment will, on the other hand, have a domicile of dependency in the country they had it in immediately before becoming impaired[13]. Finally, a domicile of choice is acquired Animo et Facto; by taking up residence in a country with the intention of permanently or indefinitely remaining there[14].

2.3 Domicile of Origin and the Doctrine of Revival

When analysing the law on the domicile of origin, its tenacity and its ability to revive are of crucial significance when considering the need for reform, however, the rules

[9] David McClean & Veronica Ruiz Abou-Nigm, *Morris: The Conflict of Laws* (9th edn, Sweet & Maxwell 2016) 101.
[10] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 305.
[11] *Udny v Udny* (1869) LR 1 Sc & Div 441, 457.
[12] Domicile and Matrimonial Proceedings Act 1973, s 3(1).
[13] *Urquhart v Butterfield* (1887) 37 Ch D 357 (CA).
[14] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 328.

surrounding the determination of a person's domicile of origin are not without their problems. As highlighted in the previous section, a child's domicile of origin is dependent upon the marital status of their parents. If at the time of birth the parents are married, the child's domicile of origin will match that of it's father's domicile at that time, and if unmarried, will take on its mother's domicile at that time. The first problem with this is its apparent contrast to the way in which a child's domicile of dependency may be assigned. If the parents are living apart, the rules on the domicile of dependency shift from a basis on marital status, to instead reflect that of the parent they live with[15]. This rule equally applies when the parents are married, but are living apart, therefore if the child is living with the mother the domicile of origin could be immediately replaced by a domicile of dependency[16]. This makes little sense, it creates a situation whereby a domicile of origin may be placed on a child in a state they have no real connection to, and appears to only be in place to lay in abeyance for the purpose of the doctrine of revival, which is a doctrine, that is in itself open to criticism, for being archaic and producing artificial results[17]. Secondly, the rules assume that the couple are of opposite sex and makes no provision for the determination of the domicile of origin in instances where, for example a same-sex couple have adopted a child, or where a child is born to a woman who is either party to a same-sex marriage or a civil partnership[18]. In both of these situations, the child is regarded as a legitimate child of that couple[19], but the outdated rules surrounding the domicile of origin provide no answers on how the domicile of origin would be determined.

As a consequence, further to needing to reformulate the law for the purpose of updating it and ensuring there are no loopholes which could result in no domicile being assigned, it could also be argued that at present, the law discriminates against children of same-sex couples, making reform essential for human rights purposes. Art. 14 of the European Convention of Human Right (ECHR) prohibits discrimination in the application of human rights on various grounds, and whilst not explicitly

[15] Domicile and Matrimonial Proceedings Act 1973, s.4(2).
[16] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 321.
[17] These criticisms will be explored in more detail later in this section.
[18] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 321.
[19] Adoption and Children Act 2002, s, 67(2) provides that an adopted person is the legitimate child of the adopters if they are adopted by a couple. Likewise the Human Fertilisation and Embryology Act 2008, s. 42 sets out that a civil partner or female spouse of a woman giving birth to a child is deemed to be the child's parent, provided they were married or in the civil partnership at the time of insemination. Under s.48(b) such child 'is the legitimate child of a child's parents.'

provided within the Article itself, this has been held to include discrimination on the grounds of sexual orientation[20]. As Art. 14 does not provide a free standing right to non-discrimination, it is necessary for the facts of the case to at least fall within the ambit of one of the Convention rights. When looking at the failure to provide rules so as to ascertain a child's domicile of origin, it is argued that this could fall within the 'private life' aspect of Art 8. The importance domicile plays in England in various aspects of law, as have already been mentioned, means that like citizenship in other countries, it plays an important role in the social identity of a person, and subsequently impacts upon their 'private life', and is therefore argued to fall within the scope and ambit of Art. 8, just as citizenship did in *Genovese v Malta*[21]. Accordingly, it would appear that in addition to being outdated, the rules on the provision of a domicile of origin are not Convention compliant[22].

This problem surrounding same-sex couples is exacerbated when considering the tenacity of the domicile of origin and the doctrine of revival. As the doctrine of revival means that the domicile of origin is utilised for the period between abandoning one domicile of choice and gaining a new one, under the current provisions, the domicile of origin may continue to raise its head throughout the life of a propositus. With the failure to provide rules on how the domicile of origin is to be determined for children of same-sex couples this is particularly problematic; it not only highlights how out of touch the law on domicile is, but also leads onto the question of why the domicile of origin is given the special treatment it receives by way of tenacity and revival.

The tenacity is a consequence of its ability to revive, and as a result of the importance the judiciary appear to give it when attempting to set it aside and ascertain a domicile of choice[23]. With the doctrine of revival meaning that, having abandoned a domicile of choice, the domicile of origin comes back into effect until a new domicile is acquired[24], the criteria that nobody be without a domicile is satisfied. Regardless, the doctrine of revival is a concept that has been criticised and recommended for reform. It has been stated that: "The doctrine of revival of the domicile of origin can, however, operate crudely, and is difficult to defend in modern times."[25] The doctrine can create

[20] *JM v UK* (2011) 53 EHRR 6, *X v Austria* (2013) 57 EHRR 14 and *Vallianatos and others v Greece* (2014) 59 EHRR 12.
[21] (2014) 58 EHRR 25 para 33.
[22] While it is recognised that this is an area that could be analysed in greater detail, to do so would be to go outside of the remit of this thesis, and is instead something to be explored further in future works.
[23] The tenacity as a result of the difficulties associated with obtaining a domicile of choice, and the standard of proof required will be considered in further detail in section 2.4.2.
[24] *Tee v Tee* [1973] 3 All ER 1105.
[25] PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713, 716.

results that seem highly artificial as it may mean that a person is domiciled in a place they left many years ago, or worse, a place they have never been to.[26] It is archaic, and was written primarily for British Colonists who "rather like elephants ... return to their birthplace to die."[27] It is a rule designed for another time, and no longer reflects the connections people have with countries in a more migratory world. A scenario demonstrating this exact concern is provided in the Law Commission Report:

> "A is born in India to English domiciled parents, and thus receives at birth a domicile in England. He remains in India after reaching the age of 16 and acquires a domicile of choice there. Later, in middle life, he leaves India intending to settle in the USA. At that point, A's domicile of choice in India ceases and his English domicile revives, although he has never even visited, let alone lived in England. If A dies intestate before acquiring a domicile in one of the States of the Union, the succession to his moveable estate would be governed by English law."[28]

Likewise, case law such as *Winans v A-G*[29] and *Henwood v Barlow Clowes International Ltd*[30] highlight the adhesive nature of the domicile of origin, despite a propositus having left it many years prior. In *Winans*, the propositus was born in the US, and had a domicile of origin in either Maryland or New Jersey. Having died in England it was necessary to determine where he was domiciled at the time of his death. Despite a hatred for England, Mr Winans had lived here for the majority of the last thirty seven years of his life for health reasons, and had not visited the US since his departure forty seven years previously. However, during his time in England his dislike for English people remained, and he continued to fantasise about his return to the US to embark upon plans to build a fleet of vessels to reign naval supremacy over England. When considering these facts, despite the length of time that had passed, the House of Lords held that he remained domiciled in his domicile of origin. In *Henwood,* the propositus was born in England and had his domicile of origin there. As a result of a dislike of the country he moved to the Isle of Man, where he set up a business and gained a domicile of choice. However, upon the collapse of his business he was ostracised, and felt it necessary to move. He then spent most of his time split between a house he owned in France, and a villa he rented is Mauritius. In abandoning the Isle of Man, his domicile of choice therein was lost, and without evidence to support a domicile of choice in either France of Mauritius, the court held that his domicile of origin in England had revived; the one country which he had no

[26] Richard Fentiman, 'Domicile Revisited' (1991) 50(3) Cambridge Law Journal 445.
[27] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 311.
[28] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.18, example 1.
[29] [1904] A.C. 287 (HL)
[30] [2008] EWCA Civ. 577, [2008] BPIR 778.

intentions of living in, and had abandoned many years previously, demonstrating just how artificial the results may be.

Further support for the idea that the doctrine of revival is in need of reform can be seen in both The First Report of the Private International Law Committee[31], and the Law Commission Working Paper No.88[32]. In the former it was suggested that a domicile should continue until another domicile is acquired[33]; in essence replacing the doctrine of revival with a continuance rule. The idea of continuance was then, further explored by the Law Commission. The Law Commission first expressed concern that the committee had not considered the artificiality behind prolonging a connection between a person, and a country which they have abandoned. Regardless, the Commission go on to recognise that this is at least the place with the most recent connection, and that imposing the domicile of origin runs the same, if not greater risks, of producing results which are artificial: "it can be argued that a person is more likely to remain connected to the country of his most recent domicile than to his country of birth"[34]. It may be that a person has never lived in or visited the place they were assigned as their domicile of origin and the Commission, upon weighing-up the competing options, appeared to recognise this inculcation. It was their recommendation, on the basis of simplicity and that there was clearly a connection to the country for a period of time, that the doctrine of revival be replaced by the continuance rule[35]. Additional support for the continuance rule can also be seen when exploring other jurisdictions. In the quest to achieve the optimal choice of law rules this research compares the laws of England, the EU and the US when considering the essential validity of marriage, and thus it is also interesting to note that the rule of continuance is adopted in the US[36].

The leading American case on this is ***Re Jones' Estate***[37]. Mr Jones was born in Wales, and had a domicile of origin in England. Later in life having borne a child, he fled Wales to escape affiliation proceedings and emigrated to the US where he gained a

[31] Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954)
[32] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985)
[33] Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954) Appendix A.
[34] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.20.
[35] This was then affirmed in the Law Commission's final report on the matter; Law Commission and Scottish Law Commission, *Private International Law: the Law of Domicile* (Law Com No 168, 1987) para 5.25.
[36] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 41-42.
[37] 192 Iowa 78; 182 N.W 227 (1921).

domicile of choice in Iowa. He set up his life in Iowa, became a naturalised American citizen and married an American. After the death of his wife the propositus decided to return to Wales for good to live with his sister and set sail from New York. The boat never made it to England as it was sunk by a German submarine off the South Coast of Ireland and the propositus was killed. As he died intestate it was necessary to determine where he was domiciled upon his death as different rules of intestacy applied in England and Iowa. Following the continuance rule the Supreme Court of Iowa held that he died domiciled in Iowa, and his estate under the laws of Iowa went to his illegitimate daughter whom he had fled from thirty years prior, and had had no contact with in the meantime, instead of passing to his brothers and sisters as it would have under English law. Given the facts of the case, this outcome appears artificial and the continuance rule is open to the very criticism levelled at the doctrine of revival[38]. Despite this iteration, it is argued that the rule of continuance is to be preferred. Such an argument is supported by the Law Commission, in their recognition that a person is more likely to be connected to their most recent domicile, rather than a domicile dating back to their birth[39], and O'Brien's acknowledgment of the argument that the rule of continuance "is more likely to lead to a decision that is founded upon recent conduct." [40] Furthermore, it is an option that is backed by other jurisdictions, such as New Zealand where s.11 of the Domicile Act 1976 states that a domicile of choice continues until a further new domicile is acquired and abolishes the doctrine of revival. Likewise s.7 of the Domicile Act 1982 in Australia, which is in force in all Australian jurisdictions, provides that the doctrine of revival is to be abolished and replaced by the continuance rule. Finally, s.3(1) of the Domicile Act 1992 in South Africa states that no person is to lose his domicile until a new one is acquired, and the doctrine of revival is not part of South African law[41]. The consideration of other jurisdictions can always act as a persuasive authority , however additionally, the Law Commission also recognised that it may be important that England follow suit "for the sake of International uniformity."[42]

Amidst this support for the replacement of the doctrine of revival by the continuance rule, Fentiman, although recognising some of the artificiality caused by the doctrine

[38] David McClean & Kisch Beevers, *Morris: The Conflict of Laws* (7th edn, Thomson Reuters (Legal) Limited 2009) 45.
[39] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.20.
[40] John O'Brien, *Conflict of Laws* (2nd edn, Cavendish Publishing Ltd 1999) 80.
[41] Domicile Act 1992, s.3(2).
[42] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.20.

of revival, maintains that it has its place within the law[43]. He considers the 'footloose propositus'[44], who has no connection to any particular state or country and how the doctrine of revival is able to assign them a domicile, to ensure that no person is left without one. As opposed to abolition, Fentiman asserts that, "what the domicile of origin and the revival doctrine need is careful handling"[45]. This careful handling would fall on the judiciary to ensure that the domicile of origin and the doctrine of revival are not unduly used in cases where, without them, they are uncertain of where a person is domiciled, or to achieve what the judiciary consider to be a desirable outcome. However, in the examination of previous cases it is evident that that the courts have been willing to use the doctrine of revival in such a way, and therefore the idea of careful handling by the judiciary does not appear to be an appropriate safeguard against its inappropriate use. For instance, in the case of *Ramsay v Liverpool Royal Infirmary*[46] it is difficult to come to any other conclusion other than that applying the domicile of origin produced the preferred outcome as part of ad hoc judicial determinativeness.

In *Ramsay*, the propositus had lived in England for 36 years having left Scotland. In that time he had never set foot back in Scotland and had made arrangements to be buried in England, yet on his death he was held to be domiciled in Scotland. The issue before the court was the validity of his will produced in Scotland, and in holding him domiciled in Scotland the will was valid, which would not have been the case had he have been domiciled in England. Though this may have been the 'correct' outcome for the case, with what appears to be a clear abandonment of Scotland, it is difficult to argue against the view that the nature of the issue influenced the court's decision[47]. With this in mind, it is difficult to see how 'careful handling' could provide an appropriate solution. Fentiman could argue that this is not a problem with the rules themselves, but with the judiciary failing to apply them correctly. Nevertheless, the tenacity of the domicile of origin combined with the doctrine of revival is evidently susceptible to use in this way.

Aside from these risks, Fentiman in his argument arguably fails to address the fact that the imposition of the domicile of origin under the doctrine of revival could lead to a person being assigned a domicile in a country to which they have never had a

[43] Richard Fentiman, 'Domicile Revisited' (1991) 50(3) Cambridge Law Journal 445.
[44] Ibid 452.
[45] Ibid 453.
[46] [1930] A.C. 588 (HL).
[47] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 307.

connection, or, whereby the connection was broken many years earlier, as opposed to a country they abandoned only a few months previously. Irrespective of judicial application, revival over continuance, therefore, has the potential to create the most out of touch results[48], and support for the continuance rule has clearly been evidenced in the consideration of other jurisdictions.

2.4 Domicile of Choice

The tenacity of the domicile of origin needs to be contextualised and set in contrast with the domicile of choice, and the precepts that determine ascertainment of the latter. As stated earlier, a domicile of choice is acquired *Animo et Facto*[49]. The factum element is the residence within the place and the animus is the intention element that is required[50]. The residence element is for the most part undisputed. It is not about the length of time one is resident, but the quality of that residence[51]. It was even suggested by Lord Chelmsford in *Bell v Kennedy* that if the animus exists before arrival in the country, that "any residence, however slight or temporary in its character following upon that intention, and in pursuance of it, will be sufficient to establish the domicile."[52] This would, in turn, suggest that what is actually needed is presence in that country and if a reform were to be achieved it may be more appropriate to replace residence for presence. This may appear a minor point based on little more than semantics, but there is evidence to support that staying with friends[53] or in a hotel[54] is sufficient to satisfy the factum. The word 'residence' has connotations of a period of time that must be satisfied, and arguably home ownership, or at least renting a property, and given case law demonstrates that this is not necessary to ascertain a domicile of choice, the law should be amended accordingly. This amendment would greater resemble what the law requires, whilst also updating the law to reflect modern judicial narrative[55].

[48] See Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.20 and John O'Brien, *Conflict of Laws* (2nd edn, Cavendish Publishing Ltd 1999) 80.
[49] Meaning when there is both the intention and the fact.
[50] David McClean & Kisch Beevers, *Morris: The Conflict of Laws* (7th edn, Thomson Reuters (Legal) Limited 2009) 33-35.
[51] *Bell v Kennedy* (1868) 6 M. 69 (HL).
[52] Ibid 77.
[53] *Stone v Stone* [1958] 1 WLR 1287.
[54] *Levene v IRC* [1928] A.C. 217 (HL).
[55] See for instance *Divall v Divall* [2014] EWHC 95 (Fam) [28] where Moor J stated that "The acquisition of a domicile of choice … requires physical presence, although it need not be long, plus an intention to remain permanently or indefinitely."

2.4.1 Satisfying the Requirement of Intention

When looking at the animus element of the domicile of choice the issue is more contentious. There is dispute over what the propositus must intend. Common law varies on what is required from an intention to remain permanently[56] to one to remain indefinitely[57]. In *Ramsay v Liverpool Royal Infirmary*, it was made clear that no length of time in itself would be sufficient to prove intention. It was said that the time in the country must be "accompanied by an intention on the part of the deceased to choose England as his permanent home."[58] In contrast, in the *Estate of Fuld (No 3)*, Scarman J stated, "a domicile of choice is acquired only if it be affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures of residency there indefinitely."[59] Here we can see a shift from 'permanent' to 'indefinite' which appears to be a slight relaxation on the requisite intention. An intention to remain permanently was strictly construed, and if there was a chance that the person would leave, the intention element would not be satisfied[60], whereas the requirement to remain indefinitely appears more relaxed. Scarman J in his judgment in *Estate of Fuld No.3* continued to state:

"If a man intends to return to the land of his birth upon a clearly foreseen and anticipated contingency, e.g. the end of his job, the intention required by law is lacking; but, if he has in his mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required."[61]

When considering the above statement, it is evident that, a vague chance of leaving will not prevent a domicile from being acquired, instead the contingency must be assessed. A contingency which is vague or uncertain, and could be described as a "pipe dream"[62], is unlikely to prevent a domicile from being acquired. Whilst one that is based on a definite event that the person has clearly in their mind may do so. In the *Estate of Re Fuld (No 3)*, it was considered that the way this is determined is

[56] *Winans v Attorney-General* [1904] A.C. 287 (HL) and *Ramsay v Liverpool Royal Infirmary* [1930] A.C. 588 (HL).
[57] *In the Estate of Fuld (No 3)* [1966] 2 WLR 717, [1968] P. 675, *Re Flyn* [1968] 1 All ER 49 and *Brown v Brown* (1982) 3 FLR 212 (CA).
[58] [1930] A.C. 588 (HL) 598.
[59] *In the Estate of Fuld (No 3)* [1966] 2 WLR 717, [1968] P. 675, 684.
[60] *Quereshi v Quereshi* [1972] Fam. 173.
[61] *In the Estate of Fuld (No 3)* [1966] 2 WLR 717, [1968] P. 675, 684-685.
[62] *Sekhri v Ray* [2013] EWHC 2290 (Fam), [2014] 1 FLR 612 [29]

whether the contingency is "clearly foreseen and reasonably anticipated"[63]. Yet, in *IRC V Bullock*[64], the court held that the propositus had not gained a domicile of choice in England as he intended to return to Canada if his wife died before him, and they held that there was a "sufficiently substantial possibility of the contingency happening."[65] In turn, the courts have provided two different tests. A sufficiently substantial possibility of something happening is different to it being reasonably anticipated. Whilst there may be a sufficiently substantial possibility that in *Bullock* his wife would die before him, it seems unlikely that he would reasonably anticipate or expect his wife who was three years his junior to die before him[66]. Therefore, it is likely that had the test from *Fuld's Estate (No 3)* been applied in *Bullock*, that the propositus would have been deemed to have gained a domicile of choice in England[67]. Again, this shows a lack of clarity in the area, and despite the test of 'clearly foreseen and reasonably anticipated' from *Fuld's Estate* being affirmed recently[68], there is still no real certainty in the area. The fact that there could be a contingency, and the propositus still gains a domicile of choice, would suggest a relaxation in the law from a strict approach of absolute permanency being required, but there remains uncertainty surrounding whether contingencies would prevent a change in domicile. The law, as it stands, is determined by personal perception, providing the judiciary with broadened discretion and enhanced flexibility, and the public with uncertainty and a lack of predictability.

Interestingly, Fawcett[69] argues that the rule selection that is able to occur under the present law allows the courts to select the domicile that will provide the desired result. He admits that, "this could be read as an admission of the preparedness to manipulate the facts in order to reach the desired result."[70] He states that such discretion and flexibility allows the courts to achieve policy aims. Fawcett looks at the contrasting case law as a result of rule selection, but states that while they may be criticised they achieve the correct results. Essentially, what the judiciary believe to be the correct results are achieved at the cost of certainty and predictability. A judge's thoughts on what the correct outcome is may not necessarily coincide with what others would

[63] [1966] 2 WLR 717, [1968] P. 675, 684,
[64] [1976] 1 WLR 1178.
[65] Ibid 1186.
[66] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 331.
[67] Ibid.
[68] *Perdoni v Curati* [2011] EWHC 3442 (Ch), [2012] WTLR 505 [27].
[69] James Fawcett, 'Result Selection in Domicile Cases' (1985) 5(3) Oxford Journal of Legal Studies 378.
[70] Ibid 380.

deem the correct result. The judiciary are there to apply the relevant rules in a way that is consistent, and it is this inconsistency that attracts support for reform in the area.

Further support for the need for certainty was also identified in the First Report of the Law Committee[71] and the Law Commission Working Paper No 88[72], as both recommended reform within the area. The Committee made the point that they are aware that the courts have had a tendency to apply a more modern and less strict approach to the cases, but asserts that the law is in need of amendment. They suggest a proposal in which presumptions of intent form part of the suggested legislation. The key presumption suggested is that, 'Where a person has his home in a country, he shall be presumed to live there permanently.'[73] The Law Commission, on the other hand, suggested that when a person has been habitually resident for seven continuous years since reaching the age of sixteen, they will be presumed to be intending to make it their home indefinitely, unless evidence is shown to the contrary[74]. Despite the differences in the proposals, it is of great significance to this research that both the Committee and the Commission identified the area as being in need of reform, and these suggested reforms will now be analysed to determine whether they are to feature within the reformulations propounded by this author.

As stated, the Law Committee suggested presumptions of intent, the key one being that 'where a person has his home in a country, he shall be presumed to live there permanently'.[75] The Law Commission took issue with this as a presumption of intent on the basis that 'home' would be no easier to resolve than an investigation into where a person is domiciled[76]. This statement is contentious. Admittedly, an investigation would have to be undertaken to determine where a person had his 'home' however, 'home' is a concept that is understood by the layman, lawyers and society as a whole and has in fact been utilised successfully in others areas of law. Article 8 of the ECHR refers to 'home' and has been recognised and understood within case law dealing

[71] Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954).
[72] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985).
[73] Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954) Appendix A, Article 2(2).
[74] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.17.
[75] Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954) Appendix A, Article 2(2).
[76] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.12.

with Convention matters[77]. There is also domestic support for the use of the term 'home' in housing legislation[78] which has again been interpreted and understood even where there has been multiple homes[79]. It is for that reason submitted the use of the term 'home' by the Law Committee is not as problematic as has been suggested.

As a result of the perceived problems with the aforementioned proposal, the Commission instead suggested a presumption of intent where there has been habitual residence for seven continuous years. This can also be criticised. Like 'home', a person's place of 'habitual residence' would have to be investigated, and it is a term that is not used as widely by laymen, as 'home' is popular everyday terminology. When considering habitual residence as an alternative to domicile, it is an underdeveloped concept "and has proved to be a source of uncertainty"[80]. With the requirement to have habitual residence in the said place for seven continuous years, it is unclear how long, and often, people are able to leave for without breaching the continuous element of the presumption[81]. The requirement for this residence to persist for seven years, having attained the age of sixteen, before the presumption takes effect, could also be criticised. Firstly, when analysing the reason behind the seven years it would seem there is little justification for this figure and could be said to be onerous. It is significantly higher than the three month requirement under the Civil Jurisdiction and Judgment Order 2001[82], which is used when determining domicile under the Brussels I Regulations, for jurisdictional purposes. However, the Commission believed it to be about the right balance but has admitted that there is "no magic in seven years"[83]. The presumption proposal by the Commission lacks thorough forethought and proper consideration. These particular problems are highlighted by Carter, who criticises the proposal for the time scale not commencing until the propositus attains the age of sixteen, as this could mean that whilst a person has been living in a particular country since they were twelve, they will not be presumed to have the intention to live their indefinitely until they reach the age of

[77] *Qazi v Harrow London Borough Council* [2003] UKHL 43, [2004] 1 AC 983 and *Buckland v UK* (2013) 56 EHRR 16.
[78] The Housing Act 2004.
[79] *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301 and *Crawley BC v Sawyer* (1988) 20 HLR 98.
[80] PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713, 720.
[81] Ibid.
[82] Civil Jurisdiction and Judgement Order 2001, SI 2001/3929, sch 1, para 9(6)(b).
[83] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.14.

twenty three, an onerous hurdle to jump[84]. Finally, Carter states that there is a lack of clarity in what is meant by 'subject to evidence to the contrary'. He questions the amount of evidence required and whether the presumption is one of fact or law[85].

The fact that neither of the suggested reforms above were ever put into action in England, does not reflect on their potential to clarify the law. The Commission made several recommendations in this report that, whilst not actioned upon in England, are supported by similar measures being utilised in other jurisdictions, suggesting that it was not about the report lacking potential, but about other matters being more prominent, and domicile fading into the background. For instance, when looking at other jurisdictions it is possible to see that they have legislated on what intention is required to attain a domicile of choice. S.10 of The Domicile Act 1982 in Australia states: 'The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.' Other jurisdictions provide similar sections to their legislation[86], and there is no reason why a similar position could not be achieved in England. While the proposals by both the Committee and the Commission go further than stating the level of intention required, such an approach would address the issues around judicial flexibility discussed above, and the inherent problems discussed below regarding ascertaining a person's intentions, and will for that reason be a consideration when proposing reform. The important point to elicit from s.10 Domicile Act 1982 is that certainty surrounding what a person must intend is possible as opposed to the current position of judicial discretion.

As indicated, in addition to the need to address the ambiguity around what intent is needed and what is meant by 'permanently' and 'indefinitely', reform would also need to address the issue inherent within intention, thus being that "the ascertainment of a person's intentions are fraught with difficulty"[87]. When considering whether a domicile of choice has been ascertained the propositus may provide a declaration of intention, however these are often treated with suspicion[88]:

"They may be interested statements designed to flatter or deceive the hearer; they may represent nothing more than vein expectations unlikely to be fulfilled; and the

[84] PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713.
[85] Ibid.
[86] New Zealand's Domicile Act 1976, s.9 and South Africa's Domicile Act 1992, s.1(2).
[87] James Fawcett, Janeen M Carruthers & Sir Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 154.
[88] *Bell v Kennedy* (1866 - 69) L.R. 1 Sc. & Div. 307.

very facility with which they can be made requires their sincerity to be manifested by some active step taken in furtherance of the expressed intention."[89]

Where no such declaration is provided the court must solely determine what the intention was. It has long been established that in order to do this, "the court must look back at the whole of the deceased's life … to decide whether he had acquired a domicile of choice."[90] It has been stressed how essential it is that no act or circumstance in a person's life should be ignored when determining whether they intended to change their domicile[91], and that a chronological examination of the life should be completed. This is something that is heavily criticised and is suggested to be in need of reform by Carter[92]. He states that it produces absurd results and suggests that instead the focus should be on "the situation as it existed at the very moment in time to which the enquiry relates, and asking directly what was then his home, which was the community with which he was then most closely connected, which is the community to which it would be most reasonable to say that he then belonged."[93] This, in itself, could prevent historical examinations of a person's life which can lead to lengthy and expensive court cases. It must be recognised that certain cases will require this chronological analysis. Even though it is apparent that intention is a necessary element to the domicile of choice, it is an area that needs considering in respect of reform to decipher if there is the potential to make the intention element clearer and easier to determine.

2.4.2 Changing One's Domicile: the Standard of Proof

Any assertions of a change in domicile burdens the person making such assertions to prove the change. The standard of proof which must be met is contentious. The general rule is that it must be proved on a balance of probabilities; the civil burden of proof, yet cases such as *Ramsay v Liverpool Royal Infirmary*[94], and *Winans v A-G*[95], as discussed earlier, suggest much more is needed. It has, in fact, in some cases, been alleged that a much higher standard of proof is required, something "beyond a

[89] James Fawcett, Janeen M Carruthers & Sir Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 166.
[90] *Agulian v Cyganik* [2006] EWCA Civ 129, [2006] 1 FCR 406 [46(1)].
[91] *Drevon v Drevon* (1864) 34 LJ Ch 129.
[92] PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713.
[93] Ibid 722-723.
[94] [1930] AC 588 (HL).
[95] [1904] AC 287 (HL).

mere balance of probabilities" [96]. In *Estate of Fuld (No 3)*[97], it was suggested that a change from a domicile of origin to one of choice, required a standard of proof approaching that of the criminal standard, highlighting the tenacity of the domicile of origin discussed earlier in the chapter. In more recent times judges have stated that the burden is no higher than the usual civil standard of proof[98], but doubt still remains: "Tradition dies hard, and there are relatively modern cases which are apparently explicable only on the basis that a fairly rigorous standard of proof is being applied"[99], as can be evidenced by the decision in *IRC v Bullock*[100] and the more recent case of *R v R (Divorce: Jurisdiction: Domicile)*[101]. In *R v R*, the claimant had lived in France for ten years and stated she thought she would remain there, however, having initially moved for the purposes of putting their children through education with the plan to thereafter return to England, the court were not satisfied that a domicile of choice in France had been acquired, in turn entrenching the tenacity of the domicile of origin proposition.

Although recent case law suggests that the law is becoming more relaxed on finding that a domicile of choice has been acquired[102], it was only in 2006 that the court reminded us of the importance of the tenacity of the domicile of origin in the case of *Cyganik v Agulian*[103]. It involved the death of a Cypriot national and the determination of whether he died domiciled in Cyprus, as this was his domicile of origin, or whether he had obtained a domicile of choice in England. The deceased had lived in England for the majority of his life, and it was accepted that for the majority of this period of time he had maintained his domicile in Cyprus, but having agreed to marry Miss Cyganik, who lived in England, the High Court held that he then became domiciled in England. The Court of Appeal felt that the judge had erred in making this decision, and allowed the appeal, stating that "the deputy judge underestimated the enduring strength of Andreas's Cypriot domicile of origin."[104] In agreeing with the success of the appeal it was then stated by Longmore LJ, that "it is easier to show a change from one domicile of choice to another domicile of choice than it is to show a change to a

[96] *Henderson v Henderson* [1965] 2 WLR 218, [1967] P.77, 80.
[97] [1966] 2 WLR 717, [1968] P. 675.
[98] *Re Flynn* [1968] 1 All ER 49 and *Henwood v Barlow Clowes International Ltd* [2008] EWCA Civ. 577, [2008] BPIR 778.
[99] PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713, 718.
[100] [1976] 3 All ER 353.
[101] [2006] 1 FLR 3Re S89.
[102] For instance *Sekhri v Ray* [2013] EWHC 2290 (Fam), [2014] 1 FLR 612 (affirmed on appeal [2014] EWCA Civ 119, [2014] 2 FLR 1168) and *Perdoni v Curati* [2011] EWHC 3442 (Ch), [2012] WTLR 505.
[103] [2006] EWCA Civ 129, [2003] 1 FCR 406.
[104] [2006] EWCA Civ 129 [2003] FCR 406 [49].

domicile of choice from a domicile of origin."[105] This undeniably shows a recent decision in which the court deemed there was a distinction between what is required to replace a domicile of origin compared to when replacing a domicile of choice, further emphasising the tenacity of the domicile of origin, and its more likely application by the courts. It remains unclear whether the court in *Cyganik* were suggesting a standard of proof more similar to the criminal standard, but in *Henwood v Barlow Clowes International Ltd*[106] the case was disapproved and the normal civil standard was held to apply. Whilst this may appear to bring some clarity, it must be stressed that when considering *Henwood*, it was stated that acquiring a new domicile should "in general always be treated as a serious allegation"[107] and the case itself could be said to show how cumbersome obtaining a domicile of choice is in practice. Reform of the law on domicile would provide the opportunity to state what standard of proof is required in order to finalise the matter and alleviate any doubt. This is supported by the Law Commission who in their suggestion for reform provided that, the normal civil standard of proof; the balance of probabilities should apply to all domicile disputes[108]. This research will, therefore, in its suggestion for reform, propose a fixed rule be put in place that will finally provide certainty and consistency in respect of the standard of proof that must be met when alleging a change of domicile.

2.5 Domicile of Dependency

When examining the domicile of dependency both children under the age of sixteen and those suffering mental disability must be considered. Under the general rules a child's domicile follows that of the father if legitimate, or the mother if illegitimate as with domicile of origin. In an attempt to create greater flexibility s.4 of the Domicile and Matrimonial Proceedings Act 1973 states that where the parents are living apart and the child has a home with the mother and not with the father, he will take the mother's domicile. The use of 'living apart' means that the parents need not be separated, they may be living apart for other reasons such as work. While this provides a step in the right direction it still appears artificial[109]. The Act does not

[105] Ibid [56].
[106] [2008] EWCA Civ. 577, [2008] BPIR 778.
[107] *Henwood v Barlow Clowes International Ltd* [2008] EWCA Civ. 577, [2008] BPIR 778 [94].
[108] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 5.17.
[109] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (3rd edn, Oxford University Press 2006) 30.

consider the position when the father is dead, nor does it apply equally to the domicile of origin. Therefore, a child may still have a domicile of origin in a country with which they have no connection, and may immediately have their domicile of origin replaced by a domicile of dependency. It is for these reasons that the Law Commission recommended reform in the area[110]. The suggested reform was that where a child's parents have the same domicile it will change with them, but where they have different domiciles, but live together, that the child's should change with that of the mother. Then when considering when the child has a home with one of the parents the domicile is the same as, and changes with that parent. As with the domicile of origin, there is again no provision for a child of a same-sex couple. However, these recommendations were altered in the Law Commission's final report[111]. The Commission introduced the idea of the child's domicile being determined by looking at the place they are most closely connected with. This is then aided by presumptions based on the parent or parents the child lives with, and their domiciles: so for instance where the child lives with both parents, and they both have the same domicile, there will be a rebuttable presumption that the child is most closely connected to that place, and therefore domiciled there[112]. Alternatively, where the child lives with both parents, but they have different domiciles, no presumption should be applied, and instead the test of closest connection should be applied solely[113]. Though the report never materialised within the law in England, as it was rejected by the UK Government[114], it is possible to see how such recommendations in their avoidance of stipulating the mother or father's domicile, could offer the versatility needed in the modern day, and was in fact introduced within Scottish law[115].

S.22 of the Family Law (Scotland) Act 2006 sets out the law on domicile for those under the age of sixteen, and like the final Law Commission report, provides that: where the parents of the child are domiciled in the same country as each other and the child has a home or homes with one, or both of them, the child will be domiciled in the same country as them. Alternatively, where these conditions do not apply, the child is domiciled in the country with which the child has, for the time being the closest

[110] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 4.18.
[111] Law Commission and Scottish Law Commission, *Private International Law: The Law on Domicile* (Law Com No 168, 1987) paras 4.12-4.20.
[112] Ibid para 4.15.
[113] Ibid para 4.17.
[114] Law Commission, *Thirtieth Annual Report* (Law Com No. 239, 1996) para 1.5, n. 24.
[115] Family Law (Scotland) Act 2006, s.22.

connection[116]. This, therefore, further demonstrates how the law on the domicile of dependency could be reformed, and Scotland could, in this regard, act as a comparator demonstrating how the acquisition of domicile of dependency could be reformulated. S.22 in its avoidance of the use of the gender based roles of 'mother' and 'father' appoints the domicile of dependency in an inclusive manner; respecting the diversity of modern families, and is to be considered an exemplar for England. However, s.22 is not faultless. In its use of the heading 'domicile of person's under 16', and its failure to reference the 'domicile of origin' or the 'domicile of dependency', it is unclear whether the rule is applied to ascertain both the domicile of origin and the domicile of dependency[117]. While there is no room for doubt that the statute replaces the common law rules on the domicile of dependency, or the derivative domicile as it is known in Scotland, the same assertions cannot be made in respect of the domicile of origin[118].

The explanatory notes to the Act state that "there will no longer be a link between a child's domicile and that of his or her parent's marital status in relation to both the domcile of origin and dependent domcile", and thus suggests that s.22 applies equally to both types of domicile. This sits uncomfortably within the law when considering the title of the section. While the doctrine of revival is still in operation, a person's domicile of origin could be the applicable law at any given age, and therefore contradicts the heading 'domicile of persons under 16'[119]. Harder, instead propounds that there is no real certainty as to whether s.22 applies to both domiciles, and offers four different approaches that could be taken when interpreting s.22. The first approach would be to apply s.22 to all types of domicile children can have, but only to children, and thereafter the domicile of origin would be determined in accordance with the common law rules. The second option would be to state that s.22 only applies to the derivative domicile of children. The third approach Harder discusses is that s.22 applies to both the domicile of origin, and the derivative domicile of children, even when the domicile of origin is in relation to an adult as a consequence of the doctrine of revival. Finally, the fourth approach offered, is that the revival rule be replaced by the continuance rule, and that s.22 would apply to all children from birth until the age of sixteen[120]. Much of this uncertainty derives from the fact that s.22 was brought into effect after a

[116] S.22(3).
[117] Elizabeth B Crawford & Janeen M Carruthers, 'Family Law (Scotland(Act 2006: Post-Legislative Scrutiny' (Feb 2016) 3-4.
[118] Sirko Harder, 'Domicile of Children: The New Law in Scotland' (2006) 10(3) Edinburgh Law Review 386,388.
[119] Ibid 394.
[120] Ibid 394-395.

Scottish Law Commission Report on Family Law[121], in which, the domicile of children had been copied from the 1987 Law Commission report, without acknowledging that, in the original report, the proposal for the domicile of children had been complemented by a recommendation that the doctrine of revival be replaced by the rule of continuance[122]. For that reason, it is important that any reforms put into place on the law of domicile are clear in their scope.

Aside from the rules as to which parent determines the domicile of dependency, this category of domicile has been criticised for governing until a child reaches the age of sixteen[123]. Carter's basis for such criticism comes from the fact that other countries allow a domicile of choice from a younger age, and the other responsibilities we place on younger members of society in England. In support of his argument, Carter highlights the fact that we will not allow a person under the age of sixteen to form the necessary intent to ascertain a domicile of choice, yet we are willing to state a child can satisfy the intention to attract having criminal responsibility from the age of ten. The fact that a person under the age of sixteen may be unable to carry out his intentions regarding domicile is, in Carter's eyes irrelevant[124].

When looking at domicile of dependency as a result of a mental disorder, the current law provides that the propositus would retain the domicile they had immediately before becoming incapable of forming the necessary intention to acquire a domicile of choice[125]. The Law Commission recommended reform on the basis that the domicile be based on the country which they are most closely connected to[126]. This could mean that a propositus was deemed to be domiciled in a country they never intended to live in, but may have been moved there by a carer. It is, for that reason, submitted that, the law as it stands is the best provision that can be in place for those not able to form the necessary intention, as at least a connection to that country or state can be seen prior to the mental impairment. As a result, no reform is suggested to domicile of dependency as a result of mental disorder, and instead reform to this area will focus on domicile of dependency for those under 16. Particular attention will be paid to the rules in place for determining a child's domicile, and ensuring that they

[121] Scottish Law Commission, *Family Law* (Scot Law Com No 135, 1992).
[122] Sirko Harder, 'Domicile of Children: The New Law in Scotland' (2006) 10(3) Edinburgh Law Review 386, 393-394.
[123] PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713.
[124] Ibid 721.
[125] *Urquhart v Butterfield* (1887) 37 Ch D. 357 (CA).
[126] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 6.9.

are the most appropriate, and are capable of application to the various families that exist within modern society.

2.6 The Need for Reform of the Law on Domicile

2.6.1 Habitual Residence

In addition to looking at ways in which the law on domicile could be reformed, alternative connecting factors may be more appropriate, and must be considered. Habitual residence is a connecting factor that was initially developed by the Hague Conference on Private International Law as a compromise of domicile and nationality[127]. It is now used within domestic legislation[128] in addition to being the main connecting factor within the Brussels II Regulations[129]. As it is used as a connecting factor in multiple areas of law, it is accepted that the meaning of habitual residence will vary according to the context. It has an autonomous meaning when used within domestic law but also within EU law. This in itself could provide some confusion when attempting to understand its meaning in a particular context[130].

Unlike domicile there are no rules surrounding categories of habitual residence, there is no habitual residence of origin, or a doctrine of revival and a person can have more than one habitual residence at a time. In order to prove habitual residence in a particular place it must be shown that there is concurrent physical residence and a mental state of having a 'settled purpose' of remaining there[131]. It is the objective fact of residence that is of great significance in the decision of habitual residence, and a person's intentions are of little importance[132]. When ascertaining whether a person is habitually resident in a particular place it is the length of time that they must have been resident in that place that is difficult to determine. In *Re J (Abduction: Custody Rights)*[133] it was stated that habitual residence could not be achieved within a day,

[127] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 329.
[128] Examples include; Domicile and Matrimonial Proceedings Act 1973, Family Law Act 1986, & Wills Act 1963.
[129] Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II) [2000] OJ L160/19, hereafter referred to as Brussels II.
[130] A problem also recognised when considering habitual residence as a replacement for domicile in the US "habitual residence has failed to supersede domicile in American family law in part because definitions of the term have remained imprecise" (Susan Frelich Appleton, 'Leaving Home? Domicile, Family, and Gender' (2013-2014) 47(5) UC Davis Law Review 1453, 1461).
[131] *Shah v Barnet London Borough Council* [1983] 2 AC 309, 344.
[132] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 332.
[133] [1990] 2 AC 562, 578.

but that it takes an "appreciable period of time". It has been suggested that a month could be deemed an appreciable period of time[134], and in *Marinos v Marinos*[135] it was recognised that it could be "measured in weeks rather than months and in an appropriate case it can probably be measured in nothing more than days". Shorter periods of time can still result in a determination that there is habitual residence where there is an evident settled purpose, thus showing the intention to remain[136]. Where there is doubt over settled intention larger periods of time may still be insufficient for habitual residence. In *A v A (Child Abduction)*[137] eight months was considered insufficient when determining whether the propositus was habitually resident in Australia, highlighting how the courts turn on the individual facts which, in turn creates an element of uncertainty. This shows that if habitual residence were to completely replace domicile it could result in the almost certain need for litigation where habitual residence is in doubt. "The subjective element tends to lead to unpredictability"[138].

When examining the element of intention required it is evident that it is markedly different to that of domicile. Habitual residence can still be achieved where the residence is for a fixed period of time such as a fixed term contract[139] or a period of study[140]: "All the law requires is that there is a settled purpose. This does not mean that the person must intend to stay where he is indefinitely, his purpose, while settled, may be for a limited period."[141] It is, therefore evident, that less is required in respect of intention when considering habitual residence. This may seem a positive step in the right direction, as one of the main problems with domicile, is satisfying the requisite intention. On the other hand, because habitual residence focuses less on what the individual wants in the long term, it could mean that people who did not wish to be connected to a particular country by habitual residence may not be able to avoid it: "The subjective arguments of lack of connection with the country or a wish to leave will not prevent habitual residence from being acquired"[142]. This was a criticism that was recognised by the Law Commission in their Working Paper No. 88[143]. The

[134] *Re F (Child Abduction)* [1992] 1 FLR 548.
[135] [2007] EWHC 2047, [2007] 2 FLR 1018 [87].
[136] *Re S (A minor) (Custody: Habitual Residence)* [1998] AC 750.
[137] [1993] 2 FLR 225.
[138] Pippa Rogerson, 'Habitual Residence: The New Domicile' (2000) 49 International and Comparative Law Quarterly 86, 90.
[139] *Re R (Abduction: Habitual Residence)* [2003] EWHC [2004] 1 FLR 216.
[140] *Kapur v Kapur* [1984] FLR 920.
[141] Peter Stone, 'The Concept of Habitual Residence in Private International Law' (2000) 29 Anglo-American Law Review 342, 355.
[142] Pippa Rogerson, 'Habitual Residence: The New Domicile' (2000) 49 International and Comparative Law Quarterly 86, 94.
[143] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985)

Commission recognised that the intention required is legally under-developed, with no judicial consensus as to the degree of importance given to it[144], and that those working abroad for extended periods of time or expatriates could be cut off from the courts of their homeland despite them remaining closely connected to it[145]. Notwithstanding the appeal of sidestepping the problems surrounding intention within domicile, habitual residence is not a viable alternative, "The concept is ... unsuitable for general choice of law purpose as it generates a link with a country that may be tenuous."[146]

It is for these reasons that the Commission set aside habitual residence as a replacement for domicile, stating "domicile, especially if amended in the ways we propose later in the consultation paper, is better suited and more likely to achieve that end in many circumstances than is habitual residence."[147] This too could be said for the definition of domicile under the Civil Jurisdiction and Judgment Order 2001, designed for the purposes of the Brussels I Regulations. Under the definition there is no requirement of future intentions to remain in the country, but rather a substantial connection with the UK, which will be presumed after a residence of 3 months. Consequently, it would appear to be open to the same tenuous links as the English notion of habitual residence, and should equally not be considered as a potential way of reforming this area of law. For this reason it would appear that habitual residence would not be a suitable replacement for domicile, people would be governed by the laws of a country they may have no connection to and intend leaving in the near future, and with no means of preventing this, artificial results would be inevitable.

2.6.2 Nationality

Nationality is often used as a connecting factor in civil law systems but has minimal use in England. One of the key advantages of the use of nationality as a connecting factor is that it is easily ascertained and proved, in turn providing certainty[148]. The Law Commission also state that because consent is needed by both the party and the

[144] Ibid para 2.4.
[145] Ibid para 2.3.
[146] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 341.
[147] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 2.5 and is a view that is supported in CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 341 and James Fawcett, Janeen M Carruthers & Sir Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 182-183.
[148] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 2.6.

state for the change in nationality, its consequences are less susceptible to criticism when a person's rights are changed by the change in nationality[149]. On the other hand, the Commission also recognise the problems with using nationality as the main connecting factor. There would need to be special rules for those who are stateless or those with more than one nationality. Special rules would also be required in federal or composite states, including the UK where, nationality would not indicate with which of the countries the person would be connected. Finally, because nationality is not dependant on residence its use would increase the situation where a person is connected with a country which he may never have lived in or only lived in for a short period of time[150]. It is for these reasons, that despite the certainty nationality would provide, the Law Commission held that it would not work as a replacement for domicile. The Commission stated that nationality has its place as a supplementary connecting factor to domicile, but is not sufficient to substitute it.

After exploring both habitual residence and nationality the Commission concluded the matter by stating that domicile should continue to be used as the connecting factor in the UK[151]. Therefore, with the issues with the law on domicile set out above, attention will now turn to the reforms suggested by this author.

2.7 Domicile and the Plan for Reform

Amidst the discussions of the need for reform, it has been suggested that the most appropriate way would be way of common law developments[152]. However, this need for reform was recognised decades ago and no such reform has occurred. As a consequence of this impasse, it is instead suggested that it is time for a legislative cathartic panacea to cure current ills. The areas of main concern surround the domicile of origin and its ability to revive, the rules around the allocation of the domicile of origin and dependency, and the intention element of the domicile of choice.

In respect of the domicile of origin and its ability to revive, it is suggested that the most appropriate reform would be the abolition of the doctrine of revival. The rule should be replaced by the continuance rule, meaning that a propositus' most recent domicile would continue until it has been replaced. This is a reform that was wholly supported

[149] Ibid.
[150] Ibid para 2.7.
[151] Ibid para 2.9.
[152] Richard Fentiman, 'Domicile Revisited' (1991) 50(3) Cambridge Law Journal 445.

by the Law Commission[153], and is still necessary and appropriate today given the artificial results discussed in section 2.3, and its outdated justification based on British colonists: “In the modern world, where people are much more ready to cut all ties to their country of birth, it is no longer justified to resort to the domicile of origin to fill a gap between the two domiciles of choice.”[154] It is also important to note that such a reform would lead to the submission of further reform. If the doctrine of revival was abolished, the domicile of origin would cease to be needed as a separate type of domicile. Under the current provisions the main distinction between the domicile of origin and the domicile of dependency, is that the former is the one that revives. The way in which the domicile is selected is broadly based on the same principles. Thus, upon the abolition of revival, the domicile of origin, as a distinct type of domicile, becomes surplus to requirements[155]. What becomes important then is that the rules used to determine the selection of a child’s domicile are appropriate. As discussed earlier, those under the current law are outdated and cannot be applied to children of parents in same-sex relationships. It may be that the rules suggested in the final report of the Law Commission, and indeed adopted in s.22 of the Family Law (Scotland) Act 2006, could be applied, but this will require careful consideration.

When looking at the domicile of choice the requisite intention should be to remain indefinitely as opposed to permanently. However, even with this clarification, problems with the domicile of choice remain. A person may still have in their mind, a particular event that would cause them to leave the country, and so the assessment of this contingency, and its impact upon satisfying the element of intention still creates judicial discretion, and uncertainty within the law. Likewise, the inherent problems with ascertaining a person’s intentions remain. For these reasons, it is propounded that the law should be reformulated so as to include rebuttable presumptions of intent. It is proposed that such presumptions should be based on where a person has their home, and so legislation would provide that where a person has his home in a country, they will be presumed to live their indefinitely. The legislation would also provide that this could then be rebutted by providing evidence to the contrary which, would have to be proved to the civil standard of the balance of probabilities. This solution would

[153] See both the Law Commission and Scottish Law Commission, *Private International Law the Law of Domicile* (Law Com No 88, 1985) para 5.20 and the Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 168, 1987) para 5.25.
[154] Sirko Harder, ‘Domicile of Children: The New Law in Scotland’ (2006) 10(3) Edinburgh Law Review 386, 396.
[155] Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 168, 1987) para 4.24 and Sirko Harder, ‘Domicile of Children: The New Law in Scotland’ (2006) 10(3) Edinburgh Law Review 386, 392.

undoubtedly bring certainty to the area, in addition to removing the difficult task of the judiciary having to decipher a person's intentions. Also, by legislating on the standard of proof required when seeking to rebut the presumption, it is clear that it is the civil standard of proof required, regardless of the domicile being replaced; preventing a heavier burden being applied to the domicile of origin in the event that it is not abolished as a separate domicile. Finally, having examined how long a person must be in the country to satisfy the residency element, 'residence' should be replaced by 'presence'. 'Residence' and the connotations of such a word does not accurately reflect what is needed to satisfy the factum.

Finally, in order to provide the holistic reformulation of the law on domicile that this chapter set out to achieve, the domicile of dependency must also be considered. As stated above, in the event that the domicile of origin be removed entirely, it would be important that any rules laid down regarding the determination of a child's domicile could be applied in all familial relationships. They would need to be sensitive to situations such as one parent families due to the death or absence of one of the parents, primary custody being with one parent, and children of same-sex relationships[156]. It may be that rules based on the place which the child is most closely connected with, supported by rebuttable presumptions based on the parent or parents they live with and their domicile[157], as previously discussed, would be the most appropriate.

These suggested reforms would provide certainty and predictability within the law of domicile, and would allow legal professionals to better advise their clients. This advice would not only be for clients protesting about the validity of a marriage, but could be in relation to the validity of a will, or succession rights under the laws of intestacy. As domicile is used as the connecting factor in various matters pertaining to personal status, the impact of this proposed reformulation stems beyond its role in reforming marriage validity; it could mean cases like *Ramsay V Liverpool Royal Infirmary*[158], where it is necessary to determine where a propositus was domiciled for the purpose of his will, are much simpler. Lastly, the reformulation addresses the largely

[156] This need for domicile to catch up with modern family law has also been discussed in relation to the law in the US; see Susan Frelich Appleton, 'Leaving Home? Domicile, Family, and Gender' (2013-2014) 47(5) UC Davis Law Review 1453. In this article, Appelton discusses how due to the developments that have occurred domicile is in need of reform or replacement in the US, and given it operates in much the same way as it does in England, this could be seen as further support of the need for reform.
[157] As was suggested at Law Commission and Scottish Law Commission, *Private International La: The Law of Domicile* (Law Com No 168, 1987) paras 4.14 - 4.16.
[158] [1930] AC 588 (HL).

undiscussed inadequacies of the law since the introduction of civil partnerships and same-sex marriages, and recommends how this might be tailored to ensure the law is fit for purpose, and Convention compliant.

2.8 Conclusion

It is clear that the law on domicile in England has its problems and is in need of reform. With the levels of migration we now have across the world, the concept seems outdated and unfit for purpose. Regardless of being based on what were more than likely very typical behaviours of the time, gone are the days of people returning to their homeland to die[159]. Putting such sentiment aside, the doctrine of revival appears counterproductive, and must be addressed. The ease at which people are now able to move from one country to another, and the increased desire to do so for reasons such as quality of life, education and employment opportunities also makes the assessment of domicile of choice important. In addition to problems caused by the tenacity of the domicile of origin, satisfying the intention element of the domicile of choice has not been without its problems, and so dealing with this is also vital.

The proposed reforms around replacing the doctrine of revival with the continuance rule, and creating presumptions of intention would go a long way in addressing these problems. Removing the ability of the domicile of origin to revive will, by default, remove some of its tenacity. This could then be furthered by removing it as a distinct category of domicile altogether. Without its ability to revive there would be little logic in distinguishing between one's domicile acquired at birth and one of dependency. As a consequence, what we would be left with is a domicile of dependency which should continue to carry no greater status than one of choice. Thus, having tackled what may be seen as a favouritism, or an inherent desire to revert to the application of the domicile of origin[160], domicile of choice can assume its rightful place. The remaining difficulties associated with determining a person's intention can then be addressed by way of rules of presumption as suggested.

Alongside these issues, it is also apparent that the rules regarding acquiring a domicile of origin and the general rules for obtaining a domicile of dependency are at

[159] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 311.
[160] As has been suggested in CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 307 and indeed James Fawcett, 'Result Selection in Domicile Cases' (1985) 5(3) Oxford Journal of Legal Studies 378, 380 where they discuss the court's desire to produce the 'right' outcome for the case, rather than necessarily following the rules in a certain manner.

odds with the current law. The general rule is that legitimate children are assigned the domicile of their father and illegitimate, that of their mother. Such rules fail to reflect not only the developments within society, but the unquestionable developments in law. Same-sex couples are able to enter into either a civil partnership[161] or a marriage[162] and therefore may, as discussed, have a legitimate child, yet the rules simply do not cater for such families. This clearly highlights how out of touch and discriminatory the law on domicile is under extant law. Not only are we faced with laws based on historic sentiments of the upper class, but we also have rules that simply do not reflect subsequent legal developments, and therefore when read together, appear to sit at odds with one another, and violate human rights principles of non-discrimination.

The developments surrounding same-sex couples and the problems they face are relatively new, on the other hand the other issues have been known and discussed for a long time and yet nothing has been done[163]. When looking at domicile in isolation it is clear how problematic the law is and therefore the importance of dealing with it *ab initio*. This becomes particularly apparent when considering the many areas of law in which domicile features. As a prevalent connecting factor in England, domicile, and the problems and uncertainties that come with it, has the potential to cause uncertainty and unpredictability in many a legal area. One such area is the essential validity of marriage, and it is suggested that if there is to be an investment of time and research into how marriage validity can be improved upon, and made more certain for couples, domicile must be addressed as a first point of reference, and as a central definitional constructive element. As a key concept within marriage validity, domicile in many instances must be assessed in order to determine validity; it forms part of the equation. Naturally, if that first part of the equation cannot be determined it jeopardises the final result. For that reason it is submitted that only when all of the elements of this research are synchronised can the aims be achieved. A person cannot run without first learning to walk, similarly certainty within the essential validity of a marriage cannot be achieved without certainty within one of the key connecting

[161] Under the Civil Partnership Act 2004.
[162] Under the Marriage (Same-Sex Couples) Act 2013.
[163] Some of the issues were raised as long ago as 1954 in the Private International Law Committee *First Report of the Private International Law Committee, 1954* (Cmd 9068) and then again in 1963 in the Private International Law Committee *Seventh Report of the Private International Law Committee, 1963* (Cmnd 1955) and then in the most recent, and highly discussed final report of the Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 168, 1987).

factors. It is finding this piece of the jigsaw puzzle that allows the puzzle to continue, and when the remaining chapters are all pieced together, to eventually be completed.

Chapter 3

Happily Ever After? Creating Certainty In England On The Choice Of Law Rules Within Marriage Validity

3.1 Introduction

The validity of one's marriage is something that rarely crosses many couples' minds; it is something often taken for granted. However, in reality, as a result of the differing rules around the world surrounding the requirements for a valid marriage, where more than one country is involved, these rules may come into conflict. The involvement of more than one country could be as a result of: a couple marrying abroad; because they themselves are from different countries; a consequence of a subsequent move; or indeed, a combination of these factors. With migration becoming more accessible, the potential for such conflict increases[1], and, thus, so does the need for this area to be addressed. Like domicile, it is an area that suffers from uncertainty, and though some of this is as a result of domicile being used as a connecting factor, which raises some the issues discussed in the previous chapter, the extent of the problems is much greater. This chapter will, therefore, evaluate marriage validity and the problems therein, before setting out how the law on this area could be reformulated to produce the optimal choice of law rules.

Marriage validity is broken down into two aspects: formal validity; and essential validity. Formal validity is concerned with the ceremony itself, and the formalities that must be complied with to conduct a valid ceremony[2], such as the vows that must be said, or the witnesses that must be present. Essential validity, in essence, covers all aspects not associated with the formalities, the primary example, and the one of concern in this research, being the capacity to marry. It is then within these two aspects of validity that various rules emerge as to what choice of law rule should apply

[1] Commission, *on applicable law and jurisdiction in divorce matters* (Green paper COM (2005) 82).
[2] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 348.

in order to select the country's law that will be applicable. It is, in turn, these choice of law rules that cause uncertainty within the area. For all that there is a general consensus in England as to the applicable law within formal validity, no such consensus exists within essential validity. Consequently, it is in relation to essential validity, and the capacity of a couple to marry, that much of the uncertainty exists.

Amidst the uncertainty within the essential validity of marriage, there are two main competing theories: the dual domicile theory; and the intended matrimonial home theory. The dual domicile theory, as introduced by Dicey[3], looks at the law of each party's pre-nuptial domicile, while the intended matrimonial home theory, introduced by Cheshire[4], turns to the law of the husband's domicile, or where the couple intend to live. While these opposing theories have continued to battle for recognition as the applicable choice of law rule, alternative theories have also continued to develop. As a result, despite the Law Commission stating that they believe the dual domicile theory to be the most appropriate choice of law rule for all issues of essential validity[5], any of the theories that will be outlined in this chapter could be applied. This is further highlighted by the support the various theories receive[6], in addition to the fact that even after the Law Commission report, the judiciary have continued to apply choice of law rules other than the dual domicile theory[7]. As a consequence, couples are uncertain on personal status, and unable to predict the choice of law rule that will be applied when assessing their marital status, and could as a result, be unsure whether their marriage is valid.

This lack of certainty leads to a shortfall within the law on marriage validity that must be addressed: "one thing that people are entitled to know from the law is whether they are formally married."[8] This is important for a whole host of reasons, some of which are emotional in nature, and others as a result of the legal consequences that might arise. Firstly, for many their marital status is one that they hold dearly, and so any potential invalidity should be apparent and capable of being understood by the couple

[3] John Morris, *Dicey and Morris on the Conflict of Laws* (8th edn, London: Stevens 1967) Rule 31 at 254-255.
[4] GC Cheshire, *Cheshire's Private International Law*, (7th edn, Butterworth & Co 1965) 227-228.
[5] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.36.
[6] For instance, *Radwan v Radwan (No2)* [1973] Fam 35 provides support for the intended matrimonial theory, while *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 supports the use of the most real and substantial connection test, and AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' [1978] Modern Law Review 38 offers support for the alternative reference test.
[7] Examples include *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 and *Minister of Employment and Immigration v Norwal* [1990] 2 FC 385.
[8] *Estin v Estin*, 344 U.S. 541, 553 (1948) (Robert Jackson J).

involved. Secondly, as outlined in the introductory chapter, certainty is important within marriage validity because of the importance of certainty within the rule of law. The rule of law requires there to be a level of transparency within the law, so that it is capable of being understood and used by society, to allow individuals to plan their lives[9]. Thirdly, as important as marriage is on a sentimental and emotive level, the legal ramifications of a couple's marital status span much wider[10]. For instance, declaring a couple married will impact upon inheritance rights where one of the parties dies intestate, or rights on free movement or immigration where one of them is a non-UK or non-EU national. It is these rights, or indeed obligations that arise from marriage, that may lead to it being questioned, and, thus, the outcome of such cases can run much deeper than the feelings they invoke; it could be the decision that determines a person's right to inheritance or their right to reside in a particular country[11]. Finally, certainty is important within marriage validity for policy reasons. As will be discussed later in the chapter, there are certain policy objectives that any choice of law rules on marriage validity should seek to achieve, and one such objective is certainty and predictability for couples[12]. Whatever the reason in each individual case, what these points highlight is the need for certainty and predictability, and therefore this chapter will critique the law on the area before suggesting a recategorisation that achieves optimal policy solutions.

An approach that may begin to address the issue of uncertainty is interest analysis. Interest analysis is a theory based on the idea that the applicable law should be that of the state most interested in the matter[13]. This theory was originally propounded by Currie[14] in the United States, but has undergone much development, and has, as a result, moved away from the case by case approach initially advocated, in favour of

[9] Joseph Raz, '*Authority of Law: Essays on Law and Morality* (Clarendon Press 1979).
[10] This was discussed by Maebh Harding, *Conflict of Laws* (5th edn, Routledge 2014) 211 when she raises the financial duty of support that arises as a result of marital status, tax exemptions and gaining residency in the UK.
[11] This problem was explored by Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013) para 4.4.1-5.3 in relation to same-sex couples who fail to recognition of their marital status, but also could equally apply to a heterosexual couple who believe they are married but are deemed not to be due to the choice of law rule applied.
[12] These policy objectives were set out by the Law Commission in, Law Commission and Scottish Law Commission, *Private International Law Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 2.35, and have also been discussed in Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[13] See, Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 408-409 for a general discussion of interest analysis.
[14] Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963).

a more rules based framework[15]. A rules based contextualisation of interest analysis would break down essential validity into the various incapacities. Each incapacity would then need to be assigned a policy sensitive choice of law rule that considers what the incapacity seeks to achieve. Such an approach offers a tailor made body of choice of law rules that are certain in nature, but flexible towards the policies behind each of the incapacities. In exploring this framework, this research will analyse the incapacities and the various choice of law rules to design and create a bespoke reformulation of the law. This reformulation will feature the new and original choice of law rule of the "continued recognised relationship theory". This theory applies the law of the country where the couple intend to live, or, the law of the country where they have lived if their relationship has been subsisting for a reasonable period of time. In exploring this new theory, along with all of the other analysis to reform the law, this chapter will extrapolate what is needed to reformulate the law, and provide the certainty and predictability that has long been sought.

3.2 Formal Validity

It is generally accepted that the *lex loci celebrationis*[16] governs all questions of formal validity. This mutual recognition is as a result of the elements that shape formal validity including: giving notice of getting married; the vows that must be said; and the requirement of witnesses. All such prerequisites are best regulated by the *lex loci* due to advantages including: knowledge held by the officials involved; party expectations[17]; and respect for tradition: when in Rome do as the Romans do. This commonality in approach has led to the understanding that a marriage that is formally valid in the *lex loci* is formally valid the world over.

To counter the general rule of the *lex loci* there are statutory and common law exceptions[18]. Common law provides instances where it is permissible for the parties

[15] This can be seen generally in the US by Caver's introduction of a set of choice of law rules in certain areas of Tort as discussed by Peter Hay, *Conflict of Laws Black Letter Outlines* (7th Edn, West Publishing Co. 2014) 229, but then also here in England in relation to marriage validity in Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 46 and Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 412.
[16] The law of the place of the celebration, and will from this point be referred to as the lex loci.
[17] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 2.36.
[18] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 361.

to disregard the requirements laid down by the *lex loci*, and instead enter into a 'common law marriage'[19]. Common law marriages may be deemed valid if: English common law applies[20]; there is insuperable difficulty in complying with the local law[21]; or marriages in countries under belligerent control[22]. Upon satisfying one of the above conditions, the only remaining criteria is that the parties take each other as husband and wife in the presence of one another.

The validity of common law marriages, where English common law applies, is as a result of the fact that the country of celebration is still governed by English common law[23]. The extent to which this can really be categorised as an exception is debatable, as was highlighted in *Taczanowska v Tackzanowska*[24] . Essentially in these cases the *lex loci* is still the applicable law, as English common law is the law of the place of celebration. The exception where there is insuperable difficulty in complying with local law permits common law marriage where it is impossible to comply with the formalities of local law[25], or there is no form available. Any inconvenience caused by the application of local law would not in itself amount to insuperability[26]. Finally, the last common law exception allows members of the armed forces to marry without submitting to the laws of the conquered country to which they occupy[27]. This was a particularly helpful exception at the end of the Second World War, and remains valid today should the need to use it arise as a result of modern conflicts.

In addition to the common law exceptions, there are two further exceptions provided by statute. Firstly, the Foreign Marriage Act 1892, as amended[28], makes provisions for the recognition of consular marriages, where at least one of the parties to the marriage is a British citizen. In order for the marriage to be valid it must have been conducted in the manner required by the Act. The second statutory exception provided under the Foreign Marriage Act 1946, as amended[29], allows a valid marriage to occur in any foreign territory by a chaplain serving with the forces. Should the

[19] Ibid.
[20] Ibid 362.
[21] David McClean & Kisch Beevers, *Morris: The Conflict of Laws* (7th Edn, Sweet and Maxwell 2009) 205.
[22] Ibid 207.
[23] *Wolfenden v Wolfenden* [1946] P 61.
[24] [1957] P 301.
[25] *Preston v Preston* [1963] P 411.
[26] *Kent v Burgess* (1840) 11 Sim 361.
[27] *Tachzanowska v Tachzanowska* [1957] P 301.
[28] The Foreign Marriage Act 1892 was amended by the Foreign Marriage Act 1947 and the Foreign Marriage (Amendment) Act 1988.
[29] Foreign Marriage Act 1947 as amended by the Foreign Marriage Act 1988 and The Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc. Amendments Order 2005, SI 2005/3129.

situation arise, a marriage entered into through these means, is valid as if it had been solemnised in the UK, whether the services are on active service in the foreign country or merely stationed there.

Regardless of the exceptions to the rule of the *lex loci*, formal validity is, on the whole a settled aspect of marriage validity and appears incontrovertible. This is further supported by the Law Commission's recognition and approval of the *lex loci* as the most appropriate choice of law rule. It is the preferred choice of law rule as "certainty, predictability and uniformity of result are achieved by the application of that law."[30] It is that same achievement of certainty which now must be sought in essential validity. At present, essential validity is plagued by various choice of law rules and contradictory case law and, therefore, requires exploration to determine how reform can achieve the much needed certainty and predictability evident in formal validity.

3.3 Essential Validity

Essential validity moves away from the focus on formalities and turns it's attention to issues surrounding whether the parties had the capacity to marry. Determining whether there was capacity to marry requires the consideration of factors like age, consanguinity, affinity, polygamy, consent and ability to remarry after divorce. As indicated, this is the element of marriage validity that is less settled, and is replete with ambiguity and uncertainty. This uncertainty stems from the competing theories on the applicable law. Although there are various theories including, the dual domicile theory[31], the intended matrimonial home theory[32] and the most real and substantial connection test, it is accepted that the two main theories fighting for dominance are the dual domicile theory and the intended matrimonial home theory. The outcome of this fight is highly unpredictable. With support for both theories coming from different sources it is possible that either could be championed at any time. It also must not be forgotten that, while the dual domicile theory and the intended matrimonial home theory may be the most likely option, it would not be out of the realms of possibility for an alternative choice of law rule to be deemed applicable. It is, as a result of this uncertainty and unpredictability, vital that each theory is explored in order to

[30] Law Commission and Scottish Law Commission, *Private International Law Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 2.36.
[31] John Morris, *Dicey and Morris on the Conflict of Laws* (8th edn, London: Stevens 1967) Rule 31 at 254-255.
[32] GC Cheshire, *Cheshire's Private International Law*, (7th edn, Butterworth & Co 1965) 227-228.

determine which offers the most practical solution, and therefore should be used consistently as the applicable choice of law rule. This is not the first attempt at exploring the area of marriage validity in a bid to find the most appropriate choice of law rule, and indeed the Law Commission's suggestion for reform will be considered throughout.

3.4 Dual Domicile v Intended Matrimonial Home

The application of the dual domicile theory requires consideration of both parties' domiciliary law to determine whether essential validity is satisfied. If, under the law of either parties, the marriage would be invalid, the dual domicile theory would deem the marriage to be invalid. Essentially, the theory requires that both parties have the capacity to marry under their own domiciliary laws to create a valid marriage. This is the theory that is considered the most orthodox, and has the support of the Law Commission: "our provisional view is that this test is preferable to the intended matrimonial home test and that it should be adopted as the test for all issues of legal capacity."[33] This support has been further echoed in cases throughout the years. *Brook v Brook*[34] demonstrates historic endorsement of the dual domicile theory, while in more recent times *Re Paine*[35] and *Szechter v Szechter*[36] could be identified as supportive to this conceptualisation. This diverse and continued validation may be attributed to the benefits behind the dual domicile theory. Advantages of the theory include the fact that it is relatively easy to apply in the prospective, it makes evading the restrictions set down by the domiciliary law difficult, and it allows each parties' country to be heard in terms of validity, which, given a persons' status is a matter of public concern, may be deemed to be of significant importance. These are advantages that were recognised by the Law Commission, which in turn led them to the conclusion that, logically, the dual domicile theory was the most appropriate choice of law rule:

"The main rationale of the dual domicile rule is that a persons' status is a matter of public concern to the country to which he belongs at the time of the marriage; and therefore the domiciliary law of each party has an equal right to be heard. The issue of whether a valid marriage has been or may be contracted should, in principle and

[33] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.36.
[34] (1861) 9 HL Cas 193.
[35] [1940] Ch 46.
[36] [1971] P 286.

in logic, depend on the conditions existing at the time of the marriage rather than subsequently."[37]

Advantages of this nature have also been recognised by academicians, however they also consider the limitations of the theory. Reed[38] acknowledges the advantages of the dual domicile theory as outlined above, but goes on to state that it "suffers from a number of substantial disadvantages."[39] In exploring the disadvantages Reed elaborates by setting out that the theory does not uphold the policy objective of the validity of marriage and that it fails to consider the law of the country to which the marriage belongs. These are points of criticism that are further explored by other commentators[40]. Taintor[41] provides that the application of the dual domicile theory shows a lack of respect for the laws of the country where the parties intend to live:

"No domicile at the time of the ceremony has, as such, a sufficiently strong interest to justify the application of its laws to determine whether or not the parties are of such qualities, or in such relationship, that their marriage should be declared void, nor to determine that their marriage should be declared valid if the status is one which offends a strong public policy of the intended family domicile."[42]

This highlights the problem with a strict dual domicile approach as it fails to consider the impact the marriage would have upon the intended matrimonial home, a problem which the Law Commission failed to recognise when recommending that the dual domicile theory be the applicable rule in marriage validity. In expanding on the aforementioned problems commentators vividly identify the problems with the use of domicile in the area of marriage validity. Regardless of chapter two's attempts to address the problems within domicile, at present, valid criticism does exist: "English law of domicile is distorted in certain respects and does not always indicate the country to which the parties really "belong"."[43] Take for instance the current law of the domicile of origin which may mean a person is domiciled in a country to which they have no connection, this country then being used as the decision maker of the validity of that persons' marriage is absurd. Whilst attempts have been made to reform the

[37] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.36.
[38] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[39] Ibid 395.
[40] TC Hartley, 'The Policy Basis of the English Conflict of Laws of Marriage' (1972) 53 Modern Law review 571, Richard Fentiman, 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Law Journal 353 and Charles W. Taintor, 'Marriage in the Conflict of Laws' (1955-1956) 9 Vanderbilt Law Review 607.
[41] Charles W Taintor, 'Marriage in the Conflict of Laws' (1955-1956) 9 Vanderbilt Law review 607.
[42] Ibid 611-612.
[43] TC Hartley, 'The Policy Basis of the English Conflict of Laws of Marriage' (1972) 53 Modern Law Review 571, 576.

law on domicile, and indeed this work itself suggests reform, as it stands this is a valid criticism of the use of the dual domicile theory, and cannot be allowed to continue on the 'hope' that the necessary reforms on the law of domicile will occur.

The intended matrimonial home theory is the dual domicile theory's primary competing choice of law rule, and has garnered support from various sources. Unlike the dual domicile theory, it lacks the support of the Law Commission. The intended matrimonial home theory looks to the laws of the husband's domicile, unless it can be shown that at the time of the marriage the parties intended to establish a matrimonial home in a different country, and did in fact follow through with that intention in a 'reasonable time'. Therefore, if the parties intend to have their matrimonial home in a particular country, and move there in pursuance of that intention, it is the laws of that country that will determine whether the marriage is valid. It is a theory which, like the dual domicile theory, has received both praise and criticism. Despite the Law Commission deeming the dual domicile theory to be the most appropriate law, they did recognise some of the advantages of the intended matrimonial home theory[44], which will be discussed later, and the theory also receives support from academics[45] and the common law.

Support for the intended matrimonial home theory can be seen in cases such as *De Reneville v De Reneville*[46] and *Kenwood v Kenwood*[47], in which remarks were made, albeit *obiter*, in support of the doctrine. In *Kenwood v Kenwood*, Denning LJ uses the example of polygamous marriages, and states that if they intend to live in the parties' domicile that allows polygamy then the marriage should be deemed valid[48]. This support goes further in *Radwan v Radwan (No2)*[49]. The case involved an English domiciliary, Mary, who married an Egyptian domiciliary in the Egypitian consulate general in Paris. The husband was already party to a polygamous marriage, which was still in existence when the couple married, and upon marrying they intended to set up their matrimonial home in Egypt. Years later, having divorced his first wife, the couple moved to England, where the husband obtained a talak divorce from Mary,

[44] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.34.
[45] For example Reed recognises many of the advantages discussed by the Law Commission, and explicitly states that "it does have a role to play as an appropriate doctrine to selective issues of capacity" (Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 399-400).
[46] [1948] P 100.
[47] [1951] P 124.
[48] Ibid 143-144.
[49] [1973] Fam 35.

who then went on to petition the English courts for a divorce. Having established that the talak divorce was not valid, it first had to be determined whether the marriage was valid. The court held that it was in fact a valid marriage because, although Mary was incapable of entering into a polygamous marriage in English law, they recognised that the intended matrimonial home was Egypt, and so applied Egyptian law to the aspects of essential validity. In reaching his decision Cumming-Bruce J concluded that Mary:

"had the capacity to enter into a polygamous union by virtue of her prenuptial decision to separate herself from the land of her domicile and to make her life with her husband in his country where the Mohammedan law of polygamous marriage was the normal institution of marriage."[50]

The extent of this support was limited, Cumming-Bruce J went on to state that his decision was not intended to import upon other aspects of law: "Nothing in this judgment bears upon the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter into a monogamous marriage."[51] Essentially, Cumming-Bruce J was not attempting to make the intended matrimonial home theory a universal test, but felt it was the correct test in individuated polygamous cases.

Despite the clear limitations set out in *Radwan v Radwan (No2)*, it is evident that there are advantages in the application of the intended matrimonial home conceptualisation. Whilst selecting the dual domicile theory as the most appropriate rule selection template, the Law Commission recognised the advantages of the intended matrimonial home theory: it reflects the society the marriage will have an impact upon, it upholds the parties' expectations, and as a result of only one applicable law, more marriages will be held valid[52]. These advantages are echoed by scholars[53], however, they also go on to consider the disadvantages of the theory in broadened terms.

One of the most striking criticisms of the intended matrimonial home theory is its discriminatory inculcations with a male/female recognition dichotomy. Unless it is shown that the parties intended to establish a matrimonial home in a different country, and followed through with the intention, it is the husband's domiciliary law alone that

[50] Ibid 54.
[51] Ibid.
[52] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.34.
[53] Such as James Fawcett, Janeen M Carruthers & Sir Peter North, *Cheshire North and Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 896-897, Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 367 and Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 397-398.

is applied. This approach "is totally out of touch with modern etymologies of gender equality."[54] It sits in stark contrast to the tone suggested by the abolition of the married women's domicile rule, and the stance of the Law Commission[55]. It is for those reasons suggested that the element regarding a presumption towards the husband's domicile should be eliminated from the conceptualisation. An adaptation of the theory may be appropriate rather than denying the use of the theory, thus allowing an updated and reformed version to be more reflective of modern day equality and due process. This modernised intended matrimonial home theory could then be used to displace the dual domicile rule if the parties intended to live in a particular country before marriage, and moved there within a reasonable time after the marriage[56]. This would in turn offer the balance of the advantages of the dual domicile rule for some marriages, whilst also upholding the idea that where relevant, the country most affected by the marriage will determine the validity. In addition to more marriages being upheld, it would also provide the desired protection in cases such as *Radwan v Radwan (No2)*, and the idea of combining the dual domicile theory with a new version of the intended matrimonial home theory will be returned to later in the thesis.

Aside from the discriminatory nature of the intended matrimonial home theory, there are other problems with the approach. One such remaining problem is the reference to moving to the selected country within a "reasonable time". There is no definition of reasonable time, it is subjective, in turn providing uncertainty within the theory. The test is also difficult to apply in the prospective as it would be unknown whether any intention to move to a particular country had been implemented in a reasonable time. Instead it may be necessary to wait and see if the matrimonial home is established, "meanwhile the validity of the marriage cannot properly be decided and it appears, must be held in abeyance."[57] Secondly, having set up home in the intended country what if the couple subsequently decide to move? Is the new country then the most interested, and able to apply its laws? This has been raised by Hill and Shuilleabhain who, in raising this concern, point out that the validity of the marriage cannot be

[54] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 397.
[55] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.35.
[56] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32.
[57] Richard Fentiman, 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Law Journal 353, 228.

reassessed every time a couple move[58]. This is not a scenario that the intended matrimonial home caters for; how such a situation is to be handled is unclear and is an undeniable weakness of the approach. Finally, it will not always be the case that the country where the parties set up the matrimonial home is the most appropriate law to apply. In instances such as those involving polygamy it is reasonable to see why the law of the matrimonial home should be applied; laws on polygamy are designed to protect the impacted society, and if polygamy is accepted within that country it is not offensive to that society, and, the marriage should not be invalidated purely because domiciliary law prohibits it. Conversely, in other instances, the domiciliary law may have an interest in being applied, and, the intended matrimonial home theory is "vulnerable to criticism on the ground that it frustrates the interests of the states which have a legitimate concern in the parties"[59]. An example of such a case may be where the capacity concerned is age. A minimum age requirement is designed to protect the individual from marrying at an age where they are considered to be vulnerable, and the domiciliary law has an interest in protecting that party. Simply because a couple have set up their matrimonial home in an alternative country within a reasonable time, does not always mean that the dual domicile rule should be dispensed with, and the intended matrimonial home theory applied universally, instead, it is necessary to consider the relevant policy objectives, as will be discussed further later.

What is evident, having explored the two main competing theories, is that neither work as a universal choice of law rule. It is clear that the Law Commission believe the dual domicile theory to be the most appropriate test and that it, "should be adopted as the test for all issues of legal capacity"[60], nonetheless, they still recognise that is has disadvantages. Neither theory operates perfectly, both have elements which are advantageous, but equally, both can be criticised. Therefore, rather than weighing up and determining one to be less problematic than the other, and applying it universally, alternatives must be explored.

[58] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 367.
[59] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 35.
[60] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.36.

3.6 Alternative Theories

There are various alternative theories that have been suggested over time. They too have received support, and were considered by the Law Commission in their Working Paper. One such theory that has received considerable support is, the 'most real and substantial connection' test. As with the intended matrimonial home theory, this test is focused on which country the marriage belongs to, as opposed to where the people themselves might belong[61]. Often when considering which country the marriage has the most real and substantial connection to, it will be the country where the couple have their matrimonial home. However, unlike the intended matrimonial home theory, this is not the only factor when determining where the most real and substantial connection is, as things such as domicile and nationality can be taken into consideration, which may be helpful when the matrimonial home has not yet been determined. This is a theory that has received support from the common law as well as academicians. Common law support can be seen in cases such as *Vervaeke v Smith*[62], in which Lord Simon stated that the most real and substantial connection test should be applied, "if not to all questions of essential validity at least to the question of the sort of quintessential validity in issue in this appeal"[63]. This was further supported in *Lawrence v Lawrence*[64] at first instance, but not in the appeal cases, and more recently, in *Westminster City Council V C*[65], in which the court recognised the existence of the 'most real and substantial connection' test as an alternative theory to allow for recognition of a marriage where appropriate, if, the dual domicile rule would result in non-recognition[66].

Academic support can also be seen for the most real and substantial connection test[67]. Fentiman[68] argues forcefully that the law that should be applied is that of the country with the most real and substantial connection. He believes that the Law Commission were wrong to select the dual domicile theory, and that "certainty in the

[61] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 359.
[62] [1983] 1 AC 145.
[63] Ibid 166.
[64] [1985] Fam. 106.
[65] [2008] EWCA Civ 198, [2009] Fam 11.
[66] *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 [74] (Wall LJ). It is important to note that despite such discussions the test was not considered appropriate in this case.
[67] Richard Fentiman, 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Law Journal 353 and Richard Fentiman, 'The Validity of Marriage and the Proper Law' (1985) 44(2) Cambridge Law Journal 256.
[68] Richard Fentiman, 'The Validity of Marriage and the Proper Law' (1985) 44(2) Cambridge Law Journal 256.

law is bought at the expense of flexibility."[69] He later states in support of the most real and substantial connection test that, "Justice lies not in the certainty of one true test for the validity of marriage, but in having a test which is flexible enough to respond to the needs of particular cases."[70] Much of Fentiman's support comes from his criticism of the dual domicile theory and the intended matrimonial home theory. He also attempts to show that many of the cases which are understood to support and evidence the application of the dual domicile theory, or the intended matrimonial home theory, actually support the most real and substantial connection test. One such example is when Fentiman articulates that *Radwan v Radwan(No2)* and *De Reneville v De Reneville* provide support for the most real and substantial connection test. In reference to *De Reneville* he states, "The matrimonial home matters not because of any intended matrimonial home test but because it discloses the legal system best connected with a marriage."[71] This analysis is unsubstantiated. *De Reneville* does not provide support for the most real and substantial connection test, but, as previously discussed, the intended matrimonial home theory. In looking for support for the most real and substantial connection test, Fentiman arguably overstates the extant precepts to suit a preferred framework. Even in cases where Fentiman cannot rule out that the intended matrimonial home theory was applied, he explains how this does not damage the proper law approach of the most real and substantial connection test. For example, he provides that in *Radwan* the integrity of the proper law approach is upheld as a result of the forceful questioning and rejection of the dual domicile theory[72]. Therefore, whilst Fentiman provides support for the most real and substantial connection test, the shewed analysis of the law on the area, provides limited persuasion that it is a more appropriate choice of law rule.

The limited evidence to show that the most real and substantial connection test is the most appropriate theory carries even less weight when the criticisms of the test are explored. Davie[73] states that the test is uncertain, and this opinion is shared by the Law Commission. The Commission determined it to be, "inherently vague and unpredictable"[74], stating that it is "a test which is difficult to apply other than through the courtroom process and it is therefore unsuitable in an area where the law's

[69] Ibid 277.
[70] Ibid 278-279.
[71] Ibid 268.
[72] Ibid 267.
[73] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 37.
[74] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.2.

function is essentially prospective, i.e. a yardstick for future planning."[75] For these reasons, whilst there is merit in applying the law of the country to which the marriage is most closely connected, it is not practical. Reform on this area requires certainty and predictability, and it should be ruled out as an appropriate universal test for essential validity.

The alternative reference test is another theory which has been proposed to provide the best way of determining the applicable law. The test provides that if the marriage would be regarded as valid by either the dual domicile theory or the intended matrimonial home theory, then it should be held to be valid. The test, however, only carries limited support[76]. The common law offers little assistance in that it has been recognised that in some cases the courts have set aside the dual domicile rule because it would invalidate a marriage that could be upheld by applying alternative tests[77]. On the other hand the justices did not go on to apply the test, and it is a test that has received criticism on the basis that:

"it would be wrong to elevate the general policy in favour of upholding the validity of marriage into a governing rule; and it would be contrary to principle to adopt the dual domicile (or the intended matrimonial home) test and then to refuse to give effect to it if it results in the invalidity of the marriage."[78]

Whilst it is public policy that marriages should be upheld, this does not apply irrespective of other considerations, and to create a rule to that effect would fail to recognise other matters which are relevant and significant: "choice of law rules should be based on sound policy grounds."[79] It is also a test that would add to the uncertainty in the area, as it is only applied when it is deemed appropriate, which is again subjective. The test also means that various laws may have to be considered which would be time consuming for the courts, in turn meaning lengthier and more expensive cases. For all these reasons the alternative reference test does not appear to be the most appropriate test to be put into place, despite the flexibility in upholding marriages it would provide.

[75] Ibid.
[76] AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern Law Review 38 and The Royal Commission, *Marriage and Divorce* (Cmd. 9678, 1956).
[77] *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 [74]
[78] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.37.
[79] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 361.

Finally, a further proposal that has been put forward is that, if there is essential validity according to the domiciliary laws of either party, the marriage will be valid[80]. This was also considered by the Law Commission, who decided that the test should not be adopted on the premise that:

"If it is accepted that a persons' status is a matter of public concern to the country in which he or she is domiciled at the time of the marriage, then the rules of that country which are designed to protect its public interest (such as rules laying down prohibited degrees of relationship or requiring monogamy) should be given effect. The proposed rule would enable a party to evade the requirements of his domiciliary law and would also lead to limping marriages."[81]

Essentially the rule does not provide equality: it accepts and promotes the importance of the law of the domiciliary being the applicable choice of law rule, but then casts the inconvenient law aside. For obvious reasons this test would fail to be appropriate as the universal test for choice of law in essential validity.

The consideration of all these alternative theories, alongside the dominant theories of the dual domicile theory and the intended matrimonial home theory, further highlights that no single approach can, or ought to be used, as a universal choice of law rule. Each theory comes with its own list of drawbacks and disadvantages that mean that instead of applying any of them universally, the courts take a 'pick and mix' approach to their application, in a bid to avoid the problems within each of them. It is for exactly these reasons that the area lacks consistency, despite the Law Commission determining that the dual domicile theory was the most appropriate choice of law rule. The judiciary are, in deciding the cases, making it clear that a universal choice of law rule does not work within marriage validity. This is then exacerbated by the exceptions that operate within the area, that allow the judiciary to avoid the application of the dual domicile theory, or whatever theory is put in its place. However, it could be argued that if the rules were entirely appropriate in the first place, there would be no need to avoid them[82], and, thus, these exceptions, and the need for them, will be explored in greater detail.

[80] TC Hartley, 'The Policy Basis of the English Conflict of Laws of Marriage' (1972) 35 Modern Law Review 571, 576-578.
[81] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.38.
[82] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 75.

3.7 The Exceptions

There are exceptions to the dual domicile rule, or indeed any of the other theories that may be adopted. These exceptions include the rule in *Sottmayer v De Barros (No2)*[83], the exception that may be invoked where England is the *lex loci*, and under supervening public policy grounds. All of these exceptions allow the general rules surrounding validity to be departed from, whether it is to find a marriage valid or invalid.

The rule in *Sottomayer v De Barros (No2)* allows the marriage to be deemed valid even if it is invalid by one of the parties' domiciliary laws, so long as one of the parties has an English domiciliary and the marriage takes place in England. Essentially, it allows English law to solely govern the marriage. Despite criticism for it being a xenophobic rule that is "unworthy of a place in a respectable system of the conflict of laws"[84], it is an exception that has been applied in other cases[85]. It has also received other support, Clarkson and Hill explain the exceptions under the concept of the differential approach, setting out why it is justifiable to step away from the general approach. They state that:

"The court is justified in ignoring the foreign incapacity on the ground that the English domiciliary has not stepped into the international arena by marrying abroad, such a person does not deserve to forfeit the right to rely on the law of the country to which he belongs and with which the marriage is more closely connected"[86].

This is not an approach we would expect a foreign court to take when determining whether a marriage is valid, if it involved an English domiciliary that had married there. If the party for instance, was under the legal age to have the capacity to marry, as this is an element of essential validity, England would expect the marriage to be deemed invalid as English laws on age are designed to protect English domicilaries. In expecting this outcome determination it seems only logical that equal respect should be shown to foreign laws, England should not be seen to 'cherry pick' when it chooses to apply the rules, and when it does not. Whilst the Marriage (Enabling) Act 1960[87] has limited the effect of the exception when dealing with cases involving affinity, its impact is minimal as it only applies to degrees of affinity and would not

[83] (1879) 5 PD 94.
[84] John Falconbridge, *Essays on the Conflict of Laws* (Canada Law Book Company 1954) 711.
[85] *Ogden v Ogden* [1908] P.46, *Vervake v Smith* [1983] 1 AC 145 and *Westminster City Council v C* [2008] EWCA Civ 198, (2009) Fam 11.
[86] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 365.
[87] Marriage (Enabling) Act 1960, s.1(3).

prevent, for instance, cousins from marrying. Therefore, the criticisms of the exception still largely apply. The exception goes against uniformity and comity as it is a "blatant 'favouring of one's own' by the English courts[88]", and has also been criticised by the Law Commission. The Commission state that, "The rule seems hard to justify in principle since it shows a unilateral preference for the English (or Scots) law of the forum[89]", and later in the paper determines that the exception should be abolished[90].

The differential approach when looking at England as the *lex loci*, and the parties are domiciled elsewhere, is that England cannot be expected to sanction a marriage that our courts would not recognise, even if valid in accordance with domiciliary laws. Clarkson justifies the differential approach that is adopted by stating that when a marriage takes place abroad, "the lex loci celebrationis does not have sufficient interest in the essentials of the marriage for us to impose the extra hurdle of compliance therewith "[91]. Whereas, when the marriage is in England, and there is a clear link to England, greater caution is needed, and such compliance can be insisted upon[92]. Essentially, both Clarkson and Hill are stating that if the marriage is abroad we do not have to make it comply with the *lex loci*, but if the marriage is in England it is expected that English laws will be upheld. If every country insisted on this it could make the hurdles when marrying abroad very high, given that prospectively essential validity may have to be satisfied in up to three countries.

The Law Commission provide some support for the exception in that they agree that:

"it is reasonable that, if the parties (even if one or both are foreign domicilaries) chose to use English or Scottish marriage procedures, they must comply with the substantive requirements of English or Scots law as the case may be, and our courts can hardly be expected to uphold the validity of marriages which their own law does not countenance."[93]

The Commission does not draw the same distinction as Clarkson and Hill between English and foreign marriages. The Commission provide that: "we should recognise the legitimate interest of a foreign country in the application of its substantive rules to marriages celebrated within its borders, particularly if we ourselves claim such an interest when a marriage is celebrated in the United Kingdom."[94] The Commission

[88] CMV Clarkson, 'Marriage in England: Favouring the Lex Fori' (1990) 10 Legal Studies 80, 84.
[89] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.17.
[90] Ibid 3.48.
[91] CMV Clarkson, 'Marriage in England: Favouring the Lex Fori' (1990) 10 Legal Studies 80, 82.
[92] Ibid 88.
[93] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.42.
[94] Ibid para 3.43.

would rather have a one rule for all approach, promoting communitarianism and harmonisation.

It is evident why such a rule may be desirable, and it is agreeable that a registrar should not have to conduct a marriage our courts would not recognise, however, potentially having to satisfy the laws on essential validity in three countries is a heavy burden. For this reason it is suggested that a better alternative would be to have the exception in the prospective for England and foreign countries so as to adhere to comity, whilst not working retrospectively. If the parties have already married in the country and complied with the formal validity requirements, the marriage should remain valid as long as it is essentially valid in accordance with the applicable choice of law, whether this be the domiciliary law or that of the matrimonial home. The marriage is not offending the *lex loci* if the invalidity was not known at the time of the marriage. For instance, if the parties were in fact cousins but the *lex loci* were not aware of this relationship. The exception should only act as a bar to the marriage ceremony being conducted if the invalidity is known, to prevent registrars from being forced to conduct a marriage their own courts would not recognise. This standpoint appears to be supported by Hartley as he states that there is no policy justification to apply the *lex loci* in assessing validity as it would, "create an additional obstacle to the validity of the marriage."[95] However, Hartley goes on to state, "It might be justified … where the question arises before the celebration of the marriage, e.g. on an application for mandamus against a registrar of marriages who refuses to allow a couple to marry."[96]

Finally, the doctrine of public policy may be invoked to ensure that the law of the *lex fori* is applied; "which when all else fails, can be relied on to ensure the application of the lex fori." [97] Characteristically, the public policy doctrine provides the courts with an escape clause in circumstances where applying the normal choice of law rule, they would be left with a marriage that is contrary to English public policy. Public policy should rarely be used, as it should only be invoked if the foreign law is "grossly offensive or repugnant to English standards of justice, decency or morality."[98] While a particular marriage may not be permitted within England on one of the incapacity grounds, it is expected that the courts will show tolerance to such marriages, as stated

[95] TC Hartley, 'The Policy Basis of the English Conflict of Laws of Marriage' (1972) 53 Modern Law review 571, 577.
[96] Ibid.
[97] CMV Clarkson, 'Marriage in England: Favouring the Lex Fori' (1990) 10 Legal Studies 80, 86.
[98] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 385.

by Simon J in *Cheni v Cheni*[99]; "the court will seek to exercise common sense, good manners and a reasonable tolerance."[100] This, however, provides limited reassurance. The potential for a court to invoke a public policy exception brings with it a degree of uncertainty. The desire to create a universal choice of law rule stemmed from a quest for certainty, however, even if this were to be achieved, the ability of the courts to invalidate the marriage on grounds of public policy removes any potential certainty established. In fact, considering the legal analysis that has already been undertaken, it is submitted that a universal choice of law rule would mean an increase in the use of the public policy exception. It has been shown that despite the Law Commission's preference for the dual domicile theory, the judiciary have continued to use alternative approaches so as to provide just and fair outcomes[101]. Thus, if this ability to deviate away from the norm was taken away, and replaced by a universal choice of law rule, the public policy exception may at times appear the only legitimate option available to the courts to achieve what they believe to be the correct outcome. In essence, the invocation of public policy comes as a result of the choice of law rule not producing the desired outcome, therefore, rather than increasing its use, the problem should be addressed at the source[102]. In respect of marriage validity, this would be by way of stepping away from a universal choice of law rule, and moving towards a system that better caters for the different incapacities and the issues they raise. On that premise the thesis will now explore the idea of interest analysis, in a bid to create an approach which negates the need for the public policy exception by formulating optimal rules that are policy sensitive.

3.8 Formulating A New Approach

3.8.1 Interest Analysis

Throughout the exploration of the choice of law rules that have developed it has become apparent that all have received criticism, and that using any one of them as a universal choice of law rule in marriage validity may not be appropriate. The "all important failing of both theories is the attempt to apply one basic rule to every

[99] [1965] P 85.
[100] *Cheni v Cheni* [1965] P 85, 99 (Simon J).
[101] See for instance Westminster City Council v C [2008] EWCA Civ 198, [2009] fam 11 and *Minister of Employment and Immigration v Norwal* [1990] 2 FC 385.
[102] The idea that there is a correlation between the quality of a choice of law rule and the frequency of attempts to escape it by the judiciary was discussed in Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 75.

case."[103] What Smart goes on to suggest is, "the introduction of a choice of law rule which eschews a mechanical approach in favour of a degree of flexibility; just as in the laws of contract and tort."[104] One such approach that seeks to achieve this flexibility, and in fact originates from the approach the United States developed in the realm of choice of law in contractual and tortious disputes, is interest analysis.

Interest analysis was a theory established by Brainerd Currie[105], and is based on the application of the law of the state most interested in the matter. Interest would be as a consequence of a policy on the area concerned, combined with the state holding such a policy, having a relationship with either of the parties, the location of the wedding, or the litigation itself[106]. In any of these instances it would be accepted that the state may have an interest, and it would need to be determined whether there was a true conflict between multiple interested states, or a false conflict. In the event of a false conflict, whereby upon assessment only one state has a reasonable interest in its laws being applied, the law of that state will be the applicable law. Where there remains a true conflict, under Currie's original form of interest analysis the law of the *lex fori*[107] is applied. It is this application of the *lex fori* without further consideration of the most interested state that has been criticised, as it permits and encourages the parties to forum shop[108]. If the parties are aware that there are multiple interested states, Currie's approach rewards the party who strikes first, by commencing proceedings in the state that will potentially produce the most favourable outcome for them. In addition, the approach under Currie can also be criticised for its case-by-case approach. Currie does not provide any rules on which States would have a reasonable interest for a given area, meaning the assessment of whether there is a true conflict, and if so, which states it is between, must be carried out for every case, which is time consuming for the courts, costly and lacks certainty and predictability for the parties involved[109].

[103] P St J Smart, 'Interest Analysis, False Conflicts, and the Essential Validity of Marriage' (1985) 14 Anglo-American Law Review 225, 231.
[104] Ibid.
[105] Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1863).
[106] Ibid 621.
[107] The law of the forum.
[108] Friedrich K Juenger, 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 American Journal of Comparative Law 1, 13.
[109] "Currie's fixation on local interests and policies made him debunk the conflicts objectives of uniformity and predictability, as well as the system values of federalism and international cooperation." See Friedrich K Juenger, 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 American Journal of Comparative Law 1, 37.

It is these very problems that limited the success of Currie's interest analysis within the courtroom. While in *Dym v Gordon*[110], Judge Fuld appeared to endorse interest analysis by stating that it provides "a method, a conceptual framework, for the disposition of tort cases having contact with more than one jurisdiction."[111] The approach seems to have been tired of only four years later when in *Tooker v Lopez*[112], Judge Fuld states, "the time has come … to endeavour to minimize what some have characterized as an ad hoc case-by-case approach by laying down guidelines as well as we can."[113] These concerns were echoed by academics in England when they began exploring the concept of interest analysis[114] particularly in relation to marriage validity; Davie asserted "Marriage is an area where stability and certainty are essential requirements. These needs are quite inconsistent with the approach to choice of law which interest analysis entails."[115] It is apparent that, like Judge Fuld in *Tooker*, what is desired within the law on marriage validity are rules that can be used to help determine the applicable law. These rules could then be used by judges and indeed, the parties themselves for predictability and certainty purposes. It is important to note that having criticised the rule scepticism within interest analysis, Davie did recognise how certain aspects of interest analysis could be used to help develop English conflict of law rules within the essential validity of marriage[116]. He considered how the assessment of state interests could be used to formulate rules to reflect the competing interests within marriage validity, so as to provide rules on an issue by issue basis[117]. It is this rules based version of interest analysis that has received attention from domestic commentators in relation to marriage validity[118], and thus it is this embryonic perspective that will be considered further.

Issue by issue analysis is a move which steps away from a universal choice of law rule that covers all of that area of law, whether that be contract, tort, or indeed

---

[110] (1965) 16 N Y 2d 120.
[111] Ibid 129.
[112] (1969) 24 NY 2d 569.
[113] *Tooker v Lopez* (1969) 24 NY 2d 569, 584.
[114] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387 and James Fawcett, 'Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems? (1982) 31 International and Comparative Law Quarterly 150.
[115] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 42.
[116] Ibid.
[117] Ibid 46.
[118] See for instance, Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 412; "A role does exist, however, for interest analysis on an issue by issue basis rather than a case by case scenario."

marriage validity, and instead breaks down these areas of law into separate issues. It, as a concept, recognises that states may be interested in different issues within a matter, and that the states may not have an interest in all of the issues[119]. It is also about recognising that a particular case may only raise one issue, and therefore it is the state most interested in that particular issue that should have its law applied. Issue by issue analysis therefore promotes the dissection of a case so as to determine what is really at issue, and subsequently what law should apply: "rather than seeking to choose a law as if all aspects of the case are contested, one should focus on the narrow issues with regard to which a conflict actually exists and proceed accordingly."[120]

Dépeçage is a possible consequence of issue by issue analysis in that "dépeçage is the application of the substantive laws of different states to different issues of the same cause of action."[121] As a consequence, it is a dépeçage inspired rules based system of interest analysis that this research propounds. Moving away from Currie's initial theories of interest analysis, this research seeks to utilise dépeçage to suggest that each of the incapacities should be considered as a separate issue, and should have the substantive laws of the most interested state on that particular matter applied. Aspects of this particularised and individuated approach were promulgated by Reed[122], and builds on the ideas of Davie as previously discussed. In setting out dépeçage based interest analysis as the proposed approach, it is necessary to consider each of the incapacities in detail, in order to determine the most appropriate choice of law rule. This will require the consideration of the relevant policy concerns and objectives behind each of them, in order to assess which state would have the most interest in any given issue. Some incapacities are about protecting the parties to the marriage, whilst others are about the society that will be effected by it. It is, therefore, important that the policy objectives within marriage validity are analysed, before exploring the incapacities in more detail.

[119] Symeon C Syemonides, 'Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect' (2013-2014) 45 University of Toledo Law Review 751, 754.
[120] Ibid
[121] Ibid 755.
[122] "What is propounded is a form of dépeçage whereby the main categories of essential validity are demarcated, the wheat is separated from the chaff, and choice of law rules recategorised to fit the specific matters." (Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 413).

3.8.2 Policy Considerations

Within the essential validity of marriage there are various policy objectives at play. The Law Commission in their Working Paper set out some of these objectives, and stated that they need to be considered when assessing whether choice of law rules are satisfactory[123]. These objectives included: certainty and predictability; upholding the validity of marriage; international uniformity of decisions; and protecting party expectations. These objectives highlight what must be taken into consideration when determining the appropriate choice of law rule for each of the incapacities and have been further discussed and expanded on by academicians[124]. The objectives listed above appear to be applicable to all of the incapacities, however, this is not so when looking at some of the other policy factors. Reed recognises factors such as eugenic concerns as well as moral, religious and cultural infrastructures[125]. These factors are, by their very nature, more relevant to certain incapacities. Eugenics is clearly applicable when dealing with consanguineous marriages, whereas moral, religious and cultural infrastructure appears relevant for multiple incapacities. It, as a factor, is about protecting the society that will be most affected by the marriage, as it is that society's religious, moral and cultural beliefs that will be impacted. On the other side of the coin, we can see the policy objective of protection. This objective is to protect the parties to the marriage, and can be evidenced by a country setting a minimum age requirement to marry, and rules surrounding where there has been a lack of consent due to the likes of fraud or duress[126]. It is these more specific policy factors that will assist in the determination of the appropriate choice of law rule for each of the incapacities under dépeçage based interest analysis. Some incapacities are clearly about protecting the parties to the marriage, while others are designed around societal beliefs. This point was recognised by Jaffey, who acknowledged that the domestic rules could be divided into rules that are designed to protect or advance the

---

[123] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 2.35.

[124] See for instance Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, Robert A Leflar, 'Choice Influencing Considerations in Conflicts Law' (1966) 41 New York University Law Review 267, TC Hartley, 'The Policy Basis of the English Conflict of Laws of Marriage' (1972) 53 Modern Law review 57 and AJE Jaffey, 'The Foundation of Rules for the Choice of Law' (1982) 2 Oxford Journal of Legal Studies 368.

[125] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 388.

[126] This protective role was also recognised by Davie when he stated "the purpose behind the law will generally be to protect the person from the consequences of the misapprehension or weakness." (Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 54).

public interest of the country concerned, and rules whose purpose is to do justice for the parties[127]. To demonstrate this, in relation to marriage, he asserted that the rules on essential validity pertaining to consanguinity and polygamy are designed to invalidate marriages that are considered to be "harmful to the moral, religious, social and perhaps even physical well-being of the community"[128], thereby an example of rules that are designed to protect and advance the interests of society. In respect of protection of the parties, he identified age as a demonstrable capacity, as the rules are designed to protect young persons against their own immaturity[129]. Therefore, when selecting the individual choice of law rule for each of the incapacities, the policy objective behind it must be considered; it is necessary to question why the rule on that incapacity was created.

Running parallel to these more specific objectives, it is of course important that the more general policy objectives are not forgotten. Although the more specific policy concerns will be analysed in making the rule selection, the more general objectives are core tenets throughout the thesis. The very aim of this research, and proposed reform, is to achieve certainty and predictability within marriage validity, and so this policy objective will, as a consequence, be advanced. It also seeks to prevent forum shopping by suggesting set choice of law rules, rules that will go on to be argued could be applied internationally, and so is certainly conscious of the desire to achieve uniformity of decision. It is with these policy objectives in mind, that we now turn to the introduction of a new choice of law rule, before dealing with each of the incapacities in turn.

3.8.3 The Continued Recognised Relationship Theory

The policy objectives outlined above demonstrate that at times it is important to consider where the couple intend to live for the purpose of choice of law rules. This is particularly apparent when considering the policy objectives of moral, religious and cultural infrastructures. These policy factors are only relevant in the country that is going to play host to the marriage, as this is the society that will witness the relationship, and will, therefore, form opinions on its place within the community. It is important that for those incapacities that are designed to uphold certain societal norms and religious beliefs, that there is a choice of law rule that is able to do this.

[127] AJE Jaffey, 'The Foundation of Rules for the Choice of Law' (1982) 2 Oxford Journal of Legal Studies 368, 368.
[128] Ibid 369.
[129] Ibid.

Whilst there is the intended matrimonial home theory which was set out earlier in the chapter, it is a choice of law rule that has its problems, and it is argued that unlike the dual domicile theory, these problems run deeper than it being used as a universal choice of law rule. Both the discriminatory nature, and the uncertainty caused if the couple later decide to relocate need to be addressed. In order to tackle this, a new approach is proposed which keeps the sentiment of the matrimonial home, but is more reflective both of modern times and the policy objectives within marriage validity.

This proposed original approach is the "continued recognised relationship theory". The continued recognised relationship theory is the application of the law of the country where the couple intend to live, or the law of the country where they have lived if their relationship has been subsisting for a reasonable period of time. Such a choice of law rule not only pays homage to the importance of the laws of the country where the couple intend to live, and the society that will be impacted by the presence of that marriage, but it also satisfies the need for certainty, and the objective of upholding the validity of marriage. In not requiring the couple's status to be reassessed if they move country, they are provided with certainty regarding their relationship. Many would expect that if they were to move, their status would simply follow them, and so in providing this, the continued recognised relationship theory also upholds party expectations. Importantly, the approach also moves away from an initial starting point based on the domiciliary law of the husband, and instead starts from a position of equality. This is more reflective of the modern day, both in respect of removing any gender stereotypes that once may have been, but also by moving away from gender based rules that assume all marriages involve parties of the opposite sex. Thus, it is argued that the continued recognised relationship theory offers a new and original approach that provides a choice of law rule that does what is required of it, in addition to meeting the demands of policy objectives and modern developments within law and society.

Despite achieving the demands needed of a contemporary choice of law rule, it is to be anticipated that there will be criticism of such an approach[130]. Firstly, in relation to applying the laws of the country where the couple have lived when the relationship has been subsisting for a reasonable period of time, it could be questioned what is a reasonable period of time? Secondly, by allowing a couple to carry their status with

[130] These potential criticisms were also recognised and discussed by Frances Hamilton & Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1, 27-30.

them when they have been in the relationship for a reasonable period of time, the approach may require a subsequent country to recognise a relationship it usually would not, and may be criticised for such expectations. Turning first to what is a reasonable period of time? In answering this, a definitive period quantified in years cannot be given. Instead, it is submitted that this is something that should be determined by considering a series of factors including; duration of the marriage, duration of the relationship prior to marrying, whether there are children involved and other commitments entered into together, such as property and other financial joint ventures. This approach allows for the differences that naturally occur between familial relationships rather than prescribing a certain number of years, which could only be decided by selecting a random number which, could be criticised for being too long or too short. The approach suggested offers greater flexibility and recognises the many ways couples start their futures together. Furthermore, it is submitted that in many cases it will be obvious whether the relationship is one of a stable and durable nature that should be given its recognition, and that in those few cases where it is not, there is a yardstick against which the courts will be able to make such a determination.

Turning to the second point, and the potential for England under such a choice of law rule to be required to recognise a marriage it normally would not permit, it is stated that, in reality, such validation already occurs. The approach does not require England to allow a marriage to take place in it's borders it would not permit its own domicilairies to enter into, but instead asks for tolerance where couples have been in a relationship for a reasonable period of time, who had no intention of moving to England when they entered into the marriage, and who complied with all of the relevant and foreseeable laws at the time. This is, in fact, a tolerance already shown under extant law. As will be discussed in greater detail later, polygamous marriages are not permitted in England, however a marriage conducted outside of England will not be denied validity purely on the grounds that it is polygamous[131]. In *Cheni v Cheni*[132], it was stated that "reasonable tolerance"[133] has its part to play in the determination of validity. Likewise, this same tolerance has been required under the dual domicile approach within the incapacity of age, where in *Mohamed v Knott*[134] a 26 year old Nigerian married a 13 year old Nigerian in Nigeria, before moving to England some few months later. Given the marriage was valid in accordance with their domicile, the courts held the marriage

[131] *Mohamed v Knott* [1969] 1 QB 1.
[132] [1965] P 85.
[133] Ibid 99.
[134] [1969] 1 QB 1.

valid despite the female party being far too young in accordance with the laws of England. Therefore, what is being asked is no different to what in reality, already occurs. Therefore, despite these potential criticisms it is argued that the continued recognised relationship theory offers a suitable choice of law rule, and will, under the system of dépeçage based interest analysis, provide the most appropriate applicable law for some of the incapacities, each of which will now be considered in turn.

3.8.4 The Incapacities:

3.8.4.1 Age

In order to enter into a valid marriage in England, the parties to the marriage must be a minimum of 16 years old in accordance with s.2 of the Marriage Act 1949. The uncertainty within the area comes from determining who must meet this requirement, which is only decided when the relevant choice of law rule is applied. To determine the correct rule it is important to understand the purpose of the minimum age. A minimum age to marry is designed to protect those who are immature and vulnerable from the concerns of a premature marriage, thus, to protect the individual. It is, therefore, suggested that the dual domicile rule is the most fitting choice of law theory here, as all countries have their own age requirements, and the protection of the young and vulnerable is best achieved by the law of their pre-nuptial domicile[135]. The application of the pre-nuptial domiciliary law is further supported by Jaffey when he states:

> "since children may develop socially and emotionally, and even physically, at different rates in different environments, it seems sensible for English law to rely on the judgment of the law of the country to which a person belongs for the decision whether he or she is mature enough to marry."[136]

It would, therefore, seem that the law that should be applied is that of the parties' own domicile, and this argument, and indeed the assertions of Jaffey are strengthened if the reforms predicated in chapter 2 occur, as they help ensure that there is a connection between a person and the country in which they are deemed to be domiciled; making them better able to determine maturity.

---

[135] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 368, and was the test that was applied in *A Local Authority v X* [2013] EWHC 3274 (Fam), [2014] 2 FLR 123 [9]

[136] AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern Law Review 38, 46.

The case of *Pugh v Pugh*[137] highlights that this does not always seem to be the case. In *Pugh v Pugh*, an English domiciliary married an Austrian girl domiciled in Hungary when she was 15 years of age. Regardless of the girl having capacity to marry under Hungarian law, the marriage was deemed invalid. The reason for the invalidity being that s.2 of the Marriage Act 1949 provides that 'A marriage solemnised between persons either of whom is under the age of sixteen shall be void.' The English law was used to protect a party domiciled in Hungary which has in turn been heavily scrutinized; "was it really the object of the statute to protect middle-aged English colonels from the wiles of designing Hungarian teenagers?"[138] It has been argued that it "seems inconceivable that English policy concerns ought to extend to foreigners from other states, whose own peculiar law deem them as lacking any requirement of protection."[139] In essence arguing that it was not the intention of s.2 of the Enabling Act to parent and protect those who their own country do not deem it necessary to protect. For that reason it is suggested by many that *Pugh v Pugh* was wrongly decided. Smart argued that this is an example of where an interest analysis approach would have provided a better result, submitting "that there can be little justification for imposing even minimum English standards in a case where there are no policy reasons requiring English law to be applied."[140] In furtherance it has been stated that, "the issue of maturity is best left to be determined by the pre-nuptial domiciliary law of whichever country the individual belongs"[141], and this is the rule that was followed in *Mohammed v Knott*[142]. In *Mohammed v Knott*, "[T]he court allowed the *lex domicilli* to determine whether the foreign propositus was sufficiently mature for marriage, and it is submitted, there was no reason why the same liberal attitude should not have prevailed in the earlier case of *Pugh v Pugh*."[143] The conflict that presented itself in *Pugh v Pugh* was a false conflict and, had an interest analysis approach been applied, as it was in *Mohammed v Knott*, the marriage would have been deemed valid.

---

[137] [1951] P 482.
[138] David McClean and Kisch Beavers, *Morris: The Conflict of Laws* (6th edn, Thomson Reuters (Legal) Limted 2005) 205.
[139]Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 416.
[140] P St J Smart, 'Interest Analysis, False Conflicts, and the Essential Validity of Marriage' (1985) 14 Anglo-American Law Review 225, 230.
[141] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 416.
[142] [1969] 1 QB 1.
[143] P St J Smart, 'Interest Analysis, False Conflicts, and the Essential Validity of Marriage' (1985) 14 Anglo-American Law Review 225, 234.

There must, however, be consideration of whether this is the only policy consideration when looking at age. Clarkson and Hill suggest that there is a second interest, and that is to prevent our domicilaries from sexually exploiting children, which would in turn make the decision in *Pugh v Pugh* justifiable[144]. It has also been suggested that the minimum age requirement is designed to protect society against unstable marriages. For this reason it is argued that: "The matrimonial domicile will be interested if either party falls short of its age requirement because the youth of either party renders such a marriage distasteful to that state and enhances the prospect of an unstable union."[145] These arguments suggest that the intended matrimonial home may have an interest in applying its law, and that *Pugh* was correctly decided. However, when considering whether England has an interest in preventing its domcilaries from 'sexually exploiting children', it must be remembered that their personal law does not find it necessary to protect them, and the argument that people from different societies and cultures mature and develop at different rates. It is not the place of English law to determine whether a domiciliary of another state is ready for marriage. Other countries have higher minimum age requirements than England, and we would not expect an English domiciliary to be prevented from marrying, or have their marriage declared void because the law of their spouse deemed them too immature. When considering what interest the intended matrimonial home has in the age of the parties, case law shows that no such interest is afforded[146]. If the intended matrimonial home was deemed to have an interest in the validity of the marriage due to a party being below the age of 16, it would mean that a real intolerance would be shown to many foreign marriages where the parties are able to marry, and in fact their society encourages young marriages. This would in turn go against the policy aim of comity and unity and cannot be accepted. Therefore, despite the above arguments against it, it is propounded that the choice of law rule that should be in place for age is the application of the party's own domiciliary law.

[144] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 369.
[145] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32,49.
[146] *Mohammed v Knott* [1969] 1 QB 1.

3.8.4.2 Consanguinity and Affinity

In most countries there are certain degrees of relationships that are prohibited, whether this be as a result of consanguinity[147] or affinity[148]. Case law in England seems to suggest that the appropriate choice of law rule for both types of relationships should be the dual domicile theory[149]. However, when considering academic comment, and public policy concerns relevant specifically to the issues, such an approach can be contested.

Firstly, when exploring consanguineous relationships, there appears to be some common ground amongst scholars, with a shared view that it should be about where the couple live[150]. This commonality of approach is as a result of the relevant policy concerns. Consanguineous relationships are often prohibited for reasons associated with societal, religious and moral beliefs, whereby in some societies relationships within a certain degree of connection are viewed with abhorrence. The other main policy concern relates to eugenics, due to concerns surrounding the increased potential for children of such relationships to be born with disabilities. In relation to both of these public policy factors, it is the society where the couple intend to live that will be most impacted, and thus Davie legitimately comes to the conclusion that the intended matrimonial home theory is the most appropriate choice of law rule[151]. As stated, this is a view that is shared by other academics, but one that this research seeks to amend in an important stratification. This amendment comes not from a disagreement regarding the society best placed to have its law applied; undoubtedly, where the couple intend to live will need to protect its society from relationships it would find repulsive, and any future genetic problems. Instead, it is simply to change it from the application of the intended matrimonial home theory, to that of the continued recognised relationship theory, given the earlier analysis surrounding the need for this original choice of law theory, that builds on and updates the concept behind the intended matrimonial home theory. This would mean that, as with the

[147] Where there is a blood relationship between the parties; for example uncle and niece.
[148] Where the parties to the marriage are already related through marriage for example; step-mother and step-son.
[149] *Re Paine* [1940] Ch 46, *Cheni v Cheni* [1965] P 85 and *Sottomayer v De Barros (No1)* (1877) 3 PD 1.
[150] This shared view can be seen amongst Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern Law Review 38.
[151] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32,51-51.

intended matrimonial home theory, the society most effected by the marriage will have it's policy concerns taken into consideration, but will not require a reassessment of validity if the parties subsequently move to an alternative country, nor does it start from a position of favouring the law of the husband's domicile.

When moving on to explore affinity, a move away from the dual domicile theory does not appear as easy. Despite views that the intended matrimonial home theory was more appropriate when dealing with cases involving consanguinity, Reed maintains that the dual domicile theory is the most appropriate rule in cases of affinity; "for affinity rules, the threatened abuse of family enclaves is best left to be determined by each party's domiciliary law that governs their personal status."[152] This is as a result of the potential tensions between family members that the focus is on the personal interests of the party involved in the marriage, and therefore points towards the dual domicile theory being more appropriate, as it is designed to protect the parties themselves. Further support of the dual domicile theory in cases of affinity, appears to come from s.1(3) of the Marriage (Enabling Act) 1960. The Act distinguishes between consanguinity and affinity in that, in the case of affinity the dual domicile rule applies and prevents the use of the exception created by *Sottomayer v De Barros (No2)*, but no such rule applies for cases of consanguinity. Meaning that an English man could marry his cousin even if her domiciliary law did not allow it by applying the exception in *Sottomayer v De Barros (No2)*, but if an English man married his former wife's sister, who's domiciliary law did not allow it the marriage would be invalid[153]. Whilst Reed and the Marriage Enabling Act both appear to point towards the dual domicile theory as the most appropriate rule, the matter does not end there.

Firstly, though the Marriage Enabling Act does appear to draw a distinction between consanguinity and affinity, it has been submitted that "[T]here is no sense in this distinction, the point must have been overlooked in the drafting of the statute."[154] Secondly, when considering Reed's justification for the application of the dual domicile theory, this could also be countered. Both Davie and Jaffey argue that the incapacity of affinity impacts upon the society where the couple will live and should be governed by the intended matrimonial home theory[155]. Davie states his reasons

[152] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 436.
[153] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 367.
[154] Ibid.
[155] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern Law Review 38.

as to why he believes the intended matrimonial home theory is interested in regulating the relationship, and one such reason is the "desire to ensure stability within the family unit"[156]. This correlates with Reed's justification for applying the dual domicile theory, and it would seem that both societies could be argued to have an interest in such a concern. It is argued that where the couple live in fact has the greatest interest. When considering how the family will view the marriage there has actually been a move away from the parties themselves which, the dual domicile theory seeks to protect, and a focus on other members of the society. Whether family members or not, it is other people that the applicable law is concerned with, along with how that family will sit in the society as a result of any fractures that may occur as a consequence of the relationship. On that basis it is submitted that it is the society where the couple intend to, or do indeed live, that is most interested in the relationship[157]. On that basis the continued recognised relationship theory is the most appropriate choice of law rule when dealing with both consanguinity and affinity.

3.8.4.3 Polygamy

In England it is understood and accepted that a marriage is the union of two people to the exclusion of all others; a monogamous relationship. This is legally the position of relationships in England but is also supported in religion and society as whole. This is not the case the world over. In many Eastern countries following Islamic law and a number of African countries polygamy is accepted and celebrated. Polygamy allows there to be multiple parties to a marriage, rarely a woman is able to take more than one husband, but more common place, a man is able to have multiple wives. In England, we would not allow a polygamous marriage to take place, regardless of the fact that the law has developed from the initial understanding that marriage is "the voluntary union for life of one man and one woman to the exclusion of all others."[158] England will now recognise valid polygamous relationships unless there are strong reasons against doing so[159]. It is, therefore, essential that England is able to determine what constitutes a valid polygamous marriage.

For there to be a valid polygamous marriage the parties to the marriage must have capacity to enter into a polygamous relationship. As evidenced throughout this

[156] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 52.
[157] This is recognised by Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 52, when he states that matrimonial home is the "state that is most likely to be affected by familial instability".
[158] *Hyde v Hyde* (1866) LR 1 P & D 130,135.
[159] *Mohammed v Knott* [1969] 1 QB 1.

chapter, there is academic support, and support from the Law Commission, that the dual domicile theory should be applied to all elements of essential validity, and thus would suggest that an English domiciliary is unable to enter into a polygamous marriage. In fact, in accordance with s.11(d) of the Matrimonial Causes Act 1973 before it was amended, a potentially polygamous marriage conducted outside of England involving an English domiciliary would be held to be void. A potentially polygamous marriage is one whereby it is monogamous at its outset, but in accordance with the law of one of the parties could become polygamous; for instance if in accordance with the husband's law he is able to have multiple wives. This was explored in the case of *Hussain v Hussain*[160], and led to the abolishment of potentially polygamous marriages where at least one of the parties was domiciled in England at the time of the marriage[161]. A marriage of this nature would now be treated as monogamous. This was a small step in the area of polygamy for English domicilaries in terms of recognising their relationships. Of greater significance was the decision in *Radwan v Radwan (No2)*[162], in which it was held that when looking at polygamy the correct choice of law rule is the intended matrimonial home theory.

In *Radwan v Radwan (No2)*, despite the longstanding understanding of the universality of the dual domicile theory, Cumming-Bruce J explored whether the same test should be applied to all capacities. He stated:

"It is arguable that it is an oversimplification of the common law to assume that the same test for the purposes of choice of law applies to every kind of capacity – non-age, affinity, prohibition of a monogamous contract by virtue of an existing spouse, and capacity for polygamy. Different public and social factors are relevant to each of these types of incapacity."[163]

This evidences that Cumming-Bruce J is doubting the application of the dual domicile theory, and also provides support for interest analysis. He highlights that different incapacities are designed for different reasons and should be individually considered. Rather than applying the dual domicile test, Cumming-Bruce J determines that the most applicable law is the law of the intended matrimonial home. He justifies this decision by stating that the propositus:

"had capacity to enter into a polygamous union by virtue of her pre-nuptial decision to separate herself from the law of her domicile and make her life with her husband

[160] [1983] Fam 26.
[161] Private International Law (Miscellaneous Provisions) Act 1995, Schedule para 2(2) which in turn amended s.11(d) of the Matrimonial Causes Act 1973.
[162] [1973] Fam 35.
[163] Ibid 51.

in his country, where the Mohammedan law of polygamous marriage was the normal institution of marriage."[164]

While Cumming-Bruce J then went on to limit the application of the intended matrimonial home theory[165] by stating that he was not seeking to provide that the intended matrimonial home theory should apply to other capacities, it still provides support for its application in cases involving polygamy.

As was to be expected, and was in fact anticipated by Cumming-Bruce J[166], this decision came under attack[167]. The premise of the attack was that Cumming-Bruce J relied upon incorrect authorities, and Karsten's belief that migration to England of persons domiciled in countries allowing polygamy, meant that the intended matrimonial home theory could lead to an increase in marriages being declared invalid[168], it was argued that: "his decision cannot be regarded as a safe guide to the law governing capacity to contract a polygamous marriage."[169] However, it is a decision that has also received support from academics[170]. Davie recognises that the intended matrimonial home theory is the correct choice of law rule, stating "After all it is this community that will be confronted with the marital relationship and which may therefore have to cope with a marriage out of step with prevalent social mores."[171]

It would appear that s.11(d) of the Matrimonial Causes Act would prevent English domicilaries from contracting a polygamous marriage and thus go against the decision in *Radwan*, however, s.14(1) of the Act must also be considered. S.14(1) of the Act provides that s.11 does not apply if the validity of the marriage is to be determined by a foreign law. Therefore, if *Radwan* is followed, so long as England is not the intended matrimonial home, s.11(d) will not be effective, and if polygamy is an accepted form of marriage in the intended matrimonial home then an English

---

[164] Ibid 54.
[165] Ibid.
[166] Ibid
[167] IGF Karsten, 'Capacity to Contract a Polygamous Marriage' (1973) 36 Modern Law Review 291, JA Wade, 'Capacity to Marry: Choice of Law Rules and Polygamous Marriages' (1973) 22(1) International Comparative Law Quarterly 571 and David Pearl, 'Capacity for Polygamy' [1973] Cambridge Law Journal 43.
[168] IGF Karsten, 'Capacity to Contract a Polygamous Marriage' (1973) 36 Modern Law Review 291, 296-297.
[169] Ibid 297.
[170] AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern Law Review 38, Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[171] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 51.

domiciliary will be able to contract a valid polygamous marriage. This is undoubtedly a stride forward in the tolerance of, and recognition of, polygamous marriages.

As seen, the use of the intended matrimonial home theory can mean that the English domicilaries are able to enjoy valid polygamous marriages. However, a disadvantage of the use of the theory is that it may lead to the invalidity of polygamous marriages that would be valid under the dual domicile approach. If, for instance, two foreign domciliaries enter into a valid polygamous marriage with the intention of setting up their marital home in England, and do so in a reasonable time the marriage would be void under s.11 of the Act, as English law would be the applicable law. Admittedly, this goes against the underlying policy concern of validating marriages but, it furthers other policy factors and is still the correct approach[172]. The policy objective of upholding moral, religious and cultural infrastructures of a society must not be forgotten, and if "[P]olygamy is contrary to the religious beliefs and customs of the community which they have voluntarily infiltrated; no injustice is done to the respective parties in applying that system of law to determine their status."[173] This does not mean that where a couple have come to England later in life having had a valid polygamous marriage for many years it will be invalidated. The marriage will only be invalid if the parties intended to move to England to set up their matrimonial home and did so in a reasonable time. All the previously mentioned rules about tolerance and comity exist, and therefore English law is not able to invalidate a marriage simply because they disagree with it. Therefore, what we see coming into play is an extension of the intended matrimonial home theory. It is the law of where the couple intend to live that applies, but because of the need to be tolerant it is submitted that what we actually had was something much closer to the continued recognised relationship theory[174]. Consequently, it is proposed that this is the approach that should be adopted as the official choice of law rule for the incapacity of polygamy within this system of dépeçage based interest analysis.

[172] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 443.
[173] Ibid.
[174] As recognised by Frances Hamilton & Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1, 17 when they state "The English courts are applying in practice an extended intended matrimonial home test."

3.8.4.4 Consent

Lack of consent as an impediment focuses on where the party did not consent to the marriage, or the consent was as a result of some fraud, duress or mistake[175]. This is the general understanding of lack of consent, however the term can be broader and encompass other impediments that the party was not aware of, and did not consent to, which lead to an imperfect marriage. These impediments include; impotence, wilful refusal, venereal disease and pregnancy per alium[176]. Where such lack of consent has occurred it will make the marriage voidable as opposed to void[177]. Alternatively, in instances where there has been a complete absence of consent, the marriage may be denied all recognition[178].

In the case of *Westminster City Council v C*[179], a Muslim marriage ceremony was conducted over the telephone between a woman domiciled in Bangladesh and a man domiciled in England. The man suffered from a severe learning disability, and though aged in his twenties his functionality was no higher than that of a three year old, and was, thus, unable to consent to the marriage. For this reason the court determined that the marriage should be denied all recognition. This decision was made for the protection of the English domiciliary, and this gives us an insight into what the applicable choice of law rule should be. In all issues of consent the purpose behind the incapacity is to protect the innocent party, therefore it is the ante-nuptial domiciliary law that should be applied[180].

It is asserted that in all cases of consent, including those regarding wilful refusal, the dual domicile theory should apply. Whilst there has been some suggestion of the *lex loci* being the applicable law[181], this is confused by an overlap in the law whereby the application of either law would have produced the same result, and has, in fact, been challenged in later cases[182]. In *Ponticelli v Ponticelli*, the *lex loci* was not followed, but instead English law was applied, as England was both the *lex fori* and the husband's

---

[175] See generally CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 370-372, and David McClean and Kisch Beavers, *Morris: The Conflict of Laws* (6th edn, Thomson Reuters (Legal) Limited 2005) 227.
[176] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 444 and Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, 53-54.
[177] Matrimonial Causes Act 1973, s.12(1).
[178] *City of Westminster v C* [2008] EWCA Civ 198, [2009] Fam 11.
[179] [2008] EWCA Civ 198, [2009] Fam 11.
[180] See also *Szechter v Szechter* [1971] P 286 and *SH v NB (Marriage: Consent)* [2009] EWHC 3274 (Fam), [2010] 1 FLR 1927.
[181] *Robert v Robert* [1947] P.164.
[182] *Way v Way* [1950] P 71 and *Ponticelli v Ponticelli* [1958] P 204.

domicile, and the court stated that if it needed to choose between the *lex fori* and the domiciliary law, the latter would be preferred[183]. This is also the position favoured amongst experts within the field[184], and is proposed as the most appropriate choice of law rule. This is not the end of the matter, there has been some debate over whether a party is able to rely upon the law of the other party's domicile, or only that of their own.

It was previously suggested by Dicey and Morris[185] that either party could rely upon either law, and is the position that is advocated to be correct by Simon P in *Szechter v Szechter*[186]. This was, however, disputed by the Law Commission who stated that it is, "difficult to say why, if a party's own law considers that he has validly consented to the marriage, he should nevertheless be entitled to avoid the marriage on the basis of his lack of consent under the other party's domiciliary law"[187]. It has also recently become evident in later editions of the leading work, that the contrary view of that previously expressed by Dicey and Morris is now preferred, and instead, correlates with the stance of the Law Commission[188]. This is certainly the most sensible approach, if the party's own law would not provide them protection against what they complain of not to have consented to, they should not be able to benefit from the law of their spouse. The purpose behind the dual domicile theory is to allow a country and it's laws to protect their domicilaries, therefore if they feel that no protection is necessary then this should be the outcome. The other party's law is not interested in protecting a non-domiciliary. This is further supported by Jaffey who states that "if the marriage is not defective by the law of his own community, it is hard to see why he should be entitled to a protection conferred by the law of the other party's domicile,

[183] *Ponticelli v Ponticelli* [1958] P 204, 214.
[184] See for instance David McClean and Kisch Beavers, *Morris: The Conflict of Laws* (7th edn, Thomson Reuters (Legal) Limited 2009) 229, AJ E Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern Law Review 38, 48, Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387. This point was also made in Rebecca Probert, 'Hanging on the Telephone: City of Westminster v IC' (2008) 20 Child and Family Law Quarterly 295, 400.
[185] John Morris, *Dicey and Morris on the Conflict of Laws* (8th edn, London: Stevens 1967) 271
[186] [1971] P 286, 294.
[187] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) 5.23.
[188] Collins and others, *Dicey, Morris & Collins: Conflict of Laws* (14th edn, Sweet & Maxwell 2006) 832 and has been confirmed in the present edition; Collins and others, *Dicey, Morris & Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 961.

or some other law."[189] This argument has been recognised by other academicians[190], and for these reasons it is assessed that the most appropriate choice of law rule to govern all elements of consent is the parties own ante-nuptial domiciliary law.

3.8.4.5 Re-Marriage After Divorce

This capacity comes into play when a propositus has married, divorced from that marriage, and then married for a second time, and all potentially applicable laws only recognise monogamous marriages. For the second marriage to be valid the divorce or annulment must be recognised as valid. It is in determining the validity of that divorce that a conflict of laws situation may arise. It may be that one potentially applicable law would recognise the divorce, and the other would not, making it necessary to determine which applicable choice of law rule is to be adopted on policy grounds. Despite the general favouring of the dual domicile rule for all incapacitates, this element has been treated differently. In all countries requiring a marriage to be monogamous, one of the requirements to enter into a marriage is that each of the parties are single. In instances of re-marriage after divorce, this raises a secondary question of whether upon entering into the second marriage the party in question was still married to their first spouse, in essence is the divorce recognised? This is known as the incidental question, it arises when "one country's conflicts rules lead to a foreign law, but under that law an incidental or subsidiary question arises which can only be resolved by the application of further conflicts rules governing that incidental question."[191] Whilst the dual domicile rule may be used for the capacity element, so, providing that the propositus must be single, what must be determined is what law applies to the incidental question.

It was at one time believed that the domicilary law also applied to the incidental question, meaning that if the law of the domicile did not recognise the divorce the second marriage would be invalid[192]. However, this was departed from in *Lawrence v Lawrence*[193]. In this case the wife was domiciled in Brazil and obtained a divorce from her first marriage in Nevada before marrying her second husband, who was domiciled

---

[189] AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern Law Review 38, 48.
[190] See for instance Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[191] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 373.
[192] *R v Brentwood Superintendent Registrar of Marriages ex partie Arias* [1968] 2 QB 956.
[193] [1985] Fam 106.

in England in Nevada the following day. England was also the intended matrimonial home and the parties set up home in England soon after the wedding. The wife's divorce was recognised by English law, but not by Brazilian law, who deemed her to be still married to the first husband. The wife petitioned for an annulment in England on the grounds that the second marriage was bigamous. English and Brazilian law were in concurrence that for a valid marriage the wife had to be single when she entered into it, however they disagreed on whether the divorce from the first marriage was valid, and therefore whether the wife was single. The wife argued that the dual domicile theory should be applicable making the second marriage void. The trial judge, however, decided that English law was applicable as the intended matrimonial home, and the country with the most real and substantial connection, thus the marriage was valid. In the Court of Appeal the same outcome was reached, but with an alternate reasoning. English law was applied as it was the law of the forum, on the basis that for the incidental question the *lex fori* should not have to give way to Brazilian, or any other law on the recognition of divorces.

The position in *Lawrence v Lawrence* was then confirmed as the applicable law by s.50 of the Family Law Act 1986. The Act provides that where the divorce or annulment has been granted by an English court, or elsewhere, and is recognised by an English court, the fact that it would not be recognised in another country will not prevent either party from remarrying. Essentially providing that the *lex fori* is the applicable law, as opposed to the dual domicile theory. This is the most appropriate choice of law rule, as applying the dual domicile theory would mean that England would be prevented from allowing a person they deem to be single from marrying. It is, therefore, submitted that applying the *lex fori* as a result of interest analysis provides the most appropriate solution, which in turn provides further support for interest analysis as opposed to a universal choice of law rule, such as the dual domicile theory[194]

The only remaining doubt in the area of re-marriage after divorce is when the divorce would be recognised by the domiciliary law, but not by English law. S.50 of the Family Law Act 1986 does not deal with this situation, and nor does it fall within *Lawrence*.

[194] Support for the idea that the capacity of remarriage after divorce provides support for interest analysis can be seen generally in TA Downes, 'Recognition of Divorce and Capacity to remarry' (1986) 35(1) International Comparative Law Quarterly 170 and Alan Reed Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 429 when he states "It should form a catalyst for policy-orientated reform of other impediment grounds to marital validity."

In a Canadian case that presented such a problem it was held that the law of the domicile was applicable, in turn deeming the marriage to be valid[195]. Despite the general policy of validating marriages it has been stated that, "In a case such as Schwebel, the lex fori should be used to avoid the even more startling result that a person is validly and monogamously married to two spouses at the same time."[196] This could in turn provide problems in relation to matrimonial relief and succession, and therefore it is suggested that the *lex fori* should remain the applicable choice of law rule and apply to all cases involving marriage after divorce. As a final point, the policy considerations that have been taken into account when dealing with this incapacity, and the consequential departure from the application of the dual domicile theory within this incapacity, is yet further support for the overarching framework adopted within this thesis, of a policy sensitive dépeçage based interest analysis reconceptualisation of the law.

3.9 Conclusion

The determination of the validity of a couple's marriage is broken down into two key components; formal validity and essential validity. Formal validity is a settled area of law in that it is accepted that it is the law of the *lex loci* that is applied. This was reiterated by the Law Commission in their report, who admitted that their preference for this approach is because of the certainty and predictability that comes with it[197]. Notwithstanding this clear aspiration for achieving certainty and predictability across marriage validity, this was not achieved within the essential validity of marriage, and is, on this account, where the attention of this chapter has focused.

Under the present law, there are two primary competing theories; the dual domicile theory and the intended matrimonial home theory. Regardless of them each gaining common law and academic support, there are problems within both. In requiring both parties' domiciliary laws to be consulted, the dual domicile theory does not uphold the policy objective of the validity of marriage, it equally does not consider the law of the country that the marriage belongs to. The intended matrimonial home theory on the other hand is discriminatory in terms of gender, may require the validity of a marriage to be reassessed if a couple subsequently move away from their intended matrimonial

[195] *Schwebel v Ungar* (1963) 42 DLR (2d) 622.
[196] CMV Clarkson & Jonathan Hill, *The Conflict of Laws (*4th edn, Oxford University Press 2011) 378.
[197] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 2.36.

home, and as discussed, is not always the appropriate law to apply. What is, therefore, apparent is that neither theory can be applied universally to the essential validity of marriage. Although the dual domicile theory was promulgated by the Law Commission[198], and would provide couples with certainty and predictability, it would do so at a high cost. It, as a universal approach, would prevent any flexibility in the area, and relevant policy considerations may not be considered. While certainty may be achieved, the application of the most appropriate law might not.

The problems with a universal choice of law rule for the essential validity of marriage are further highlighted by the alternative theories. Like the dual domicile theory and the intended matrimonial home theory, they too have their weaknesses, and fail to be appropriate for a one rule fits all approach. Aside from the alternative theories which have been used and discussed by the judiciary[199], there is also another tool at the court's disposal which allows them to avoid the application of a choice of law rule they consider inappropriate, and that is the exceptions. Even if a universal choice of law rule was selected, at present, the courts would still be able to avoid it under certain circumstances. This could be considered advantageous as it brings a degree of flexibility back into the picture, but, it is instead argued that it destroys the certainty discussed above. An exception waiting in the wings to be applied at any time, will have parties questioning whether it might happen to them, and thus removes the core objective of the universal choice of law rule. In addition, it might also be suggested that in relying on exceptions to step in, there is an admittance that the approach itself does not work[200]. This view, along with the criticisms already outlined in respect of a universal approach, suggests that it is time to address the problem properly by looking at what choice of law rules would be appropriate, rather than simply papering over the cracks with escape clauses.

In assessing what choice of law rules would be appropriate, this chapter explored the concept of interest analysis and how it has developed over time. Currie's original version of interest analysis has been heavily criticised for its forum favouritism, but it is a modern dépeçage based interest analysis approach that this research identifies as the optimal solution. This categorisation of interest analysis has received some support from the academic community[201], as a result of the policy sensitive rules that

[198] Ibid para 3.36.
[199] See for instance *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 which utilised the most real and substantial connection test.
[200] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 75.
[201] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and Alan Reed, 'Essential Validity of

are able to be created. Each incapacity is explored in order to determine what policy objectives or concerns are at the heart of the incapacity so as to ensure that the selected rule reflects this optimisation. Dépeçage based interest analysis allows for a tailor made set of choice of law rules, which then provides the much desired combination of certainty and flexibility; it recognises the differences within the incapacities, whilst also providing a clear and certain rule that couples, and indeed, the legal profession can consult:

"Marriage validity is an eminently apposite subject for the application of a modified interest analysis theory, on dépeçage principles, to delineate between identifiable community interest in regulating parties who establish a matrimonial residence within their state borders, as opposed to the countervailing personal interests of the respective parties."[202]

It is this policy sensitive mechanism when determining the appropriate choice of law rule that enhances the approach by creating rules that lead to the most appropriate law being applied, and thereby meaning that the invocation of exceptions will become a thing of the past.

Upon reflection of the policy objectives and the current choice of law rules it was felt that the dual domicile theory could be the most workable solution when dealing with certain incapacities as a result of it being the choice of law rule best paced to protect parties. This argument would also become stronger if the reforms suggested in chapter 2 were actioned, to ensure that one's domicile is both easier to ascertain and more reflective of a propositus' ties to a country. On the other hand, it was determined that the intended matrimonial home theory required some updating. Through consideration of the most important aspects of the intended matrimonial home theory, the continued recognised relationship theory was established. Like the intended matrimonial home theory, it focuses on the country where the couple intend to live, or the law of the country where they have lived if their relationship has been subsisting for a reasonable period of time. Prevalent within this approach is the same desire to protect the cultural, moral and religious views of the impacted society. Importantly, however, the continued recognised relationship theory achieves this without preferring either parties' domiciliary law, and whilst making it clear that a subsequent move need not mean a couple's status is reassessed. It is as a result of these

Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.

[202] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 459.

improvements that the continued recognised relationship theory is selected as the most appropriate choice of law rule for some incapacities. This thesis recognises that some criticisms may be levelled at the new theory, but these are addressed head on, demonstrating that though perfection may not have been achieved, or be achievable, the theory offers a sound and robust formula for applying the most appropriate law.

It was with this formula for the continued recognised relationship theory, combined with the dual domicile theory, that this research was able to focus on assessing each of the incapacities and the policy issues entailed. Following the plan of an approach of dépeçage based interest analysis, each incapacity was considered in order to assess the most appropriate choice of law rule. Age and consent were both deemed to be primarily concerned with the protection of the parties to the marriage, and so the dual domicile theory was selected as the most appropriate choice of law rule. Whereas, consanguinity and affinity, and polygamy were held to raise concerns that involved the society within which they planned to live, and their acceptance of their marriage, and therefore the continued recognised relationship theory was considered to be the most appropriate choice of law rule. Finally, the incidental question within re-marriage after divorce, was thought to raise entirely different concerns, surrounding how their status was viewed in the country they were then seeking to marry in, and so the *lex fori* was of key importance.

It is with this approach that couples in England will be able to determine whether their marital status will be recognised. It offers couples the certainty and predictability they deserve when dealing with their marital status, whilst not being so rigid and inflexible that it fails to consider any relevant policy concerns. Marriage validity is an area within the conflict of laws that has been very much neglected. In spite of the attention it received from the Law Commission and academics alike, years have passed by and any hopes of change appears to have faded. Reed stated that, "the parlous state of our law ... needs to be reformulated for the next millennium"[203] and this is exactly what this research aims to achieve. This chapter makes significant in-roads to achieving the overarching aims of this thesis, and indeed hits the objective of demonstrating how certainty might be achieved within essential validity in England however, with the modern developments within the law, the reformulation must not stop here. Important though such changes may be, they fail to consider the ability of same-sex couples to marry, and the increasing levels of migration. With differing laws around the world

[203] Ibid 450.

regarding the ability of same-sex couples to marry or enter into civil partnership type relationships, it is an area ripe for conflicts disputes. Likewise, with increased migration, providing certainty within our English borders provides only limited certainty for couples. Therefore the analysis iterated herein, and suggested reforms promulgated in this chapter, will hopefully act as a catalyst towards a beneficial recategorisation and optimisation of policy sensitive choice of law rules appurtenant to essential validity, in order to truly overhaul the law in this area, in a manner that has never been pervasively considered before, and provide the much needed holistic reform.

Chapter 4

Are We Still Married? Establishing A Choice Of Law Rule To Allow Same-Sex Couples To Assess The Validity Of Their Relationship

4.1 Introduction

The recognition of same-sex relationships is an area that has undergone, and continues to be subject to, development and debate. In England, there are now two forms of recognised same-sex relationships: civil partnerships as a result of the Civil Partnership Act 2004; and same-sex marriage as a result of the Marriage (Same-Sex Couples) Act 2013. Getting to this stage has however been a lengthy process. For many years in England homosexual activity was a criminal matter and at its worst resulted in capital punishment[1]. This criminalisation finally ended in 1967 when the Sexual Offences Act decriminalised homosexuality in England and Wales. As the fight for equality continued, a landmark step forward involved the introduction of the Civil Partnership Act 2004. This allowed same-sex couples to register their relationship, providing them with almost identical rights to that of a married couple. The introduction of such rights, but under a different status, led to questions surrounding the denial of the term "married" or "marriage" to same-sex couples, with many arguing that a civil partnership could be seen as a somewhat lesser status[2]. As discussed in chapter 1, for some, marriage is about status, with marriage being considered the highest relationship status that can be accomplished: "Marriage is understood internationally

[1] In 1726 three men were hung under the Sodomy Enactment of 1583.
[2] Kerry Abrams, 'Citizen Spouse' (2013) 101(2) California Law Review, 407 and Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267.

and represents the highest form of recognition for a committed relationship, (described by many as the gold standard)."[3]

In creating an alternative status for same-sex couples, as opposed to allowing them to marry, the "gold standard" associated with the status was actively denied: "Because many rights and benefits are tied to the words "marriage", "married", or "spouse" it is impossible to create a perfectly parallel institution that has a different name."[4] What appeared to be a final breakthrough then occurred in 2013 when the Marriage (Same-Sex Couples) Act was created, providing same-sex couples in England the opportunity to marry. Nevertheless, if we step outside of England, same-sex marriage is not available in every country, and there is a whole host of recognised relationships. Within the EU alone there are countries that allow same-sex marriage[5], countries that allow a relationship analogous to civil partnerships[6], countries that recognise a form of relationship that carries less legal responsibilities than a civil partnership[7], and until the recent decision in *Oliari v Italy*[8] that required at least some recognition of same-sex relationships, there were countries that failed to offer any legal recognition to same-sex relationships at all[9]. Disparity to this level in the EU demonstrates how significant of a conflict of law issue this is worldwide. If a community that comes together on many issues and tends to follow one another's legal progress has such incongruent rules on the area, one can only begin to imagine the scale of the problem worldwide when considering the many countries with completely different legal, political and societal views. Not only is there inconsistency in the types of relationships recognised, but also the choice of law rules within them, highlighting that rather than a final breakthrough, the Marriage (Same-Sex Couples) Act was more of a stepping stone within the law, and that work is still needed surrounding recognition.

It is with the ever increasing levels of migration that recognition becomes problematic. Currently, as a same-sex couple move around Europe, their relationship status is likely to change as a result of the choice of law rules within the varying relationship statuses. As with the capacity issues dealt with in the previous chapter, the choice of

[3] *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295 [6] (which is a reference to para of Kitzinger's affadavit).
[4] Nancy G Maxwell, 'Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison' (2001) 28 Arizona Journal of International and Comparative Law 141, 192-193.
[5] Belgium, France and Spain.
[6] Germany and Switzerland.
[7] France and Belgium as alternatives to same-sex marriage.
[8] (Application Nos 18766/11 and 36030/11, 21 July 2015).
[9] Italy and Cyprus.

law rules applied to determine the capacity of the parties to enter and remain in that same-sex relationship varies. In England, there is a minimum of two different choice of law rules in place between the two potential relationship statuses. This, in itself, proves problematic when determining the validity of a foreign same-sex relationship, which is made more difficult by the realisation that the choice of law rules surrounding same-sex marriage are vague, and left open to the argument of many different choice of law rules being applicable. This subsequently leads to the fundamental question of what law will be applied when assessing a foreign same-sex relationship and will the relationship be considered valid? Under the present law these questions are difficult to determine. The Marriage (Same-Sex Couples) Act provides no definitive answer and thus it would appear that currently such questions have only one direction in which they can be sent, and this is directly to the courtroom.

This chapter will explore the problems faced by same-sex couples in England, before looking at how the law could be improved. It is asserted that the way in which this is achieved is through the creation of a choice of law rule specifically for same-sex relationships, as its own incapacity under the system of dépeçage. It is, therefore, the aim of this chapter to determine the most appropriate choice of law rule for same-sex relationships in order to conclude that it should be treated in the same manner as any of the other incapacities. Consequently, having explored the problems faced by the couples in civil partnership type relationships and same-sex marriages in greater detail, the next step will be to examine the law in more depth to determine the most appropriate choice of law rule. This will be conducted by considering the choice of law rules adopted by other incapacities and why they were selected, exactly what the aim of the choice of law rule is for same-sex relationships in respect of policy objectives, and finally, a comparative analysis of the approaches adopted throughout the EU and the US to ensure the most appropriate choice of law rule is selected. The promulgation of this optimal pathway also sets the scene vis-à-vis the reformed choice of law rules in same-sex relationships more broadly, in order to achieve the fine balance of flexibility and certainty so desperately needed. Parliament aimed to achieve equality in the passing of the Marriage (Same-Sex Couples) Act, but it failed to provide the much needed certainty that must accompany it, therefore, this chapter will identify how this can be rectified.

4.2 The Civil Partnership Act 2004

The Civil Partnership Act[10] was enacted in 2004, and created a recognised relationship for same-sex couples for the first time in England. The Act provided rights for those entering into the partnership which are almost identical to those involved in a marriage[11]. In addition to recognising civil partnerships that are registered in England, the Act also provided recognition for 'overseas relationships'[12]. S.212(1)(a) states that an overseas relationship is either a specified relationship[13] or a relationship that meets the general conditions[14]. Upon meeting this criteria they are then treated as having formed a civil partnership, provided that the individual had capacity to enter into the relationship, and met all the requirements necessary to ensure the formal validity of the relationship under the relevant law[15].

In congruence with a heterosexual marriage, s.215(1) sets out that formal validity and essential validity must still be satisfied in accordance with the relevant law. The distinction between the requirements comes from the definition of 'relevant law', which is defined in s.212(2) as, 'the law of the country or territory where the relationship is registered (including its rules of private international law)', and this is the applicable rule for both formal and essential validity. In effect, the Act is stating that for both formal and essential validity, the *lex loci registrationis* is the applicable choice of law rule, which, can be likened to the *lex loci celebrationis*. This is in contrast to marriage validity, where it is often deemed that the domiciliary law plays a key part in the determination of capacity, and the *lex loci celebrationis*[16] applies only to formal validity. Whilst there are arguments over whether an alternative choice of law rule is more appropriate for essential validity, the *lex loci* is not a popular argument amongst English academicians or the judiciary: "We ought not to turn the forensic clock back some 120 years and revert to the *lex loci* as the applicable law for issues of capacity."[17] It is a rule that is highly criticised, primarily as a result of the fact that it

[10] Thereafter referred to as the CPA.
[11] For instance the Civil Partnership Act sets out that a civil partner will have the same rights as a spouse in relation to; giving evidence, parental responsibility, applying for residence, wills and administration of estates.
[12] S. 212.
[13] S. 213 sets out that that a specified relationship for the purposes of s.212 are those in Schedule 20 of the Act.
[14] The general conditions are set out in s.214.
[15] S.215(1).
[16] Hereafter referred to as the lex loci.
[17] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.23.

allows parties to evade restrictions imposed on them by their domicilairy law, and effectively forum shop[18].

Upon recognising overseas relationships the CPA converted all relationships into civil partnerships, irrespective of whether it was a same-sex marriage, something equivalent to a civil partnership, or indeed a relationship which had less significant legal rights and responsibilities attached[19]. This meant that relationships were both upgraded and downgraded by the CPA[20]. This has now been changed by the introduction of the Marriage (Same-Sex Couples) Act 2013[21] in respect of downgrading relationships, and marriages are no longer regarded as overseas relationships. Prior to this change, and historically, marriages were downgraded to be recognised as civil partnerships and the couple were stripped of the title of marriage. When considering the impact this may have on a person it is crucial to consider the importance and symbolic nature of marriage as a status: it brings with it a body of rights, and a sense of acceptance much like a person's citizenship status[22]. Taking away that marital status from a couple who are in a same-sex marriage could, therefore, be likened to removal of their status of citizenship[23]. Dorf asserts that in failing to allow a same-sex couple to marry the government is labelling them as a 'second class citizen', which they then have to reassert every time they are asked their marital status: "Every time the members of a same-sex couple that wish to be married are denied that opportunity under the state law answer "no" to the question of whether they are married, they participate in their own oppression."[24]

This then must surely be true of any couple who have been stripped of their status, and essentially excluded from a individuated group. Dorf explains this further by asking the reader to consider the idea of forcing all homosexuals to wear a pink triangle badge, and how this would force them to "out themselves", as it stamps them

[18] Ibid.
[19] See s.215.
[20] For instance a French pacte civil de solidarité (PACS) would be upgraded and a Belgium same-sex marriage would be downgraded.
[21] Thereafter referred to as the M(SSC)A.
[22] The notion of citizenship and how it can be compared with marriage will be explored in greater detail in section 4.4.
[23] It is argued by many that in denying a person the right to marry the person of their choosing, whether this involves a same-sex marriage, is a denial of full citizenship. See for instance; Angela P Harris, 'Loving Before and After the Law' (2007-2008) 76 Fordham International Law Review, 2821, Nicholas Bamforth, 'Sexuality and Citizenship in Contemporary Constitutional Argument'. (20012) 10(2) International Journal of Constitutional Law, 477 and Dimitry Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33(1) Fordham International Law Review, 156.
[24] Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267, 1308.

with a badge of inferiority[25]. This analogy may seem to exaggerate the matter, but, is it really that dissimilar to being branded with the term civil partner? Aside from there being no badge that must be worn, the status of "civil union" or "civil partnership" is how such couples would be forced to refer to their relationships when filling out governmental forms, and how society would refer to their relationship. This was the problem faced by the couple in the case of *Wilkinson v Kitzinger*[26]. This case concerned Susan Jane Wilkinson and Celia Clare Kitzinger who, having been in a stable and committed relationship for a substantial period of time, decided to marry. As same-sex marriage was at the time not permitted in England they went to British Columbia to marry in accordance with Canadian law before returning back to England. As both women were English domicilaries, and returned immediately to England, the marriage was not recognised, and upon the coming into force of the CPA was deemed a civil partnership. This status was not one that the couple were happy with, despite it carrying the tangible benefits of marriage, and they believed that "while marriage remains open to heterosexual couples only, offering the 'consolation prize' of a civil partnership to lesbians and gay men is offensive and demeaning."[27] For this reason the couple took the matter to the courts arguing that the lack of recognition of their marriage was a violation of their rights, and that it should be duly recognised.

The couple submitted that not allowing same-sex couples to marry was a violation of Articles 8, 12 and 14 of the European Convention of Human Rights[28]. They wished the court to determine as such, and in turn read the rights in a way that would allow their marriage to be recognised, or failing that to make a declaration of incompatibility under s.4(2) of the Human Rights Act 1998. Regardless of recognising how the couple felt about the status of civil partners, the court held that the Articles could not be read in a way that would mean that the marriage was declared valid, and nor did they believe that the Matrimonial Causes Act 1973 or the CPA was incompatible with Articles 8, 12 and 14. The court accepted that the couple felt hurt and humiliated by what they perceived to be a downgrading of their relationship, however, they felt these were not emotions, "shared by a substantial number of same-sex couples content with the status of same-sex partnership."[29] They also held that marriage has a longstanding definition and acceptance of being between a man and a woman, and

[25] Ibid 1299-1304.
[26] [2006] EWHC 2022 (Fam), [2007] 1 FLR 295.
[27] Ibid [5] (which is a reference to para 18 of Wilkinson's affidavit).
[28] Ibid [38].
[29] Ibid [116].

that is what Article 12 was designed to safeguard, stating that "to accord a same-sex relationship the title and status of marriage would be to fly in the face of the convention"[30]. Finally, they determined that the CPA was in no way intended to create a relationship that was inferior to marriage, but was designed to remove any legal and social disadvantages suffered by homosexuals in long-term relationships[31].

What is evident in exploring this case is the hurt felt by Wilkinson and Kitzinger. Much like Dorf anticipated in his article[32], the couple felt they were being treated as inferior, the status of marriage was of considerable importance to them despite being presented with an alternative, as discussed in chapter 1 marriage, has an important symbolic status:

"This symbolic status of marriage as a fundamental social institution is, in many ways, as important as its formal legal status. It provides for social recognition of key relationships, and to have our relationship denied that symbolic status devalues it relative to the relationships of heterosexual couples."[33]

As a result of the M(SSC)A, the law has now changed on this matter and the downgrading of marriages to civil partnerships will no longer occur, all of which will be discussed at a later point.

Regardless of the change in law surrounding the downgrading of marriages, there is still a very clear problem where relationships are upgraded. It still may be that a relationship is upgraded to a civil partnership from something far less onerous such as a French Civil Pact of Solidarity (PACS), which gives only limited rights on breakdown of the relationship[34]. Upon the upgrade many more rights and responsibilities than were ever intended, or even potentially known, arise. It was pointed out by Harper and Landells that such upgrades may be problematic when couples in relationships similar to a French PACS move to England and then separate: "they will have imposed upon them a whole series of obligations and procedures to dissolve their partnership which would not have applied in their home country."[35]

---

[30] Ibid [120].
[31] Ibid [121].
[32] Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267.
[33] *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295 [5] (which is a reference to para 21 of Wilkinson's affidavit).
[34] For instance, there is no right to maintenance; see Joanna Miles, 'Unmarried Cohabitation in a European Perspective', 105 in Jens M Scherpe (ed) *Family Law Volume III: Family Law in Perspective* (Edward Elgar Publishing Ltd 2016).
[35] Mark Harper & Katharine Landells, 'The Civil Partnership Act 2004 in Force' [2005] Family Law, 963.

What these points highlight is that the lack of universality attached to civil partnerships makes them difficult to apply throughout the EU, never mind the world over[36]. Unlike marriage, it is not a status that is universally recognised[37], which in turn leads to confusion for couples involved in such relationships, upgrades and downgrades in relationship status, and, of course, a lack of any recognition at all depending on what state borders are crossed: "[T]he major international difference between marriage and civil partnership is the territorial limitations of the latter."[38] This could in turn provide further support for arguments regarding a form of second class citizenship. Those in an alternative relationship face greater levels of uncertainty when crossing state borders.

4.3 Marriage (Same-Sex Couples) Act 2013 and the Loophole Within

In 2013, the M(SSC)A was introduced which meant that same-sex marriages could take place in England, and those which have taken place abroad may also be recognised in similar vein, as opposed to being reduced to a civil partnership. The ability to recognise foreign same-sex marriages arises from s.10(1)(b) which provides that a marriage under the law of any other country outside the UK is not prevented from being recognised under the law of England and Wales only because it is the marriage of a same-sex couple. 'Does not prevent' means that recognition is not forced under the process of the English legal system *per se*, but rather the courts are provided with a degree of discretion when determining validity. This discretion may have been designed by Parliament to ensure that the requirements of formal validity and essential validity are still satisfied.

Unlike the CPA, the M(SSC)A makes no reference to the choice of law rules that are to be applied, and it has, therefore, been presumed that when considering formal validity the *lex loci* would be applied as with all previous examples. Determining the choice of law rule for essential validity could, however, be more ambiguous. It has

[36] Richard Frimston, 'Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law' (2006) 6 Private Client Business 352.
[37] "Heterosexual marriage still attracts the highest form of legal and social recognition in the UK, most of Europe and Commonwealth jurisdictions" (Kate Spencer, 'Same Sex Couples and the Right to Marry – European Perspectives' (2010) 6 Cambridge Student Law Review 155, 157.
[38] Kenneth Mck Norrie, 'Recognition of Foreign Relationships Under the Civil Partnership Act 2004' (2006) 2(1) Journal of Private International Law, 137, 166.

been suggested by Davis[39] that, given that the Law Commission considered the matter in 1987, and felt no need to legislate on the matter, the traditional stance of referring to the law of each party's ante-nuptial domicile stands: "Hence the absence of specific provisions in the Bill simply has the result that capacity will continue to be assessed by reference to the law of the ante-nuptial domicile."[40] This is a rather bold assertion to make. Although Davis recognises problems with the parameters of the M(SSC)A, nonetheless it is somewhat premature to 'assume' that the law of the pre-nuptial domicile will apply. Davis acknowledges the complexity surrounding essential validity arising from the various rules throughout the EU, but appears to be confident from the outset that the applicable law in England is that of the parties' ante-nuptial domicile[41]. For this assertion, reliance is placed on Dicey and the Law Commission Working Paper in support[42]. However, this is only a fraction of the picture, the Law Commission may have indicated the dual domicile theory as the most applicable rule in the latest relevant paper[43], but case law provides contradictory evidence. Despite the Law Commission's stance on the applicable choice of law rule, the courts have continued to consider and make reference to alternative choice of law rules[44]. In addition, it has also been suggested that it can be inferred from Schedule 4 of the M(SSC)A that where the same-sex marriage is to take place in England, and involves a person domiciled in a country that does not permit same-sex marriage, that it will not affect the validity of the marriage[45]. In essence, this implies that, indeed, the dual domicile rule is not necessarily the applicable choice of law rule. On that premise, it could be suggested that to assume that reference will always be made to the dual domicile theory seems rudimentary, and unsubstantiated, and further reference to this important hypothecate will be made later in the chapter.

The consideration of extant law under the CPA and the M(SSC)A reveals that the applicable choice of law rule when determining capacity appears different between the two legislative enactments. This may appear an insignificant observation,

[39] Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013).
[40] Ibid para 2.
[41] Ibid para 3.2.
[42] This is evident not only in the passage quoted above from para 3.2 which, gains its support from the Law Commission, but also in para 3.2 where Davis states: "English law assesses capacity according to the law of the domicile of the parties immediately before the time of marriage." In which he refers to rule 74 of Dicey for support (Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013) .
[43] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.36.
[44] *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 provides support for the most real and substantial connection test, while *Minister of Employment and Immigration v Narwal* (1990) 26 RFL (3d) 95 provides support for the alternative reference test.
[45] Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 392.

however, this factorisation, combined with the amendment to the CPA preventing marriages being deemed an overseas relationship, has the potential to cause devastating effects on the validity of some same-sex marriages.

Under s.213 of the CPA, in its original format, it was simply stated that a specified relationship for the purposes of s.212 was those set out in schedule 20. Schedule 20 contained a whole host of countries and their recognised same-sex relationships, including marriage[46]. In accordance with the CPA all of the listed relationships were then recognised as civil partnerships in England, whether it meant an upgrade or downgrade in the relationship status. Schedule 2, part 3 s.5(2) of the M(SSC)A however, amends the CPA in that after s.213(1), s.213(1A) is inserted which states: "But, for the purposes of the application of this Act to England and Wales, marriage is not an overseas relationship." The concomitant is that a foreign same-sex marriage can no longer be downgraded to a civil partnership, and it must be considered a valid marriage.

While on the surface this may appear a victory for those in a same-sex marriage, this may not always be the case. It must be remembered that when initially recognising any such foreign same-sex marriages they were assessed by applying the *lex loci registrationis* rules on essential validity as required under the CPA[47]. In order to apply the M(SSC)A it would appear in accordance with Davis that the dual domicile theory would have to be applied to ensure that both parties had capacity under the laws of their ante-nuptial domiciles. This distinction may, in some cases, be the difference between having a recognised relationship or not. If the parties had no such capacity under their ante-nuptial domiciliary law it could mean that their relationship is not recognised at all. Any such invalidity may mean that the relationship falls into the loophole in the law. It would not be a valid same-sex marriage, and due to the change in the definition of overseas relationships brought about by Schedule 2, part 3 s.5(2) of the M(SSC)A, , it is equally unable to be classified as a civil partnership. The potential for this problem to arise was also considered by Davis in his Memorandum on the Bill[48]. He postulated a fictional scenario that could undoubtedly occur in England to demonstrate this point[49]. The scenario involved Harry, a UK domiciliary and his Italian boyfriend Luca. They had lived together in London and Paris but had not entered into a civil partnership as they instead wished to marry when the

[46] Some examples include the French PACS, Canadian Marriage and Belgium Cohabitation Legale.
[47] S.215(1).
[48] Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013) para 3-4.
[49] Ibid para 4.4.1-5.3.

opportunity arose. Luca's career took them to Belgium where they lived for a few years and entered into a valid marriage in accordance with Belgium law. Upon the termination of Luca's temporary employment contract the couple returned to England. Davis then discusses the validity of the marriage under both the CPA and the Bill (now the M(SSC)A). Historically, under the CPA their marriage would have been considered a valid overseas relationship as both parties would have had capacity to marry in accordance with the relevant law; Belgium law, as the law of the *lex loci,* and their relationship would therefore be treated as a civil partnership. However the position under the M(SSC)A could potentially be quite different. If the applicable law is, as suggested, that of both parties' prenuptial domiciles, Luca is likely to have lacked capacity to enter into the marriage, as he would plausibly be deemed to be domiciled in Italy or France at the time of the marriage, neither of which permitted marriage between couples of the same-sex. In addition, as a consequence of the M(SSC)A, the marriage could no longer be recognised as a civil partnership as a result of the newly amended s.213(1A) of the CPA, preventing marriages from being recognised as civil partnerships. As Davis recognises, the marriage could simply be declared void, and could as he suggests all occur without the couple realising there is a problem, until years later when something such as Harry's death raises the question of validity for succession purposes, by which point it would be too late.

The above example shows how serious the consequences may be for impacted individuals, and the potentially capricious nature of choice of law iteration. Even stepping aside from the prospect of the couple being unaware that they have lost the likes of succession rights without particularised knowledge, there are, of course, other problems that present themselves. There may be a real lack of certainty and predictability surrounding their relationship: whether this is because they have moved from one country to England after the enforcement of the M(SSC)A, or because they moved here prior to the Act, but had their relationship downgraded to a civil partnership, and are now left wondering if it is back to a marriage or nothing at all. There is also hurt and anger that may be caused by the fact that having once had their relationship downgraded, they are now told their relationship would not be recognised at all. One need only consider cases like *Wilkinson v Kitzinger*[50] where the couples felt that their rights had been violated by the demotion of their status to civil partnership; how would such a couple feel if they were then told their relationship gains no recognition in England at all? Without wishing to trivialise the arguments

[50] [2006] EWHC 2022 (Fam), [2007] 1 FLR 295.

made by the likes of Wilkinson and Kitzinger it clearly highlights how big of an issue this problem is, and, therefore, the urgency required in rectifying it in the best way possible to avoid injustice and deleterious unforeseen consequences as a by product of the conflict of laws.

As previously mentioned, s.10(1)(b) of the M(SSC)A seems to supply an element of discretion by stating a marriage celebrated outside of England is not prevented from being recognised. Davis considers whether this could mean that, regardless of capacity issues, English courts could still deem the marriage valid[51]. However, he then goes on to state that, "At most the provisions seem to leave a discretion to the court to decide whether or not to apply the rules of capacity, but arguably they do not even go that far."[52] In essence, it is all in the interpretation of s.10(1)(b), and at best the courts have a discretion to declare the marriage valid, regardless of any incapacity[53]. Given the seriousness of any such interpretations, and the consequences it could have, this precarious position is simply not good enough, and a cathartic panacea is needed to cure currents ills. In an attempt to provide a solution to this, Davis goes on to suggest that s.10(1)(b) should be revised and extended[54]. Having set out that the marriage will not be prevented from being recognised only because it is a marriage of a same-sex couple, he recommends that is should also provide that it will not be prevented from being recognised, "because one of the couple has been or is domiciled in, or is a national of, a country or territory which does not permit or recognise same sex marriage."[55] Such an idea is based on laws from France and Belgium, but holds little merit in England. In assessing Davis' recommendation it is evident that the ambiguity still remains from the wording of 'not prevented'. Rather than something being imposed upon the courts it is yet another exception to add to an area littered with them, when what is actually needed is certainty and predictability. It may also encourage forum shopping if it is apparent that ante-nuptial prohibitions will be put to one side, and finally it also appears to place the problems faced by same-sex couples above those faced in heterosexual marriages. The application of the ante-nuptial domicile does not only cause problems for those in a same-sex marriage[56], and therefore an exception specifically designed to

[51] Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013) para 5.3.
[52] Ibid para 4.
[53] A dilemma also recognised in Jonathan Hill & Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 393, in their discussion of s.10(1) and the result under both a narrow and broad interpretation.
[54] Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013) para 7.
[55] Ibid.
[56] See for instance *Pugh v Pugh* [1951] P 482.

alleviate the problem for same-sex marriages could open the door to a whole host of potential future problems.

Instead, a choice of law rule must be created for same-sex relationships in order to provide the much needed certainty discussed for all the other incapacities in the previous chapter. There is enough uncertainty caused by the differing rules on recognition of same-sex relationships throughout the world, and, thus, the minimum that can be expected is some consistency in the choice of law rules in determining the validity. This choice of law rule should be applied to every same-sex relationship dispute in England, whether it involves a civil partnership, or a marriage, to ensure there is consistency, certainty and most importantly no loophole for a previously recognised relationship to fall victim of. In creating the M(SSC)A, Parliament was seeking to ensure that same-sex couples received equal treatment as heterosexual couples, and, therefore, it is vital that they are not, "subjected to any more complicated regulation of their family lives than opposite-sex couples in analogous circumstances."[57] To break down this hurdle, this chapter will go on to determine a choice of law rule that could be applied to any case involving a civil partnership or marriage that comes before the English judiciary.

4.4 Discovering the Best Choice of Law Rule

As with the previous chapter, it is necessary to consider what choice of law rule would present the optimal reform pathway when dealing with same-sex relationships. It is argued that it should be treated as any other incapacity, like age, polygamy or consent, and, thus, have a rule that can be applied by the courts using the dépeçage version of interest analysis. It has been argued that in adopting the dépeçage version of interest analysis some of the many policy objectives[58] that the choice of law rules in the area of marriage validity seek to achieve are advanced[59]. For that reason a choice of law rule was discussed and determined for each of the incapacities and has been outlined in the previous chapter. The appropriate choice of law rule for same-sex relationships did not feature in the previous chapter, as historically it was not

[57] Kenneth Mck Norrie, 'Recognition of Foreign Relationships Under the Civil Partnership Act 2004' (2006) 2(1) Journal of Private International Law, 137, 167.
[58] Such as certainty and predictability, upholding the validity of marriage, and international uniformity of decisions as discussed at section 3.7.2.
[59] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.

discussed within the literature. When dépeçage was discussed by academicians such as Reed and Davie[60] civil partnerships had not been introduced in England never mind same-sex marriage, and therefore was not something that would have featured on the agenda of incapacities. However, times have moved on since then and the law has developed significantly. In England, and indeed many other countries, same-sex relationships have become extremely relevant, and so it is essential that the public policy objectives such as certainty, predictability and uniformity of international decisions are sought as they are within all other incapacities. The way this is achieved is by bringing it in line with the other incapacities explored, and providing it with its own choice of law rule that can be consistently applied by the courts.

In addition to the policy objectives outlined, it is submitted that further objectives come into play when dealing with same-sex relationships. These include equality, citizenship and the symbolic status of marriage. These additional policy objectives are of importance because of the inconsistency of rights still evident today throughout the world. The ability for same-sex couples to marry and have that marriage recognised could certainly be termed as the latest battle for equality. Discrimination in the marriage arena is not a new problem, but has simply turned its attention from women and black people to same-sex couples[61]. Looking particularly at the US, it is evident that there was a time when it was common place in many states for interracial marriages to be banned. This was not true of every state and, therefore, cases concerning the validity of interracial marriages arose. As with same-sex marriages today, those cases showed the many factors that the judiciary took into consideration. In *State v Ross*[62], despite multiple passionate dissents in which allowing interracial marriage was likened to allowing small pox and pet rattlesnakes into the country[63] the marriage was still deemed valid on the basis that, "the law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister states."[64] Although comity is still a policy consideration, it does not guarantee every same-sex

[60] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws (1994) 23 Anglo-American Law Review 32 and Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[61] See Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267, Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines,* (Yale University Press 2006) and Frances Hamilton & Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1.
[62] 76 N.C. 242 (1877).
[63] Ibid 250.
[64] Ibid 243.

couple recognition owing to the many countries and states who still heavily oppose same-sex marriage[65].

Koppelman however, recognised that amidst the prejudice and bias opinion there came a method which the judiciary began to apply to the interracial marriage cases. The cases were broken down and categorised as either; evasion cases[66], extraterritorial cases[67] or migratory cases[68]. Evasion cases were always invalidated, extraterritorial cases were always recognised and migratory cases remained divided. Whilst recognising the obscurity of almost promoting the laws of such a despicable time, Koppelman states that:

"the Southern judges did have something intelligent to say about how to deal with deep moral disagreement. The question for us today is whether we can manage at least the minimal level of decency and mutual respect that existed in the awful years of legalized racism."[69]

This minimal level of decency, would, it is proposed, in the current day, come from the establishment of a choice of law rule that is applicable by the courts consistently, to offer a level of certainty for couples entering into same-sex marriages, and while the US may have gone further with its accomplishments in relation to same-sex marriage, not every country or indeed Member State has, and so this point maintains its importance.

Eventually the case of *Loving v Virginia*[70] was heard and laws banning interracial marriages were declared unconstitutional. Though this may seem irrelevant when considering the policy objective of equality for same-sex couples it indeed sparked further discussion. The first of which is the Loving analogy where academics attempted to argue that, on the basis of *Loving*, it was unconstitutional to prevent a person marrying their proposed spouse on the basis of sex[71]. However, a more interesting argument was that put forward by Dorf[72]. He explored the idea that the

[65] Such as Russia, Poland and Bulgaria.
[66] Whereby the parties have travelled outside their home state or country to evade the laws prohibiting them from marrying, and plan to return to that home state immediately after marrying.
[67] This is where the parties have never lived in the state but the marriage is relevant to the litigation conducted there. For instance, where a spouse dies intestate and their partner is seeking to inherit property located in the forum state.
[68] This is where there was no intention to evade the law of any state and the marriage was valid at the time and location, but the couple later move to a country where the marriage is prohibited.
[69] Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines,* (Yale University Press 2006) 49.
[70] 388 U.S 1 (1967).
[71] Andrew Koppelman, 'Why Discrimination Against Lesbians and Gay Men is Sex Discrimination' (1994) 69 New York University Law Review 197 and Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale University Press 2006) 49.
[72] Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267, 1272.

denial of the term 'marriage' to couples who are permitted to enter into civil unions does not constitute any state-imposed harm[73]. He questioned this theory by arguing that the same would have applied to interracial couples: "if that were true, then it would be equally true that the denial of the term marriage to interracial couples would also amount to no state-imposed harm."[74] Dorf goes on to concede that, whilst it could be submitted that both situations result in state-imposed harm, it may still be deemed that whilst this is unconstitutional in cases of interracial marriages, that is not the case for same-sex marriages[75].

Instead, the equality argument must be considered in tandem with the purpose behind the denial of the term marriage. Though the US appeared to be able to justify the inequality experienced by same-sex couples on the basis of the level of scrutiny that must be applied to sexual orientation discrimination[76], their case law suggests that a law designed to relegate a group of people to a second class citizenship is not permitted[77]. Thereby, raising the idea of citizenship and the symbolic status of marriage as relevant policy concerns.

As discussed in chapter 1, marriage has a symbolic status, and it has been argued that this status can be likened to that of citizenship[78]. In order to explore this argument and the need to consider it as a public policy concern when determining the most appropriate choice of law rule, it is necessary to first define what is meant by citizenship in this context. While citizenship can have a strict legal definition surrounding the imposition of legal, political, and welfare rights, most notably the right to an abode[79], and, may be understood narrowly by many as a right to carry a particular passport[80], sociologically the meaning is much broader as it is considered to confer: "membership, identity, values and rights of participation"[81], it is more than a 'bundle of rights', and is something we participate in[82]. Though it is recognised that

[73] Ibid.
[74] Ibid.
[75] "An opponent of same-sex marriage could lose this battle yet win the war; she could concede that there is state-imposed harm in both circumstances but contend that the harm is unconstitutional in the case of the interracial union while it is constitutional in the case of the same-sex union." (Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267, 1272).
[76] As discussed by Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267, 1271-1272.
[77] *Brown v Board of Education* 347 US 483 (1954) and *Plessy v Ferguson* 163 US 537 (1896).
[78] Kerry Abrams, 'Citizen Spouse' (2013) 101(2) California Law Review 407.
[79] Keith Faulks, *Citizenship in Modern Britain* (Edinburgh University Press 1998) 2-4.
[80] Nira Yuval-Davis, 'Women, Citizenship and Difference' (1997) 57 Feminist Review 4, 4.
[81] Kathleen Knight Abowitz & Jason Harnish, 'Contemporary Discourses of Citizenship' (2006) 76(4) Review of Educational Research 653, 653.
[82] Ruth Lister, 'Why Citizenship: Where, How and Why Children' (2007) 8 Theoretical Inquires in Law 693.

citizenship is a concept that is never purely legal or sociological, as the two are intertwined[83], much of the focus when considering it as a policy concern within marriage will be sociologically informed.

As is the nature within sociology, there is no constant and definitive definition of citizenship, however "Membership – or the idea that a citizen derives her rights and obligations from the social contract of the nation-state – is an idea central to most notions of citizenship."[84] As recognised by Lister, citizenship has implications on belonging and identity formation as citizenship is about more than legal rights[85]. As discussed by Brubaker, there is a "distinction between citizens and foreigners."[86] Citizenship is an in-group, and as noted by Abrams in her discussion of Brubaker: "It is this distinction that makes citizenship not only an instrument but also an object of closure – not everyone can get it, so the status itself becomes something to desire."[87] It is this aspect of citizenship, of providing restricted access to a desired group or status which, in turn provides rights, that can be likened to the status of marriage. As was demonstrated in chapter 1, marriage has become somewhat of a desired legal status, but is not available to all. In failing to allow a same-sex couple to marry, or refusing to recognise a pre-existing marriage as a marriage, same-sex couples, like foreigners, are refused membership. It is this refusal of membership to the status of marriage that can be assimilated with the denial of citizenship as the same ideas of identity and access to a much desired, prestigious status are being denied, along with the rights that come with it[88]. Though civil partnerships and civil unions, have been introduced in many countries it is argued that they are not an adequate substitute for marriage, regardless of the equal rights that such statuses bestow[89], and this is a consequence of the symbolic status of marriage. In denying access to the status of marriage, same-sex couples are denied the prestige associated with it, and are

[83] Engin F Isin & Patricia K Wood, *Citizenship & Identity* (Sage Publications 1999) 4.
[84] Kathleen Knight Abowitz & Jason Harnish, 'Contemporary Discourses of Citizenship' (2006) 76(4) Review of Educational Research 653, 680.
[85] See Ruth Lister, 'Why Citizenship: Where, How and Why Children' (2007) 8 Theoretical Inquires in Law 693, in which she recognises the role contemporary citizenship theory has, in addition to legal rights when exploring citizenship and whether a group are recognised as full citizens, in this instance is the status of children as citizens.
[86] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University press 1992) 21.
[87] Kerry Abrams, 'Citizen Spouse' (2013) 101(2) California Law Review, 407, 409.
[88] Frances Hamilton and Lauren Clayton-Helm argue that, as marriage is of constitutional importance, same-sex couples in being denied access to marriage and its full level of constitutional protections, are only regarded as partial citizens (Frances Hamilton and Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1, 18-19.
[89] Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review, 1267, 1269.

instead provided with a form of second class citizenship[90]. Like citizenship, marriage is able to be used as an object of closure[91], and is therefore something that must be considered when attempting to determine the best choice of law rule for same-sex relationships, as to deny a same-sex couple the continued recognition of their marriage could result in much deeper feelings of rejection and inferiority.

To determine what choice of law rule should be put in place, a process of elimination might be helpful. It is unlikely that the rules that were dismissed in the previous chapter for dépeçage purposes will be most appropriate for use in same-sex relationships, and so it might be helpful to begin with them, to narrow down the potential choices. The most real and substantial connection test, the alternative reference test and satisfying the laws of either domiciliary were all ruled out in the previous chapter as viable options based on rationales relating to concerns such as cherry picking, certainty and public policy. Though it may be predicted that they are, for the same reasons, unlikely to be adopted for same-sex relationship purposes, it is important to briefly consider each of them. The most real and substantial connection test was ruled out in the previous chapter owing to its lack of certainty, and the difficulty that the courts face in applying the rule in the prospective, and should, for the same reasons be rejected for same-sex relationships. The alternative reference test was also considered, but this standardisation has received criticism in the purviews of contextualisation of inappropriate public policy considerations, and, it is essentially a rule that promotes cherry picking, and consequently, it should, as asserted in the previous chapter, be ruled out of the options for same-sex relationships. The concept of satisfying the domiciliary laws of either party must also be considered, however, this too is problematic as it recognises the importance of domiciliary law, and the protective role it plays, but then fails to treat both domiciles equally. Again, this is a form of cherry picking and will not be a prospective choice of law rule for same-sex relationships. Finally, application of the *lex loci* should be considered, given it was the applicable choice of law rule for civil partnerships, and is also an adduced connecting factorisation within marriage, primordially attached to formal validity. It has been stated that, in order to achieve legal certainty and continuity of the relationship, the *lex loci* is the most appropriate rule[92]. However, the application of the *lex loci* could lead to forum shopping, whereby a same-sex couple

[90] Ibid.
[91] Kerry Abrams, 'Citizen Spouse' (2013) 101(2) California Law Review, 407, 410.
[92] Martina Melcher, '(Mutual) Recognition of Registered Relationships Via EU Private International Law' (2013) 9(1) Journal of Private International Law, 149, 161-162.

simply look for the most convenient place for them to marry before returning home to potentially discover that their domiciliary law will still not recognise the marriage on public policy grounds, leading to the problem of limping marriages. Regardless of advocating the *lex loci* as the most appropriate rule formulation, Melcher also recognised this as a potential problem[93], and therefore it is necessary to consider whether a more appropriate choice of law rule exists.

Prospectively, having rejected the alternative options considered in the previous chapter as an optimal reform pathway, it would appear that the best two options are those that have been selected for the other capacities: the dual domicile theory; and the continued recognised relationship theory. If we begin by exploring which capacities the dual domicile theory was deemed the most appropriate choice of law rule for, it may be possible to determine whether it would be the most suitable for same-sex relationships. It was determined in the previous chapter that the dual domicile theory should be applied in cases dealing with age and consent incapacities[94]. The justifications when dealing with age and consent are that an age limit is put in place in order to protect the parties from an under age marriage, that they are not mature enough to handle, or, in cases of consent, to prevent parties being involved in a marriage they never wished to be a part of, or would not have been involved with had they have known the full picture. Thus, the reasoning and policy concern behind applying the dual domicile theory is very protective in ambit. Conversely, the continued recognised relationship theory was deemed the most suitable for the capacities of consanguinity and affinity, and polygamy[95]. The reasoning behind the application of the continued recognised relationship theory being, that these incapacities are concerned with society, and how acceptable such marriages are within the impacted society, where the parties reside. The law is concerned with ensuring the marriage will be accepted within the society *per se* rather than protecting the individuals involved.

It is fundamental, when dealing with same-sex relationships, to consider the apposite and overarching public policy effectuations that are relevant. Is the law seeking to protect the individual's rights and best interests, or societal values? A same-sex relationship is not something we would fear somebody falling victim to, or being vulnerable within, like we would fear a fourteen year old girl marrying. It would be

[93] Ibid 167.
[94] See sections 3.7.4.1 and 3.7.4.4.
[95] See sections 3.7.4.2 and 3.7.4.3.

difficult to state when preventing such relationships, that it was for the good of the parties. Instead, it is something society expresses an opinion on, and develops in time with social mores. As attitudes to same-sex relationships develop, the law evolves in its footsteps; this is the nature of the English legal system. An alternative example of this shadowing of societal values can be seen when considering the capacity of polygamy. In England, marriage is understood and defined as a monogamous relationship, meaning, unlike certain other countries a man is not able to have multiple wives[96]. In not allowing polygamous relationships in England, and only showing tolerance to polygamous marriages under certain circumstances, the law is simply protecting the traditions of our societal cultural norms. Until very recently, we only allowed marriage between a man and a woman, but England as a society has now changed it's attitude towards same-sex relationships, so much so, that the law has recognised this change and followed along the same path by creating the M(SSC)A.

Prior to the Act, the lawmaker was protecting what was once the general consensus in society, it was protecting the views and beliefs of society which is reflective of the purpose of the continued recognised relationship theory. It would, therefore, seem that for the purposes of dépeçage the continued recognised relationship theory would present the best choice of law rule from the aforementioned options for all same-sex relationships in England. It would mean that same-sex relationships would not be denied recognition simply because one of the parties did not have capacity under their domiciliary law if they intended, for instance, to remain in England, making it their matrimonial home[97].

The use of the continued recognised relationship theory may come under criticism from those who consider that in not stating the applicable choice of law rule, Parliament were indicating the orthodox position of the application of the dual domicile theory, as laid out by the Law Commission in their Working Paper[98]. This, as previously explored, was Davis' position on the law, and he justified his standpoint by stating, "This will at least be consistent with the treatment of overseas heterosexual marriages."[99] Although the logic behind this assumption is understandable, simply utilising the dual domicile theory on the basis of assumption is highly problematic. It may be that, in omitting choice of law rules, Parliament did intend for the dual domicile

[96] *Hyde v Hyde* (1866) LR 1 P&D 130.
[97] A clear comparison can be drawn here with *Radwan v Radwan (No2)* [1973] Fam 35.
[98] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.36.
[99] Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013) para 2.

theory to be applied, as the Law Commission had stated it was the most applicable rule; however, times have moved on along with developing substantive theories. The Law Commission paper is outdated, and as identified in the previous chapter, the dual domicile theory should not be blanketly applied, without reflective consideration and more enlightened analysis. Rather, the most appropriate rule should be identified and applied: assuming Parliament simply wanted the dual domicile theory to be applied will lead to inefficacious and egregious outcomes. It is also apparent from suggestions previously mentioned by Hill and Shuilleabhain, that there are conflicting opinions surrounding what the applicable law is when the marriage takes place in England. Finally, this need for further exploration into the best choice of law rule for same-sex marriage is further supported by the inaccuracy of Davis' quote about conjoining together principles predicated upon assumptions related retrospectively to heterosexual marriages. The Law Commission may have provided that the dual domicile theory was the best option, but Davis has failed to consider the many cases discussed in the previous chapter where the dual domicile theory was not applied[100]. In practice, the courts have not unilaterally applied the dual domicile theory to every marriage validity case. Wall LJ stated in *Westminster City Council v C*[101], that, "departures from the dual domicile rule designed to uphold the principle of marriage may be appropriate when the marriage in question is one which, on grounds of public policy, the courts will think it right to uphold."[102] Thus, it is wrong to presume such instances would not occur in same-sex marriage cases that come before the courts. Marriage validity is not, and cannot be, a one size fits all approach. Instead, as with all of the other incapacities set out in the previous chapter, a rule should be created for all instances of same-sex relationships to ensure the courts correctly determine the validity of a same-sex relationship celebrated outside of England.

4.5 Choice of Law Rules in the EU

The next iteration, subsequent to the above discussion on extant English law judicial precepts, is to examine how same-sex relationships are dealt with around the EU, in a bid to ensure the most appropriate choice of law rule is applied. Taking a comparative approach allows possible choice of law rules to be investigated in a wider ambit, in order to determine the extent to which they would be suitable as a choice of

[100] Examples include *Radwan v Radwan (No2)* [1973] Fam 35 and *Vervaeke v Smith* [1983] 1 AC 145.
[101] [2008] EWCA Civ 198, [2009] Fam 11.
[102] *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 [90].

law rule for same-sex relationships in England[103]. Indeed, it has been stated that simply looking at one's own national laws is not enough in order to find the best legal solutions:

"it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative juris who was corralled in his own system."[104] .

The European Court of Human Rights has made it clear so far that it is not willing to provide a general rule on same-sex marriage, but rather provides the contracting states with a margin of appreciation to determine for themselves whether to declare the marriage as valid[105]. A more recent case has led to the finding that excluding same-sex couples from civil partnerships violated Article 14 of the ECHR in conjunction with Article 8, nevertheless, the court declared this was not them considering whether there was a general positive obligation on the respondent state to provide legal recognition of same-sex relationships[106]. This has however, been altered yet again as a result of the decision in *Oliari v Italy*[107]*.* In the case of *Vallianatos and others v Greece*[108], the applicants were seeking to have law 3179/2008 declared incompatible with their rights under Articles 8 and 14 of the ECHR. The law had created a new relationship in Greece which would be known as a civil union. This was a relationship that provided rights and obligations on the parties involved without having to get married. The relationship was not to include same-sex couples, but was, like marriage, only to be open to opposite sex couples. The applicants alleged that this law infringed their rights as same-sex couples to respect for their private and family life, and amounted to unjustified discrimination between different-sex and same-sex couples, to the detriment of the latter.

The Greek government stated that there was a legitimate aim behind the law, that being "a set of provisions allowing parents to raise their biological children in such a way that the father had an equitable share of parental responsibility without the couple

[103] "comparative law is enormously valuable for private international law, indeed so indispensable for its development that the methods of private international law today are essentially those of comparative law." (K Zweigert & H Kotz, *An Introduction to Comparative Law* (Translated by Tony Weir 3rd edn, Oxford University Press 1998) 6).
[104] K Zweigert & H Kotz, *An Introduction to Comparative Law* (Translated by Tony Weir, 3rd edn, Oxford University Press 1998)15.
[105] *Schalk & Kopf v Austria* (2011) 53 EHRR 20.
[106] *Vallianatos and Others v Greece* (2014) 59 EHRR 12.
[107] (Application Nos 18766/11 and 36030/11, 21 July 2015).
[108] (2014) 59 EHRR 12.

being obliged to marry."[109] Essentially arguing that the logic behind the law was to prevent couples with children or planning children seeing marriage as a necessity to obtain adequate rights and protection. The difference in treatment between opposite-sex and same-sex couples was then justified by stating:

"the biological difference between different-sex and same-sex couples, in so far as the latter could not have biological children together, justified limiting civil unions to different-sex couples …. In their view, same-sex couples were not in a similar or comparable situation to different-sex couples since they could not in any circumstances have biological children together."[110]

The government also argued that the other benefits that would come from the status of a civil union, such as property and financial rights, could be obtained through private contracts and so were not entirely excluded from the reach of same-sex couples.

The European Court of Human Rights held that in relation to the ability to privately contract to many of the same rights, this in itself may be accurate, but it would not provide same-sex couple's relationships with any official recognition. Aside from the court's acceptance of the argument regarding biological children, they stressed the need for the government to be able to show that there was a legitimate aim, and that the actions were proportionate in achieving that aim. The court went on to recognise the legitimacy behind enacting legislation to regulate children born outside of marriage, and indeed promoting the institution of marriage, however, they did not consider the measures taken under law 3719/2008 to be proportionate, and necessary in achieving that aim. The court was of the opinion that the primary aim of the law was to introduce a form of civil partnership, "which excluded same-sex couples while allowing different-sex couples, whether or not they had children, to regulate numerous aspects of their relationship."[111] The court concluded that it would have been possible for the legislature to extend the rights to same-sex couples whilst also providing for children born outside of marriage, and accordingly held that there had been a violation of Article 14 when read in conjunction with Article 8.

It is, however, important to note the limits the court placed on the scope of the case. The European Court of Human Rights provided that the application did not relate to a general obligation on the Greek State to provide for a form of legal recognition in domestic law for same-sex couples. The case was not about providing a new right for

[109] Ibid [62].
[110] Ibid [67].
[111] Ibid [88].

same-sex couples, it was about the denial of a right given to others, from which same-sex couples were excluded, and determining whether that was a breach of Article 14 when read in conjunction with Article 8.

Olairi v Italy on the other hand, made more significant steps forward. The case involved combined cases where applicants in Italy were claiming that Italian legislation was discriminatory as it did not allow them to marry or enter into any other type of civil union, and thus breached Articles 8, 12 and 14 of the ECHR. In the case it was held that there had been a breach of Article 8, and that allowing homosexual couples to enter into civil unions or registered partnerships was the most appropriate way in which their relationship could be recognised[112]. This was an important development within the law in respect of same-sex couples, however, the European Court of Human Rights were not prepared to conclude that Article 12 had been violated. Consequently, they did not set a requirement that same-sex couples be able to marry, as they were of the opinion that the ability for same-sex couples to marry was still better determined by the individual states.

Regardless of *Oliari*, there remains various standpoints on same-sex relationships, "as Member States … determine what form of same-sex relationship they introduce."[113] Some countries recognise same-sex marriages and others recognise civil partnership type relationships with varying degrees of responsibility. In addition, the choice of law rules that each of the countries within the EU use to determine essential validity of a marriage also vary considerably. Some countries apply the law based on the parties' nationality, others on domicile, and it may even involve a reference to habitual residence. Therefore, to extract from this an ideal choice of law rule for essential validity is no easy task. It has been recognised that within European states it is more usual to follow the pattern of personal law of nationality or pre-nuptial domicile[114], nevertheless, this is still not a definitive answer and does not reflect that in England, for civil partnership, essential validity is governed by the *lex loci regisrationis.*

Instead, it may be helpful to consider the 2004/38 EU Directive on the rights of citizens of the EU and their family to move and reside freely around the union. The directive allows the family members of EU citizens to move with them even when they

[112] *Oliari v Italy* (Application Nos 18766/11 and 36030/11, 21 July 2015) [174].
[113] Frances Hamilton & Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1, 22.
[114] Helen Toner, *Partnership Rights, Free Movement and EU Law*, (Hart Publishing 2004) 44.

themselves, are not EU citizens. 'Family Members' is defined in Article 2. Article 2(2)(a) recognises the spouse, and Article 2(2)(b) provides some recognition for partners within a registered partnership. Unlike spouse, a registered partner comes with certain conditions. They may only be treated as family members if the registered partnership is treated as equivalent to a marriage in the host member state. If the relationship would not be deemed as such in the host member state the only option would be to argue that they are beneficiaries under article 3(2)(b), as they are 'the partner with whom the union citizen has a durable relationship, duly attested.' This is a relationship which is examined by the host member state and, if justified, they may deny entry or residence[115]. It would seem that an alternative approach emerges here, however, it is first important to notice the hierarchy of personal relationships that is encapsulated in this approach. A spouse automatically achieves recognition as a family member as a result of its so-called 'gold standard'. On the other hand, a registered partner must still jump through hoops in order to achieve validation; showing yet again how, "we have placed marriage on a pedestal, both socially and legally, using it to dispense important social welfare benefits and to signal maturity and belonging to the community."[116] If the host member state would not treat their registered partnership as equivalent to marriage their only hope would be to argue that they are beneficiaries under article 3(2)(b); further highlighting the rights and benefits that are often attached to marriage, as opposed to citizenship, and the impact this can have on those made to accept an alternative status[117]. Regardless of the fact that the couple may have wished to enter into a same-sex marriage, but were unable to do so, their registered partnership may be treated in a second class manner by other member states.

A critique of the established approach under the directive is also revealing. As opposed to looking at the relationship under the law of the parties domiciliary or nationality, it considers how the host member state would define the relationship. It could be argued that it does this because it is the state that will be most effected by the relationship as this is where the couple intend to live. It will, therefore, be that society that must accept and welcome the relationship. This is essentially the justification behind the continued recognised relationship theory: the country that will house the couple is the one that must be able to recognise the relationship. This may be the reason behind the inequality for same-sex relationships. A spouse is not

[115] Art 3(2).
[116] Kerry Abrams, 'Citizen Spouse' (2013) 101(2) California Law Review, 407, 431.
[117] Ibid 412.

required to qualify their marriage, and spouse in an accepted status throughout the EU, unlike a registered partner, or a same-sex spouse who would pass through various levels of acceptance, and also outright invalidity. It is opined that the directive reflects this by allowing the host member state to determine validity upon movement of such couples regardless of the uncertainty this creates, and the obvious problem of limping marriages.

The one distinction between the continued recognised relationship theory and applying the law of the host member state is the stability provided by the continued recognised relationship theory. The animus (intention) to live in a particular country, and effectuation within a reasonable time, implicates this is the law that controls the essential validity of the marriage, even if some years later the couple move away from the particularised legal system. The idea behind the theory is that the marriage will not require reassessment every time the couple move, thereby satisfying the much needed certainty proviso. This stability is not provided under the directive idea of turning to the law of the host member state. In applying this test every time a couple crossed state borders the validity of their relationship would be brought back into question. Notwithstanding this difference, what can be taken away from this comparison is the process of referring to the law of the most effected country, the one where the couple intend to live.

Whilst at present it is apparent that the Member States adopt various choice of law rules when determining the validity of same-sex relationships, there is an element of consistency in the area from the directive and its reference to the laws of the host member state. It is this consistency that could be considered alongside the examination of the choice of law rules in England to assist in the determination of the best possible choice of law rule for the incapacity of same-sex relationships.

4.6 Choice of Law Rules in the US

Beyond the review of the choice of law rules in England and the EU, it is important to also consider choice of law rules in the US. In addition to the US being considered in greater detail in chapter 6, it is essential to consider it now within this contextualisation as a comparator reform pathway. In the American style legal system, each State has its own governing law and therefore crossing State borders could, until recently, mean a same-sex couple crosses from a State which allows same-sex marriage to one that

does not. Multiple choice of law rules were adopted by the states, and like England, any of them could have been applied[118]. These choice of law rules will be considered briefly, before moving on to see how the law has developed.

The US operates an entirely different legal system to that of England as there are both federal and state laws. The federal laws may set out a basic set of rights or laws, and then it may be that a state expands on this to create a more comprehensive set of rights and laws for its citizens. As a result of the Tenth Amendment, certain powers are reserved to the states, and one such power is the right to control family law legislation. Therefore, when dealing with family matters, it is generally state law that is of importance, and it is the state Supreme Court that would have final say on the matter, though this does not entirely prevent federal intervention.

Although there are certain laws in the US regarding recognition of other states judgments[119], the federal government passed the Defence of Marriage Act[120], which restricted the federal definition of marriage to members of the opposite sex, and prevented married same-sex couples from accessing federal economic funds. DOMA was introduced as a reaction to the consideration of the legalisation of same-sex marriage in *Baehr v Lewin*[121]. While the Act did not forbid states from enacting legislation permitting same-sex marriage, it did prevent states from having to recognise marriages entered into in other states[122]. S.3 defined how the terms "marriage" and "spouse" were to be interpreted for all federal statutes:

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

The law began to develop and move away from this position when in 2013, s.3 was declared unconstitutional in the majority decision in *United States v Windsor*[123]. The case involved two female residents of New York who had entered into a valid same-sex marriage in Ontario, Canada, and returned to New York where the marriage was recognised. Notwithstanding this recognition, upon the death of her wife, Windsor was

[118] Wardle alone points out six different legal positions across the States in, Lynn D Wardle 'From Slavery to Same-Sex Marriage: Comity versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations' [2008] Brigham Young University Law Review 1855.
[119] Full Faith and Credit Clause.
[120] Hereafter referred to as the DOMA.
[121] 74 Haw 530, 852 P 2d 44 (1993).
[122] See s.2.
[123] 133 S Ct 2675 (2013).

required to pay estate tax as she did not qualify for spousal exemption, because under DOMA a same-sex partner is excluded from the definition of 'spouse'. The United States District Court, and the court of appeals, ruled that s.3 was unconstitutional and ordered the United States to pay Windsor a refund. This decision was then upheld in the Supreme Court, and it was recognised that "DOMA seeks to injure the very class New York seeks to protect."[124] The majority opinion was that s.3 violated the Due Process Clause of the Fifth Amendment as it failed to provide liberty and equality to all citizens: "[T]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the states."[125]

This was the start of a drive towards change: "[T]he decision[s] will only intensify the fast moving debate over same-sex marriage, and the clash in the Supreme Court reflected the one around the nation."[126] *United States v Windsor* was a "civil rights landmark"[127], which started a chain reaction, and lead Federal District Courts in other states to invalidate state prohibitions on same-sex marriage[128]. Although the case did not legalise same-sex marriage, which remained "highly contested in the United States"[129], it was an important incremental step that has a clear impact on the area.

States were, at this point, still able to determine the validity of a same-sex marriage as a result of s.2 DOMA[130]. It was perfectly possible for a marriage to be deemed valid by a judge in one state, and then invalid in another state[131]. In order to establish the required strong public policy against same-sex marriage many states introduced what were termed mini-DOMA's[132] These mini-Doma's allowed the states to declare that a marriage in that State is one between a man and a woman and, accordingly, same-sex marriages to be invalid. These mini-DOMA's provided that in addition to the State in question not allowing same-sex marriages to take place, they could also fail

---

[124] *United States v Windsor* 133 S.Ct. 2675 (2013) 2693.
[125] Ibid.
[126] Adam Liptak, 'Supreme Court Bolsters Gay Marriage with Two Major Rulings' *N.Y. Times*, (New York June 26 2013) available at http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all last accessed 11/08/17
[127] Ibid.
[128] See for instance in Virginia; *Bostic v Rainey* 970 F Supp 2d 456 (ED Va 2014), in Kentucky; *Bourke v Beshear* 996 F Supp 2d 542 (WD Ky 2014), in Michigan; *Deboer v Snyder* 772 F 3d 388 (Mich 2014), and in Utah; *Kitchen v Herbert* 961 F Supp 2d 1181 (CD Utah 2013).
[129] Nancy J Knauer, 'LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality' (2014) 24(1) Texas Journal of Women and the Law 101, 106.
[130] S.2 of the Act provides that states are not required to recognise same-sex marriages from other states when they have strong public policies to the contrary.
[131] This is how conflicts of law cases arise within same-sex marriage as one party may argue that State A's law is applicable making the marriage valid, while another party may argue that the law in State B applies making the marriage invalid; for instance *In Re May's Estate* 114 NE 2d 4 (NY 1953).
[132] States with mini-DOMA's included; Texas, Ohio, Mississippi and Tennessee.

to recognise any such relationships from an alternative State. As Silberman recognised:

"Unless and until the Supreme Court determines that a prohibition on same-sex marriage is unconscionable as a matter of federal law, it is within the prerogative of each individual state to determine what status to accord to same-sex couples who want to formalize their relationship and/or what rights should attach to such relationships."[133]

Regardless of such bans on same-sex marriage, each State still had to determine the applicable choice of law rule when assessing validity. As will be discussed in greater detail in chapter 6, there are various choice of law rules that can be considered when assessing the essential validity of a marriage in the US. Prior to the recent amendments as a result of *Obergefell v Hodges*, any one of these could have been applied by the states when determining the validity of a same-sex marriage. The first option was the First Restatement of the Conflict of Laws[134], which provided that the applicable law is where the marriage occurred[135] and, thus, is the same as the English rule of the *lex loci celebrationis*. However, s.132 of the Restatement First provides exceptions to the *lex loci* in that regardless of complying with local law the marriage would still be deemed invalid if one of the domiciliaries had married contrary to a statute in their domicile, or if it was polygamous or incestuous. Therefore, while the premise of the Restatement is that the law of the place of celebration is the applicable law, it could be argued that this rule is consumed by what appears to be a wide scoping exception[136]. Alternatively, the courts could have applied interest analysis whereby, the state which has the most interest in having its law applied is applied[137]. Amongst others, there is also the Second Restatement[138], in which the law with the most significant relationship was deemed to be the most applicable law[139]. So many choices, not to mention how some of these have further developed into other theories, highlights the uncertainty same-sex couples faced in the US when crossing state borders.

In an attempt to unravel some of this uncertainty Koppelman explored the choice of law rules and suggested that there are three main contenders: firstly, the option to

[133] Linda Silberman, 'Same-Sex Marriage Refining the Conflict of Laws Analysis' (2004-2005) 153 University of Pennslyvania Law Review, 2195, 2195.
[134] Restatement (First) of Conflict of Laws (1934).
[135] Ibid S.121.
[136] Perry Dane, 'Whereof One Cannot Speak: Legal Diversity and the Limits of a Restatement of Conflict of Laws' (2000) 75(2) Indiana Law Journal 511, 512-514.
[137] As introduced by Brainerd Currie in Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1863).
[138] Restatement (Second) of Conflict of Laws (1971)
[139] Ibid, S.283(1)

follow the Second Restatement, where the most interested state at the time of the marriage determines validity, and if valid then it is valid thereafter even if the couple move; secondly by reference to the parties' common domicile from time to time; or finally by the application of interest analysis on case by case basis[140].

The initial option set out by Koppelman, of following the Second Restatement, has many similarities to the continued recognised relationship theory that has been suggested as the most appropriate choice of law rule for same-sex marriages in England. The most notable difference being how open and flexible the Second Restatement appears, contextualised by the term, 'most interested state'. This element, it is suggested, needs further development as it leaves a degree of uncertainty as to how the 'most interested state' is determined; however, Koppelman still deems it to be the best option[141]. In developing and addressing the problems with the rule, the concept of 'most significant relationship' would need to be unpicked. How is the most significant relationship defined? Is it where the parties were domiciled, where they intend to live, or somewhere else? It is this uncertainty that must be considered and carefully developed to create a more stable and consistent choice of law rule. The Second Restatement itself also requires further investigation as the relationship between s.283(1) and s.283(2) is somewhat confusing[142]. In addressing the two remaining options, Koppelman states that domicile based rules are difficult as they do not deal with people moving very well, and he recognises that a case by case approach is uncertain. Thus, Koppelman is clearly aiming to provide certainty in the law by suggesting one rule that will apply, and states that validity need not be continuously assessed.

It is, therefore, evident, that like England, the academicians within the US were striving for certainty. While there are some key issues and differences between the suggestion made by Koppelman and the choice of law rule recommended in this research for England, it is possible to see the similarities. Like the suggestion made for England, Koppelman identified one choice of law rule which he believed should be applied to all same-sex marriages, and set out that if valid according to the relevant

[140] Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale University Press 2006).
[141] The application of the second restatement is further supported by Willis LM Reese, 'Marriage in American Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 952, who whilst recognising that the second restatement was not perfect believed it was the best available option. However it is a choice of law rule that has, more recently received criticism; William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review 1371, which will be looked at in greater detail later.
[142] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review 1371, 1388-1389.

law at the time of the marriage, it should be valid everywhere. This is further supported by Silberman who stated: “with respect to the United States as a whole, there is an argument that the entire question of marriage and divorce regulation should be subject to a uniform standard, perhaps best achieved at the federal level.”[143]

This all effectively provides support for the continued recognised relationship theory as the most appropriate choice of law rule for same-sex relationships in England. The recent decision in *Obergefell* has taken the developments within same-sex marriage much further in the US. Rather than establishing a federal choice of law rule for the assessment of validity, it instead set out the requirement that all states recognise and permit same-sex marriage, invalidating s.2 of DOMA, which allowed states not to recognise same-sex marriages conducted in other states. Whilst this is not something necessarily of concern in England, given same-sex marriage is permitted, and there is no federal/state structure, it may highlight what could be achieved as a starting point in the EU given what has been accomplished in the US, all of which will be discussed in the remaining chapters. The important elements to be drawn out of this for the purposes of the law in England, is that academics in the US also saw merit in creating a rule for assessing the essential validity of same-sex marriages, and indeed recognised that same-sex marriages should not be re-assessed every time state borders were crossed.

4.7 Conclusion

The exploration of the current position on choice of law rules for same-sex relationships in England, highlights the need for it to be treated like the other incapacities and therefore appointed a definitive choice of law rule. The implementation of such a rule would allow those coming into England to assess the validity of their same-sex relationship no matter where it was performed, and whether it was a same-sex marriage, or something akin to a civil partnership. This assessment will in turn provide these couples with certainty regarding the validity and recognition of their relationship in England, just as has been sought for all other incapacities.

Currently the essential validity of civil partnerships is governed by the *lex loci*, while there is much dispute over the choice of law rule for same-sex marriage, with some

[143] Linda Silberman, ‘Same-Sex Marriage Refining the Conflict of Laws Analysis’ (2004-2005) 153 University of Pennslyvania Law Review, 2195, 2196.

suggestion that it is the dual domicile theory[144]. As discovered, this can lead to a loophole in the law whereby the relationship is offered no recognition at all, given that same-sex marriages can no longer be considered as civil partnerships. This exacerbates the need for a unified choice of law rule for same-sex relationships in England, as the current stance leads to uncertainty not faced by those in a heterosexual marriage, given it is a status recognised internationally.

Though same-sex marriage has never featured within the incapacities explored by other academicians proposing dépeçage[145], as was evident within the previous chapter, much of the literature pre-dates the CPA and inevitably the M(SSC)A. Given the developments that have occurred since, it is now impossible to simply cast it aside. As with all of the other incapacities discussed, the couples it effects deserve certainty and predictability when it comes to their marriage and its validity. Likewise, it is an incapacity that is susceptible to cross border conflict, and so the relevant public policy issues must be considered. As with the other incapacities, the relevant public policy considerations begin to highlight the most appropriate choice of law rule, and as set out, there are additional policy considerations that raise their head within the arena of same-sex marriage surrounding equality, citizenship and the symbolic status of marriage. It is only when all of these elements are explored that an appropriate choice of law rule can be selected.

Same-sex relationships as an incapacity is about the protection of society and its established norms, as opposed to protecting the parties to the relationship. Consequently, the country most interested in having its law applied is that where the relationship will be based, as this will be the country most effected. For that reason the continued recognised relationship theory is the most appropriate choice of law rule. It means that where the couple intend to live will govern the validity of the marriage, but will also provide continued protection if, later in time, the couple move to a country that would not normally recognise such relationships. It is a rule that recognises the impact such relationships have on society and allows that society to govern, but balances this with the certainty couples deserve. The approach ensures that their relationship will not undergo a re-assessment should they later move

[144] Stuart Davis, *Marriage (Same Sex Couples) Bill Memorandum* (2013)
[145] For instance, Davie and Reed explored dépeçage in the following articles, but did not consider same-sex relationships; Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387 and Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws (1994) 23 Anglo-American Law Review 32.

elsewhere, which not only provides a level of certainty, but also recognises the importance of the status in terms of citizenship and symbolism; it is the balanced approach the incapacity needs.

A comparative analysis of the choice of law rules utilised in the EU and the US unveiled yet more potential rules. However, what was also apparent when exploring the US was the desire of academics to achieve certainty through the production of a uniform standard[146]. Similarly, with this research, academics were recognising the need to provide couples with certainty, and suggested the way this could be achieved was through a set choice of law rule. This, despite the more recent developments within the US as a result of *Obergefell*, is support for the argument that there should be a choice of law rule in place for same-sex relationships in England.

Couples planning to move to England should, with a degree of certainty, be able to determine whether their relationship will be recognised and this statement applies equally regardless of the incapacity at issue. Therefore, under dépeçage based interest analysis, same-sex relationships also require a set choice of law rule. This rule, whilst wishing to provide certainty and predictability, must be sympathetic to the policy concerns the incapacity raises by considering the laws of the society where the couple will live. Though the dual domicile rule steps in to protect the individuals to the marriage it does not protect the society and is on that basis inappropriate here. Instead, the continued recognised relationship theory offers the approach that balances the needs of the individuals with those of the most impacted state.

[146] See for instance Linda Silberman, 'Same-Sex Marriage Refining the Conflict of Laws Analysis' (2004-2005) 153 University of Pennslyvania Law Review, 2195 and Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale University Press 2006).

Chapter 5

Speak Now Or Forever Hold Your Peace: Is Harmonisation Across The EU The Key To Preventing Delayed Objections When Couples Relocate?

5.1 Introduction

The focus of the previous chapters has been on achieving certainty in choice of law precepts vis-à-vis the recognition of marriages in England. This has included the exploration of same-sex marriages, to reflect the recent developments within the law. With the determination of the appropriate choice of law rules for the essential validity of marriage within England complete, this chapter seeks to expand on the parameters of the research in this field, by considering whether the reformulation of the choice of law rules on essential validity could be undertaken at an EU level. In doing so, the largely unchartered territory of assessing how certainty could be achieved at an EU level will be explored.

As a consequence of the ever increasing levels of migration, achieving certainty within England alone is insufficient. Under the current system of law there are differing choice of law rules for marriage validity across the EU, and the uncertainty eradicated at state level in the previous chapters has the potential to revive every time a couple cross a state border. Essential validity of marriage, and the quest to achieve certainty, has been explored over the years, but it has been on a much more restricted basis, with the position of the laws in England being the primary focus[1]. However, with the right to free movement[2], employment opportunities, and increasing cross border

[1] See for instance Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32, AJE Jaffey, 'The Essential Validity of Marriage in the English Conflict of Laws' (1978) 41 Modern law Review 38 and Richard Fentiman, 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Law Journal 353 that all focus on the position of the law and its need for development in England.

[2] Which will, regardless of Brexit, continue for the remaining Member States, making the need for the EU to be addressed in this thesis still of crucial importance.

familial ties[3], it is essential that the remit is widened. This chapter will analyse and assess the choice of law rules at play in the EU, with the view to establishing set choice of law rules holistically across the board: "As long as Private International Law rules remain national, application of these rules could lead to decisional discord and limping relationships."[4] Thus, effectively eroding any certainty achieved, and must for that reason be tackled at the more pervasive and all encompassing EU level.

In assessing the extent to which harmonisation of the choice of law rules is necessary to achieve certainty for couples, a persons' rights to free movement will also be explored. In a marital relationship or civil partnership involving a non-EU national, the recognition or non-recognition as the case may be, of that status may determine the ability of that couple to relocate. To deny recognition could be to deny that EU national the fundamental freedom of free movement, and potentially the right to equality[5]; in turn, elevating the need for this matter to be addressed. Striving to accomplish a set of choice of law rules at an EU level does not guarantee the successive recognition of all relationships. Instead, it will provide couples with the tools to predict the recognition of their relationship if they anticipate crossing state borders. This will, therefore, give couples the opportunity to make an informed decision, which may be of particular importance if such a move would lead to the marriage or civil partnership being declared invalid. The predetermination of any consequential invalidity will also prove greatly important to couples where one of the parties is a non-EU national, who may, as a result of the relationship being declared invalid, be denied entry. The choice of law rules laid down in this chapter will, therefore, allow couples to plan their lives with a greater degree of certainty surrounding their marital status.

The concept of Europeanisation of choice of law rules is not original, and has been utilised within areas such as tort[6] and contract[7] successfully. Albeit, on a somewhat

[3] Statistics from the centre for social justice, "European Family Law: Faster Divorce and Foreign Law" (2009) 5, available at http://www.centreforsocialjustice.org.uk/UserStorage/pdf/pdf%20reports/CSJEuropeanFamilyLaw.pdf (last accessed 21/04/17) shows that of the annual 2.2 million EU marriages, 350,000 involve an international couple.

[4] Ian Curry-Sumner, 'Interstate Recognition of Same-Sex Relationships in Europe' (2009-2010) 13 The Journal of Gender, Race & Justice 59, 60.

[5] If we consider Ronald Dworkin's emphasis on egalitarianism, and the need for the law to respect the individual's rights, see for instance Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 25, a denial of the right to free movement because of the type of relationships a person is in, could be viewed as a denial of equality within the law.

[6] Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, hereafter referred to as Rome II, provides the applicable law in tortious cases.

[7] See for instance Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Art 4 which sets out the applicable law for various contractual relationships when one has not been agreed by the parties.

more limited scale, it has also been explored within family law, particularly within the field of divorce recognition. For instance in Brussels II and Brussels II bis[8] unified jurisdictional rules for divorce proceedings were established, and subsequent attempts were made to harmonise the choice of law rules utilised within the jurisdictions[9]. These attempts to clarify the law came as a result of the potential invocation of several laws[10] and the uncertainty this created, along with the risk of limping divorces. With similar problems evident within the area of marriage validity, it would appear that amidst the problems with Rome III and achieving what was sought, marriage validity and its associated problems were left behind.

This chapter will therefore explore the concept of Europeanisation and how it could be achieved within the essential validity of marriage categorisation. To ensure history does not repeat itself, this exploration will involve considering the criticisms of Rome III and why it was ultimately rejected. This will allow an assessment of whether such criticisms may apply within potential choice of law rules for marriage validity, and if so, to ensure they are not replicated within the proposal for Europeanisation. In establishing the most appropriate applicable law, the choice of law rules of a selection of Member States will be considered. This is a vital step in order to determine whether the dépeçage based interest analysis approach, designed for England, could be implemented at an EU level. The balance between certainty and flexibility such an approach offers, over the more rigid application of a universal choice of law rule, makes it an appropriate starting point where possible. The consideration of the current rules in place in some of the Member States, will therefore, act almost as a litmus test, to determine whether it is possible to proceed with dépeçage based interest analysis as the foundations for Europeanisation of this area. In addition, it will be assessed whether any existing EU family law precepts offer a more suitable alternative. This is important for both thoroughness and familiarity purposes, despite any preconceptions about dépeçage based interest analysis and its appropriateness. As this research is aimed at providing the most appropriate choice of law rule, a

[8]Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II) [2000] OJ L160/19 hereafter referred to as Brussels II, and Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition of enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 (Brussels II bis) [2003] OJ L338/1, hereafter referred to as Brussels II bis.

[9] Commission, 'Proposal for Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters' COM (2006) 399 final Hereafter referred to as Rome III.

[10] Commission, 'on applicable law and jurisdiction in divorce matters' COM (2005) 82 final (Green Paper) para 1.

holistic approach must be taken. Consequently, connecting factors already at play within EU law are noteworthy and must be explored for any merit they may hold, and their ease of application due to the Member States' familiarity with them.

The examination of harmonisation, followed by a detailed consideration of the appropriate choice of law rules, ensures that comprehensive conclusions are drawn. This approach highlights how dépeçage based interest analysis stands apart from the rest, in its ability to achieve certainty for couples throughout the EU in respect of the validity of their marriage. This is a status fought for[11] and held dearly[12] by many, and so in providing that certainty and predictability for couples, this chapter will provide a significant contribution to the much needed development of the law.

5.2 Europeanisation a New Concept?

Traditionally, it may have been suggested that EU law is not concerned with the regulation of family law, but in more recent years such a stance has been departed from[13]. The emergence of Brussels II, Brussels II bis, Rome III and the Commission on European Family Law, which was established in 2001, all highlight EU involvement within family law. While historically speaking these may be relatively new additions to the EU remit, Europeanisation is clearly not an alien concept within family law.

In 1998 the Brussels II Convention was signed by EU Member States and Brussels II was brought into force in 2001. This was then amended and replaced by Brussels II bis which came into force in 2005. These regulations provide uniform jurisdictional rules throughout the EU to determine whether a court is able to hear a case in respect of divorce. In addition Brussels II bis provides for almost automatic recognition of all matrimonial judgments granted by the courts of Member States. This was an important step in the law in order to reduce the situations of limping divorces[14] and

[11] As can be seen by the continuous fights for equal rights to marriage by same-sex couples as discussed in the previous chapter.
[12] As demonstrated in the case of *Wilkinson and Kitzinger* [2006] EWHC 2022 (fam), [2007] 1 FLR 295 in their desire to keep the status of married as opposed to having it recognised as a civil partnership. See also *Estin v Estin* 334 US 541, 553 (1948) (Robert Jackson J) "one thing that people are entitled to know from the law is whether they are formally married." Which again demonstrates the importance attached to such a status for many.
[13] See Peter McEleavy, 'The Communitarization of Divorce Rules: What Impact for English and Scottish Law?' (2004) 53(3) International and Comparative Law Quarterly 605 and Kate Spencer, 'Same-Sex Couples and the Right to Marry – European Perspectives' (2010) 6 Cambridge Student Law Review 155.
[14] Oliver Remien, 'European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice' (2001) 38 Common Market Law Review 53, 56.

formed part of the aim to increase European integration and a single market[15]. An aim, it is submitted, that should be extended to marriage validity in order to prevent limping marriages and promote recognition through a single market. This should include same-sex relations where multiple relationship statuses and rules as to recognition remain at large.

Brussels II bis was only a step in producing Europeanisation. Though limping divorces would become less prevalent due to the recognition of other Member States' judgments, it could lead to a dash to court, as Brussels II bis did not provide for harmonisation regarding the applicable law. Provided the Member State of the court first seised had a sufficient connection with the parties it would have jurisdiction and be able to apply its own laws. It would, therefore, be beneficial in some instances for one of the parties to rush to a court that would provide them with the most financially favourable outcome:

"Where a marriage has a European element spouses will be told that if they do not strike first and commence proceedings, there will be a chance that the other party will seise the authorities of a different Member State with which one or both parties has a close connection"[16].

It is evident that without setting down choice of law rules, dictating the applicable law regardless of which court is seised the "regulation only addresses concerns of uncertainty, unpredictability, and unfairness in a minor way."[17]

In an attempt to remedy this, Rome III was proposed, and was designed to determine the applicable law in divorce proceedings by setting out the appropriate choice of law rules. Art 1(7) of the proposal sets out that chapter IIa is inserted into Brussels II bis, and in turn that chapter would include Art 20a which would allow the parties to choose the applicable law together, or in the absence of such a choice, provides a hierarchical set of choice of law rules. In drafting such a proposal the Commission were aiming to provide the certainty that was lacking under the position of Brussels II bis: "Apart from the lack of legal certainty and flexibility, the current situation may also lead to results that do not correspond to legitimate expectations of citizens."[18] The Commission

[15]CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 409-410 referring to Clare McGlynn, 'A Family Law for the European Union?' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 235.
[16] Peter McEleavy, 'The Brussels II Regulation: How the European Community has Moved into Family Law' (2002) 51(4) International and Comparative law Quarterly 883, 887.
[17] Teresa Henderson, 'From Brussels to Rome: The Necessity of Resolving Divorce Law Conflicts Across the European Union' (2010-2011) 28(4) Wisconsin International Law Journal 768,780.
[18] Commission, 'on applicable law and jurisdiction in divorce matters' COM (2005) 82 final (Green Paper) para 2.

determined that with the increasing levels of migration, and the respective increase in international divorces, the ability for an array of choice of law rules to be invoked increased the need to clarify the law:

"The increasing mobility of citizens within the European Union has resulted in an increasing number of "international" marriages where spouses are of different nationalities, or live in different Member States or live in a Member State of which they are not nationals. In the event that an international couple decide to divorce, several laws may be invoked."[19]

Such action was required in order to comply with and work towards the common judicial area of making life simpler for citizens as required by the European Council[20].

This same argument could also be made in relation to the recognition of marriages and their validity. Increased levels of migration and 'international' marriages, alongside a whole host of potentially applicable choice of law rules results in the same, yet undetected concerns within marriage validity. The European Council expressed their aim was "to make life simpler for European citizens by improving and simplifying the rules … particularly in cases with important human dimensions, having an impact on the everyday life of citizens."[21] Consequently, it would seem that marriage and its recognition should be of primary importance. Marriage is a fundamental part of a person's life, and there should be no doubt whether a couple's marriage will be deemed valid or not; "one thing that people are entitled to know from the law is whether they are formally married."[22] It is for that reason essential that choice of law rules are established at a European level in order to keep the rules as simple as possible, and in turn provide that much needed certainty. Lest it be forgotten that certainty is one of the key tenets of the rule of law[23], and the undeniably important role it plays. Joseph Raz states that the law should be stable so as to allow people to plan their lives and provide them with certainty, adding that "[T]he evils of uncertainty are in … restricting people's ability to plan their future."[24]

In relying on Rome III to assert that similar choice of law rules should be created for marriage validity it must, of course, be mentioned that Rome III was unsuccessful in

[19] Ibid para 1.
[20] Official Journal of the European Communities 'Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice' C19/1, 23/01/1999, para 39.
[21] Ibid.
[22] *Estin v Estin* 334 US 541, 553 (1948) (Robert Jackson J).
[23] "The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning and apply equally to everyone." Per Thomas Carothers, 'The Rule of Law Revival' (1998) 77 Foreign Affairs 95, 96.
[24] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979).

becoming a regulation, and was in fact heavily criticised by the UK. However, it is important to assess why the proposal was criticised, in order to determine to what extent a proposal to Europeanise choice of law rules on marriage validity would too, be subject to such criticism. One of the key criticisms of Rome III raised in the House of Lords European Union Committee Report on Rome III – Choice of Law in Divorce[25] was that judges and other legal professionals would need to adopt and apply foreign law[26], and it was their opinion that the only system that would offer simplicity and certainty was the *lex fori*[27]. It was also suggested that the European Commission were not competent to propose Rome III[28]. These criticisms will be considered in further detail to determine to what extent, if at all, they indicate a barrier to legislation providing choice of law rules for marriage validity in the EU.

5.3 Criticisms of Rome III

As outlined above, one of the key criticisms of Rome III as far as the UK was concerned, was the stepping away from the use of the *lex fori* which had traditionally been applied, and moving towards foreign law. The rules under Rome III would require the judiciary, and other legal professionals, to apply foreign law, and the committee were of the opinion that such adaptations by the profession were unnecessary: "We suggest that the only system which would provide a combination of simplicity and certainty is that of lex fori."[29] In addition they were also of the opinion that the application of foreign law to matters of divorce would be costly, as time would be spent determining the applicable law alongside the time and difficulties associated with the application of laws one is less familiar with[30]. It is evident that for the UK, the application of the *lex fori* in matters of divorce is to be preferred[31], and that "the Europeanization in this area was clearly going too far."[32]

This criticism, becomes less relevant in relation to marriage validity and creating a system of choice of law rules at an EU level. The *lex fori* is rarely used in relation to

[25] House of Lords European Union Committee Report 52nd Report of Session 2005-06, *Rome III – Choice of Law in Divorce* HL paper 272 7th December 2006.
[26] Ibid para 11.
[27] Ibid, see written evidence 17.
[28] Ibid, see written evidence 34.
[29] Ibid, see written evidence 17.
[30] Ibid, see written evidence 24.
[31] Katharina Boele-Woelki, 'To Be or Not to Be: Enhanced Cooperation in International Divorce Law within the European Union' (2008-2009) 39 Victoria University Wellington Law Review 779, 784.
[32] Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 International Journal of Law, Policy and the Family 178, 181.

marriage validity, rather it is often the domiciliary law of each of the parties that is applied, and therefore the courts and the professionals engaged in this area are familiar with the application of foreign law. For that reason the proposal of EU choice of law rules requiring Member States to apply laws other than their own is unlikely to be a cause for concern or objection. Though the costs associated with applying foreign law must be considered, this is a cost already incurred within the area, and costs would be reduced by the clarity in the applicable choice of law rules, as opposed to the current position which requires time spent deciphering the applicable law.

There is also the suggestion that the EU is not competent to legislate on family law: "The lack of competence of the EC to regulate family law has been recognised by the ECJ"[33]. This stance also appears to have some support in the House of Lords report on Rome III, where it is expressed that those whom suggested Rome III did not fully understand the important concepts such as domicile in accordance with English law[34]. However, there has been an increase in EU involvement within family law[35]. The Brussels II legislation has been described as a "watershed in the evolution of EU family law"[36], and with involvement in areas like succession[37], it is possible to see the increasing involvement in other aspects of family law. Albeit unsuccessful, there have also been proposals for regulations concerning other elements of family law[38], and the Commission on European Family Law was also established in 2001. Each highlighting that there is indeed precedent for EU involvement within family law. It has also been argued that, "[O]nly an international solution from an international body (the EU) will suffice."[39] This type of argument is based on the need to achieve a common market within the EU, and that, whilst the demonstrated uncertainty as to jurisdiction and applicable law remains, a common market is unachievable. This is an argument that could also be applied to the choice of law rules on marriage validity, on the

[33] Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 International Journal of Law, Policy and the Family 178, 192.
[34] House of Lords European Union Committee Report 52nd Report of Session 2005-06, *Rome III – Choice of Law in Divorce* HL paper 272 7th December 2006, written evidence 34.
[35] Helen Stalford, 'Regulating Family Life in Post-Amsterdam Europe' (2003) 28(1) European Law Review 39, 52.
[36] Marie NI Shuilleabhain, "Ten Years of European Family Law: Retrospective Reflections From a Common Law Perspective" (2010) 59(4) International Comparative Law Quarterly 1021, 1022.
[37] Regulation (EU) No 650/2012 of 4 July 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 [2012] OJ L201/107.
[38] For instance; Commission 'Less Bureaucracy for Citizens: Promoting Free movement of public Documents and the Recognition of the effect of Civil Status Records' COM (2010) 747 final (Green Paper), and Commission, 'Proposal for a Regulation on Promoting the Free Movement of Citizens' COM (2013) 228.
[39] Teresa Henderson, 'From Brussels to Rome: The Necessity of Resolving Divorce Law Conflicts Across the European Union' (2010-2011) 28(4) Wisconsin International Law Journal 768, 772.

premise that EU involvement is needed to ensure the imperative of free movement, and this is something that will be explored in further detail later in the chapter.

Aside from criticisms raised in the House of Lords Committee Report, one of the concerns surrounding Rome III was that harmony would still not be achieved owing to the reliance on habitual residence as the default choice of law rule where a mutual decision is lacking[40]. Such scepticism is as a result of the autonomous nature of habitual residence as previously explored in chapter 2. This criticism relates directly to the use of habitual residence in Rome III and would only be a consideration if it were a potential connecting factor to be utilised in the choice of law rules suggested for marriage validity in the EU. The use of habitual residence as a potential connecting factor will be explored a little later in the chapter, and it will be determined whether this is a criticism likely to effect the proposal for the EU choice of law rules.

5.4 Is Rome III all Bad?

While it is evident that Rome III can, and has been criticised, support can be seen in the achievement of enhanced cooperation[41] between certain Member States[42], who saw the value in unified choice of law rules for divorce. This support is then echoed from academicians themselves, who recognise what the proposal was seeking to achieve: "[I]ntroducing uniform choice of law rules minimises the risk of limping situations, takes account of the reasonable expectations of the parties and enables the achievement of justice."[43] Fiorini is able to identify the benefits of harmonisation within divorce, it is how those aims are to be achieved that is problematic. Fiorini recognises that there is a distinction between agreeing on the final destination and agreeing on the route to getting there: "admitting that hostility against the idea of harmonizing choice of law rules is not deserved in the current context does not imply approving of the Rome III proposal as it currently stands."[44] What becomes evident is that, whilst Rome III may have been criticised, this does not mean that there has been

[40] Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 International Journal of Law, Policy and the Family 178, 197.
[41] The enhanced cooperation was introduced by Council Regulation (EC) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.
[42] The contracting member states are: Spain, Italy Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal.
[43] Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 International Journal of Law, Policy and the Family 178, 188.
[44] Ibid 190.

a rejection of harmonisation within family law, or even specifically within divorce, it means that the method adopted within Rome III has problems which must be addressed and learned from.

Crucially, despite the rejection of Rome III, it has been recognised that without harmonised rules, there is a real lack of certainty for couples when determining the applicable law for their divorce, thereby making "the process more difficult for European citizens."[45] Further, it has been recognised that certainty and predictability can only be achieved through community action, and that this is not an obstacle that can be tackled by Member States alone. The very root of the problem stems from the lack of uniform rules in Europe, consequently uniformity is the only long term cure[46]. With such similar aims of achieving certainty, predictability and the prevention of forum shopping it is argued that, as with divorce, community action is the only way of achieving those aims within marriage validity. On that premise, it is necessary to determine to what extent such uniform rules may receive support. Whilst Rome III may have been rejected, it has been highlighted that this may have been down to the pathway that was taken, rather than uniformity itself, thus it must be assessed to what extent, if at all, there is support for EU harmonisation.

5.5 Supporting Harmonisation

As previously outlined, a group of Member States entered into an enhanced cooperation regarding Rome III, which provided them with unified choice of law rules when dealing with divorce. This, in itself provides, support albeit limited, for the harmonisation of choice of law rules within the EU, as those Member States recognised the benefits of harmonisation. When determining to what extent there is any further support, it is important to note that in proposing harmonisation, this research remains strictly in the confines of choice of law rules in marriage validity, and it does not seek to harmonise substantive law. This is a crucial distinction. While there appears to be some support generally for the harmonisation of choice of law

[45] Teresa Henderson, 'From Brussels to Rome: The Necessity of Resolving Divorce Law Conflicts Across the European Union' (2010-2011) 28(4) Wisconsin International Law Journal 768, 776.
[46] See for instance Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 International Journal of Law, Policy and the Family 178, 185 where it is stated that "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 Stated acting alone being able to solve problems that the lack of uniform rules in Europe may give rise to."

rules within family[47], such support becomes limited when dealing with substantive law[48]. There are fears that "European competence may soon spill over into the sphere of substantive family law."[49] The very use of the term "spill over" suggests that such unification would be unwelcome. This reluctance for harmonisation could be associated with concerns over the quashing of cultural identity. The cultural background of a Member State is likely to have had a major influence on its legal system over the years, and "[t]he legal system can thus be considered as a mirror of a state and of its culture."[50] Consequently, if the substantive law were to be unified it would eliminate the diversity[51] and remove the history and cultural values, which are often considered of vital importance within the field of family law[52]. The importance of such factors has, however, been brought into question:

"A variety of factors facilitate the impression of domestic sources being unique and incompatible with a unification, including national customs, the incorporation of different views into laws, religious and emotional bonds, as well as the lack of foreign ties. Upon closer examination, these factors may be over-emphasised."[53]

Such factors need not be over analysed given Member States will not be required to change their substantive law on matters of marriage validity, and the general support attached to the unification of choice of law rules should apply.

[47] See for instance David Hodson, 'Rome III: Subsidiarity, Proportionality and the House of Lords' (2007) 1 International Family Law Online http://onlineservices.jordanpublishing.co.uk/web/pub.xql?action=home&pub=FAMILYpa&lang=en#addHistory=true&filename=Family_IFLONLINE_IFL_2007_03_12.dita.xml&docid=Family_IFLONLINE_IFL_2007_03_12&inner_id=&tid=&query=&scope=&resource=&toc=false&eventType=lcContent.loadDocFamily_IFLONLINE_IFL_2007_03_12 (last accessed 11/08/16) where he states: "As part of its harmonisation process in family law, the EU quite rightly decided that there should be a unified and harmonised approach to the choice of law principles." See also Walter Pintens, 'Europeanisation of Family Law' and Nina Dethloff 'Arguments for the Unificaton and Harmonisation of Family Law in Europe' in Katharina Boele-Woelki (ed), *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Volume 4, Intersentia 2003).

[48] See for instance Kate Spencer, 'Same Sex Couples and the Right to marry – European Perspectives' (2010) 6 Cambridge Student Law Review 155, 173-174. Who, in considering unification states how it may be beneficial to gain further rights for same-sex couples but that it is unnecessary to instigate a complete unification of family law.

[49] Marie NI Shuilleabhain, 'Ten Years of European Family Law: Retrospective Reflections From a Common Law Perspective' (2010) 59(4) International Comparative Law Quarterly 1021, 1026.

[50] NA Bararsma, *The Europeanisation of International Family Law* (T.M.C. Asser Press 2011) 282.

[51] Fernanda G Nicola, 'Family Law Exceptionalism in Comparative Law' (2010) 58 The American Journal of Comparative Law 777, 781.

[52] NA Bararsma, *The Europeanisation of International Family Law* (T.M.C. Asser Press 2011) 282.

[53] Dieter Martiny, 'Is the Unification of Family Law Feasible or even Desirable?' (2010) available at SSRN: http://ssrn.com/abstract=1612157 last accessed 21/04/17.

5.5.1 Why Harmonisation is Essential for Free Movement

Perhaps more significantly, is the support stemming from the contention that harmonisation of private international law is necessary for free movement[54]. With the ever increasing levels of migration and subsequent international marriages it has been propounded that the Member States alone are not capable of meeting the demands this brings: "The laws and courts of individual states are not always capable of dealing with the complexities of this new found mobility, and as such a body of international law is growing up to meet the challenges." [55] Academics recognise the problems faced by families when they attempt to cross borders around the EU, and this is a problem that will continue for the remaining Member States and it's citizens after England's departure from the EU, and for that reason remains a priority in this thesis. As a result of the various choice of law rules within family law, and no requirement to recognise previous judgments a resistance to relocate is foreseeable. Couples may decide not to exercise their rights to free movement regardless of the opportunities such movements may bring, because of the problems they may face regarding the recognition of their familial status[56]. This then highlights how the, "Differences between certain national rules … hamper the free movement of persons and the sound operation of the internal market. There are accordingly grounds for enacting provisions to unify the rules."[57] Despite its origin being in a regulation regarding the recognition of divorce matters or parental responsibility, such a statement can certainly be applied to marriage validity. With the varying choice of law rules in operation across the Member States, it is possible to see why a couple may be reluctant to move, for fears that their relationship will not be recognised. This, in essence, places a bar on the free movement of persons, which is a fundamental freedom. A freedom, that can only "be ensured if the exercise of those freedoms does not involve the loss of legal positions that have already been acquired in another

[54] See for instance Peter McEleavy, 'The Communitarization of Divorce Rules: What Impact for English and Scottish Law?' (2004) 53(3) International and Comparative Law Quarterly 605 and Nina Dethloff 'Arguments for the Unificaton and Harmonisation of Family Law in Europe' in Katharina Boele-Woelki (ed) *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Vol 4, Intersentia 2003).

[55] The Centre for Social Justice, 'European Family Law: Faster Divorce and Foreigm Law' (2009) pg 5 available at www.centreforsocialjustice.org.uk/userstorage/pdf/Pdf%20reports/CSJEuropeanFamilyLaw.pdf last accessed 21/04/17.

[56] Maria Tenreiro & Monika Ekstrom, 'Unification of Private International Law in Family Law Matters Within the European Union' in Katharina Boele-Woelki (ed), *Perspectives for the Unification of Harmonisation of Family Law in Europe* (vol. 4, Intersentia 2003) 187.

[57] Brussels II, Recital 4.

Member State."[58] At present, loss of legal position of this nature could be anticipated in relation to any of the incapacities to marry. For instance, when considering the incapacity of age, Member States are likely to have differing laws regarding the minimum age at which a person is able to marry, and upon moving from one Member State to another a spouse may find that in the host state they are below such minimum age, and, thus, it would need to be determined whether the host state would consider the marriage valid. This concern becomes particularly significant when looking at same-sex relationships as a result of the citizenship directive[59].

The Citizenship Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States, is an important directive when considering the ability of those in a same-sex relationship to exercise their right to free movement. Art 2(2)(a) provides that 'family member' includes a spouse, however, as a consequence of each Member State being able to determine for themselves whether to recognise a same-sex marriage under the principle of subsidiarity, spouse is not deemed to include a same-sex spouse[60]. This is despite arguments that the term 'spouse' is gender neutral and should include same-sex marital partners[61]. Art 2(2)(b) on the other hand provides for same-sex couples in a registered partnership, but only if the host Member State treats the registered partnership as equivalent to marriage. As a result of this factorisation, a couple could find themselves in a situation whereby the non-recognition of their relationship impacts upon further rights such as their succession rights, where they feel discriminated against, or in the most extreme cases are prevented from relocating to a particular Member State at all.

If one of the partner's is a non-EU citizen they will not have independent rights to free movement to another Member State, and so would be reliant on their status as a registered partner. If the Member State in question does not consider a registered partnership as equivalent to marriage, that non-EU partner may be prevented from

[58] N. A. Bararsma, *The Europeanisation of International Family Law* (T.M.C. Asser Press 2011) 271.
[59] Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation EEC No 1612/68 OJ L158/77 (hereafter referred to as the Citizenship Directive).
[60] Frances Hamilton and Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1, 23.
[61] Dimitri Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 3(1) Fordham International Law Review 156, 190 referring to , Mark Bell, 'EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process', 2005 *ILGA Europe, and Gay Association*, available at www.ilga-europe.org/content/download/1448/9061/file/freedom.pdf last accessed 21/04/17.

moving there. This in turn creates a restriction on the free movement rights of same-sex couples, as the EU citizen is unlikely to exercise their rights if they would be unable to take their loved one with them. The only remaining alternative for such a couple would be under Art 3(2)(b), which allows entry and residence for 'the partner with whom the union citizen has a durable relationship, duly attested.' This is a relationship that the Member State concerned shall examine, and can, on providing justification, still deny entry. These provisions highlight the extra hurdles same-sex couples must jump in order to access their free movement rights when their partner is a third country national; a hurdle that would not be faced by those in a heterosexual marriage[62], and could for that reason be considered an inequality in the morality of law[63].

As a result of the directive it is clear how extreme the repercussions may be when Member States do not recognise same-sex partnerships as equivalent to marriage: "at stake are the fundamental *human rights* of family members whose families do not receive legal recognition and protection in all European jurisdictions."[64] Recent developments in the case of *Oilari v Italy*[65], has led to the requirement of all Member States to create some form of registered partnership or civil union for same-sex couples to enter into. The requirement has, however, fallen short of being extended to include the recognition of, or entering into, same-sex marriages. Instead, various relationships with their differing rights may be entered into whilst failing to address the problems then faced by a non-EU same-sex spouse or partner being unable to relocate due to non-recognition. Consequently, regardless of the decision in *Oilari*, the potential for same-sex couples to be denied the right to free movement continues, and the need for further reform remains.

In the wake of considering the most extreme end of the spectrum, whereby the right to free movement may be denied to a couple as a result of their relationship status, the quote from Baarsma cited above, must not be forgotten; free movement is only ensured where the exercise of such freedom does not result in the loss of a legal position. Consequently, a couple who are able to relocate despite their relationship

[62] Frances Hamilton and Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1, 26.
[63] It was stated in Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 205 that the government "must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth."
[64] Theresa Glennon, 'An American Perspective on the Debate Over the Harmonisation or Unification of Family Law in Europe' (2004-2005) 38(1) Family Law Quarterly 185, 201.
[65] *Oliari and Others v Italy,* Application Nos 18766/11 and 36030/11, 21 July 2015.

not being recognised still face a restriction on their right to free movement, as the exercise of the right effects their status and legal position lawfully acquired elsewhere. There are many differing laws in place across the Member States regarding same-sex relationships. Some countries recognise a form of civil partnership[66] which will have various levels of rights and responsibilities attached, and others recognise same-sex marriages[67]. With these diverging provisions for same-sex couples, alongside the various potential choice of law rules, a couple may be confused as to what extent their relationship is valid, and therefore which rights and responsibilities are, and are not, protected[68]. While *Oliari v Italy* may now mean some recognition is guaranteed in the Member States, it does not extend to same-sex marriage. A couple who have entered into a same-sex marriage could, therefore, find that their marriage is not recognised, and that instead minimal rights are offered. This creates the problem of limping marriages, whereby the relationship is recognised in one Member State but not in another. As a result of the differing choice of law rules that are applied, a couple's marriage may flicker on and off like a light as they cross state borders. Therefore, while Member States maintain the right not to recognise same-sex marriages, some couples may find that the right to enter into a same-sex marriage is a "meagre right indeed."[69] On that basis it is evident that whilst free movement may not literally be denied, when taking into account the change in status it is clear that such denial in recognition could act as a deterrent to exercising the right to free movement[70]. For that reason, this must be tackled in the most effective way, and "[I]t is not unreasonable to suggest, therefore, that the European Union is perhaps the most appropriate and effective forum in which to address some of the more complex issues that arise out of the operation of free movement."[71]

This exploration of problems surrounding access to the right to free movement demonstrates that harmonisation is needed throughout the EU on the choice of law rules to be applied in marriage validity cases. Rules of this nature could prevent the outright denial of the right to free movement, by requiring a particular choice of law

[66] Such as Germany and Hungary.
[67] For instance; France, UK, Spain and Belgium.
[68] Prior to the case of *Oliari and Others v Italy* this doubt, depending on which Member State the couple had moved to could have extended to whether the relationship would be recognised at all.
[69] Barbara Cox, 'Same-Sex Marriage and Choice of Law: If we Marry I Hawaii, Are we still Married when we Return Home?' [1994] Wisconsin Law Review 1033, 1040.
[70] Much like the arguments made regarding the non-recognition of divorce in Mario Tenreiro and Monika Estrom, 'Unification of Private International Law in Family Law Matters Within the European Union' in Katharina Boele-Woelki (ed), *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Vol 4, Intersentia 2003).
[71] Helen Stalford, 'Regulating Family Life in Post-Amsterdam Europe' (2003) 28(1) European Law Review 39, 52.

rule to be applied. The rules would also provide certainty in terms of recognition, all without seeking to harmonise substantive family law. Though other attempts at harmonisation, such as Rome III have been criticised, positive aspects have been drawn out and discussed. The challenge, when determining what the appropriate choice of law rules are, is to offer that fine balance between certainty and flexibility. This challenge will now be embarked upon.

5.6 The Most Appropriate Choice of Law Rules for the EU

5.6.1 Member States and their Respective Choice of Law Rules

In determining the most appropriate choice of law rules for marriage validity at an EU level, an appropriate starting point would be to consider the interest analysis based dépeçage rules outlined for England, to establish whether they could be utilised across the EU. In assessing this it is important to survey to what extent such choice of law rules are similar to other EU Member States. This could then be used to conclude whether such a suggestion would manifestly change the applicable rules in other Member States and, therefore, are more likely to be challenged, or whether the impact would be minimal.

It is evident that many Member States apply a version of the dual domicile theory, but as opposed to referring to the parties' domicile, it is the law of the country of nationality. For instance, Art 3 of the French Civil Code sets out that it is French law that is to be applied to French nationals in relation to status and capacity, even when living abroad. This is then further supported by Art 170 which states that the *lex loci* applies in relation to formalities, but also provides that French nationals must not breach any of the provisions set out in the code. The respective provisions essentially cover off the incapacities, again confirming that for French nationals, French law is applied; a stance that is mirrored in many Member States[72].

Amidst the highlighting of the similarities to the dual domicile approach, and the correlation with that aspect of the choice of law rules outlined as appropriate for

[72] For example in Italy, Art 27 of Act 218 of 31st May 1995 sets out that capacity to marry and other conditions for marriage are governed by the national law of each betrothed at marriage. In Poland Art 14 of the Private International Law Act sets out that capacity to contract marriage is evaluated separately for each of the spouses in accordance with their national laws. Finally, in Germany Art 13(1) of the Introductory Act to the Civil Code provides that the conditions governing each person to be married are the laws of the country of which he or she is a national.

England, it would be neglectful to fail to mention the problems with such an approach. Firstly, the use of nationality as a connecting factor, as opposed to domicile, could be criticised as there is no residence requirement to satisfy nationality. Residence carries with it a level of connection with a country, and with no such requirement there could be an increase in situations where the laws being applied have little, or no connection with the parties involved[73]. Secondly, the application of the law of each of the parties' nationality in every case, would mark the return to the one rule fits all approach that was heavily criticised in chapter 3. Such a rigid and singular stance is not the answer, as it fails to consider the country which may be home to the marriage, and indeed the individuality of cases.

Conversely, the purpose and policy objectives behind the application of each parties domiciliary or national law must be reflected upon. In doing so, in chapter 3, it was determined that the use of nationality or domicile is usually about protecting the parties to the marriage. This is demonstrable when looking at the incapacity of age, where the law may step in to ensure that nationals of that country are not entering into a marriage at an age when they may not have matured enough in such a society to handle the related consequences. However, this is not true of every incapacity. Not every incapacity is about protecting the parties seeking to marry, alternatively some are concerned with the protection of society. It may be that a particular Member State does not wish to promote a type of relationship, and any rules governing such relationships are about shielding the general public. Examples include polygamy, and more recently, same-sex marriage. In such instances, it seems a nonsense to apply the law of the parties' nationality, as this may not be the country which will be most effected by the marriage if the parties do not intend to live there.

The errors in applying the dual domicile theory, or a close variant, when the aim is to protect societal concerns are further highlighted by the use of public policy exceptions. In instances where both parties to the marriage are able to marry under their domiciliary or national law, it is still possible for the host Member State to refuse recognition on public policy grounds. This can be demonstrated if we consider a scenario involving a polygamous marriage that has been validly entered into in accordance with the parties' national laws. This couple then decide to move to Italy, and despite Italy's laws setting out that the applicable law is the national law of both

[73] This is one of the key criticisms recognised by the Law Commission; Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985) para 2.7, as discussed in chapter 2.

the parties[74], the marriage may still be denied recognition as Italy could invoke a public policy exception, as polygamy is not permitted in Italy[75]. The invocation of such exceptions adds to the uncertainty within the area as, regardless of researching the private international law rules, a couple may find themselves subject to an exception. Aside from the additional uncertainty caused, there is an important point to be made about how the use of such exceptions demonstrates errors in the choice of law rules. Returning to the scenario involving Italy, the very fact that Italy would need to invoke a public policy exception shows that the use of nationality is not always appropriate. Instead, it exhibits that there are occasions, potentially incapacities, where the country where the marriage will belong is more appropriate, thereby disencumbering the need to exploit public policy exceptions.

Alongside demonstrating the problems with nationality as a universal choice of law rule, polygamy also uncovers the tolerance that is shown by some Member States. In spite of the ability to invoke public policy exceptions where the marriage would not be allowed in the host Member State, this is not a stance that is automatically adopted in every Member State. While the tolerance shown by England in relation to polygamous marriages was explored in chapter 3, it is by no means the only Member State to do so. Germany, like England, do not permit polygamous marriages in their borders, but they may nonetheless, recognise a polygamous marriage as valid if it was valid under the laws applicable to it at the time it was concluded[76]. Likewise, the Netherlands will show tolerance to polygamous marriages, and will recognise them where, parties who are allowed to, do so in accordance with their laws, and then subsequently decide they wish to move to the Netherlands. The basis for this recognition from the Netherlands is that the couple, “may expect that the rights and duties attaching to the marriage apply everywhere ... For those reasons, the marriage will have to be recognized."[77] In defiance of the ability to deny recognition of the marriage, some Member States are more willing to consider the expectations of the parties to the marriage when it was validly entered into and has been legally

[74] Art 27 of Act 218 of 31st May 1995.
[75] In addition to polygamous marriages, same-sex marriages could also be used to demonstrate this point. The recognition of same-sex marriages is decided by each of the Member States, and under the principle of subsidiarity there is no need to recognise a same-sex marriage permitted in another Member State.
[76] CF. Regional Court Frankfurt aM FamRZ 1976, P. 217 and Administrative Court of Appeals Kassel NVWZ. RR 1999, pp. 274,275.
[77] Government of Netherland, 2010 ‘Hirsch Ballin Restricts Recognition of Foreign Polygamous Marriages’, Press Release (27 January 2010) available at www.government.nl/latest/news/2010/01/27/hirsch-ballin-restricts-recogntion-of-foreign-polygamous-marriages last accessed 21/04/17.

subsisting since. While this tolerance undoubtedly shows a level of acceptance and upholds the public policy objectives of the validity of marriage, it may leave couples in a greater state of confusion as to whether their marriage will be recognised. With the various choice of law rules at play across the EU along with the ability to invoke public policy exceptions which some member states may or may not utilise, it leaves couples in a realm of uncertainty with little hope of predicting the fate of their marriage.

Instead, what should be sought are rules that balance all of these inculcations. Appropriately selected choice of law rules will not require the use of public policy exceptions, as each rule will be chosen with the nature of the incapacity and the relevant public policy considerations in mind. This type of approach caters for certainty amidst the flexibility and autonomous nature that is family life, as opposed to a one rule fits all rigid and confined approach. In stepping away from the universal choice of law rule of applying the law of both parties nationality or domicile, rules that go to the heart of the incapacities should be adopted. On this premise the combination of the dual domicile theory and the continued recognised relationship theory, suggested under the dépeçage based interest analysis approach for England, would also be the most appropriate for the EU. Admittedly, at first glance this may appear a dramatic shift from the universal application of nationality based rules that seem to dominate throughout the EU, however, in reality it may not cause as much of a stir as one may expect. With the problems caused by the application of exceptions, and the fact that some Member States are already showing the kind of tolerance required under the continued recognised relationship theory[78], such a proposal may not be that controversial an option. For instance; if we look at a couple entering into a polygamous marriage in accordance with the law of their nationality, but intending to move to Italy, under the most popular approach of applying the law of both parties nationality, the marriage would be *prima facie* valid, and to find otherwise, Italy would have to invoke a public policy exception, bringing with it the uncertainty such exceptions carry. However, if under the system of dépeçage based interest analysis the continued recognised relationship theory was applied, the applicable law would be Italy as this is where they intended to live. As a result the marriage would not be valid under the known and accepted choice of law rules, rather than as a result of the ad hoc invocation of exceptions. Notwithstanding that the outcome would be the same, there is certainty and predictability for the parties, allowing them to make an informed decision about moving to Italy, and the law of the country most effected by

[78] Such as England, Germany and the Netherlands as previously discussed.

the marriage is upheld. Philosophically, there is still an element of freedom, as although the constraints of the law may lead to the same invalidity, freedom comes from this certainty and the ability to plan and work around the law[79].

Secondly, although the use of an alternative theory may be new when dealing with the capacity element of marriages, when looking at the law surrounding marriages more widely, alternative approaches are not uncommon. In reality, where the couple are living plays a part in the general effects of a marriage. Where the parties do not have a common nationality it may be that the Member State turns to where the couple are habitually resident or where they predominantly live[80].

Finally, while civil codes and EU databases[81] suggest that nationality is generally the connecting factor when dealing with the essential validity of marriage, this may not always be accurate. This can be explored further when considering England and its conflict of laws rules. English conflicts of laws rules on marriage validity are not codified and it is often suggested that the most popular choice of law rule is the dual domicile theory, which is described as the most "orthodox view"[82], and the one which "commands most support in English law"[83]. It is also the only theory that is mentioned on the EU database[84]. In reality, other choice of law rules are in operation in England, and have received support within case law[85]. Whilst this can be identified when considering English law, such assertions as an outsider looking in are difficult to make in relation to other Member States. In reality, with limited access to Member States' case law, it cannot be said with any certainty that they too are not adopting other connecting factors that they are familiar with, such as habitual residence or where the couple predominantly live. If, in fact, such a practice is occurring, this would make the aforementioned suggestions less dramatic and likely to be objected to, as the Member State would be showing an approach somewhat more relaxed than a strict application

[79] Jeremy Waldon, 'Thoughtfulness and the Rule of Law' (2011) New York University Public Law and Legal Theory Working Papers, paper 263, 4 available at http://lsr.nellco.org/nyu_plltwp/263 last accessed 21/04/17.
[80] See Art 14 of the Introductory Act to the Civil Code for Germany; Art 29 of the 218 Act for Italy and Art 18 of the International Private Law Act (IPRG) for Austria.
[81] For instance, the Europa website sets out the conflicts rules on marriage for many of the Member States, see http://ec.europa.eu/civiljustice/applicable_law/applicable_law_eng_en.htm Last accessed 21/04/17.
[82] David McClean and Kisch Beevers, *Morris: The Conflicts of Laws* (7th edn, Thomson Reuters (legal) Limited 2009) 211.
[83] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 355.
[84] http://ec.europa.eu/civiljustice/applicable_law/applicable_law_eng_en.htm see the tab for the UK, last accessed 21/04/17.
[85] See for example *Radwan v Radwan (No 2)* [1973] Fam 35 for support of the intended matrimonial home theory and *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11 for support for the most real and substantial connection test.

of the law of nationality. In essence, the applicable law, as set out under the civil codes and EU databases, provides a worst case scenario from which to build on. Tackling the issue from this angle means that the existence of other choice of law rules and an element of flexibility in the approach taken, would only bolster the outlined approach. The application of both the dual domicile theory and the continued recognised relationship theory, dependent upon the incapacity at hand would, look somewhat less of a stride forward and certainly more achievable at an EU level.

5.6.2 Choice of Law Rules within the EU

In assessing the most appropriate choice of law rules, in addition to exploring those used within England and other Member States, it is also important to consider the connecting factors used within the EU family law context. This is important as it may uncover a more appropriate solution to those previously outlined. Furthermore, it may point to a connecting factor that the Member States are already familiar with from other aspects of family law. This could be advantageous as it could lead to an easier transition, but it may also mean Member States are more willing to accept and apply it to marriage validity due to its familiarity.

One such connecting factor is that of habitual residence. Although Rome III was unsuccessful, enhanced cooperation was entered into by select Member States[86], and they maintained the use of habitual residence proposed in Rome III. In the first instance under the regulation it is determined whether the parties have agreed on the applicable law[87] and, if this has not been agreed upon the regulation provides a checklist of potential choice of law rules[88] which, when taken in order, sets out the most appropriate choice of law rule. The first option on said checklist is where the parties have their common habitual residence. In the absence of a mutual agreement between the parties, habitual residence is the default choice of law rule. Likewise in Regulation (EU) No 650/2012 on dealing with succession, Art 21(1) provides that the applicable law 'to the succession as a whole shall be the law of the state in which the deceased had his habitual residence at the time of death.'

Irrespective of such familiarity, habitual residence may not provide the appropriate solution at an EU level. It is not a connecting factor with an established and certain

[86]Council Regulation (EC) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.
[87] Ibid, Chapter 2, Art 5.
[88] Ibid, Chapter 2, Art 8.

definition, in contrast, it has an autonomous nature and "may have a different meaning in different statutes according to their context and purpose."[89] It is a nebulous notion, and for that reason does not provide the unity required in a set choice of law rule[90]. One Member State's definition of habitual residence could differ to another, further adding to the uncertainty in its application. As outlined in chapter 2, under English law, habitual residence requires the concurrence of physical residence and the mental status of having a settled purpose of remaining[91]. While this may appear on the surface reasonably straightforward, with a little digging it is possible to see the uncertainty beneath the surface. The length of residence required to satisfy physical presence seems to vary widely, and most certainly appears to be assessed on a case-by-case basis. In the case of *Re J (Abduction: Custody Rights)*[92]Lord Brandon stated that habitual residence could only be acquired after an "appreciable period of time"[93], and in *Nessa v Chief Adjudication Officer*[94] four days was not considered long enough. When considering cases with slightly longer timescales, it can be seen in *Re F (Child Abduction)*[95] one month was sufficient, similarly in *Re S (A Child) (Habitual Residence)*[96] 7 – 8 weeks was sufficient. Such cases can be contrasted with that of *A v A (Child Abduction)*[97] where eight months was considered insufficient. Each case is clearly assessed individually, and the period of residence is considered alongside the settled intention, and "the subjective element tends to lead to unpredictability"[98].

The second element of intention may also prove problematic. Though at first glance it may appear relatively easy to satisfy, as the propositus need only intend to remain for a fixed period of time, as opposed to indefinitely[99], this is not without its challenges. As a result of only requiring there to be an intention to remain for a fixed period of time, instances may arise where a person is deemed habitually resident in a country to which they have no, or very little connection. This is particularly foreseeable where a person has moved to a Member State for work purposes, they will have an intention to remain there for as long as the position taken up requires, and will be physically

[89] *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98, 105 (Baroness Hale).
[90] Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 International Journal of Law, Policy and the Family 178.
[91] *Shah v Barnet London Borough Council* [1983] 2 AC 309, 344.
[92] [1990] 2 AC 562.
[93] Ibid 578.
[94] [1999] 1 WLR 1937.
[95] [1992] 1 FLR 548.
[96] [2009] EWCA Civ 1021, [2010] 1 FLR 1146.
[97] [1993] 2 FLR 225.
[98] Pippa Rogerson, 'Habitual Residence: The New Domicile' (2000) 49 International and Comparative Law Quarterly 86, 90.
[99] For instance see *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968, [2004] 1 FLR 216, *Kapur v Kapur* [1984] FLR 920 and *Re B (No2)* [1993] 1 FLR 993.

resident there[100]. A determination of habitual residence in these circumstances, could lead to the application of that Member State's laws regardless of the wishes and expectations of the worker.

Irrespective of the highlighted concerns pertaining to the English notion of habitual residence, and indeed the potential for various interpretations amongst the Member States, it is important to evaluate its meaning under EU law. Regardless of the contextual approach usually adopted when determining the interpretation of habitual residence, it has been given an autonomous and uniform meaning for EU purposes. Given its popularity as a connecting factor in many EU Regulations, the Court of Justice of the European Union considered its meaning and provided an interpretation. In *Magdalena Fernández v Commission*[101], the ECJ held that 'habitual residence' was the place where the person has his permanent or habitual centre of interests. This interpretation has been reiterated and confirmed within subsequent case law[102]. As previously stated, Brussels II bis also utilises habitual residence for jurisdictional purposes, and whilst the Regulations themselves do not provide an interpretation, one can be seen in the Borras Report[103], which is an explanatory report for Brussels II. The report sets out that habitual residence is "the place where the person has established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purposes of determining such residence."[104] This same focus on habitual centre of interests is evident[105], and should, in the exploration of connecting factors within the EU, also be considered as a potential solution.

The undertaking of such consideration does, however, highlight that all is not what it may seem. As always, within any application of EU law, "habitual residence has to be ascertained 'in light of the aim and scheme of the community legislation concerned'."[106] Therefore, if what is at issue is related to employment rights, the place of employment will be taken into consideration, likewise, if it is the habitual residence

[100] Such an example can be seen in the case of *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968, [2004] 1 FLR 216, where the propositus had transferred to work in Germany for about 6 months, and was held to be habitually resident there.
[101] C452/93 [1994] ECR I-4295.
[102] C90/97 *Swaddling v Adjudication Officer* [1999] ECRI-1075, C372/02 *Adanez-Vega* [2004] ECR I-10761 and the English case of *Marinos v Marinos* [2007] EWHC 2047, [2007] 2 FLR 1018.
[103] Alegria Borras, Explanatory report, 'on the Convention, drawn up on the basis of Art K.3 of the Treaty on the European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters', [1998] OJ C221/27.
[104] Ibid para 32.
[105] *Z v Z (Divorce Proceedings)* [2009] EWHC 2626 (Fam), [2010] 1 FLR 694.
[106] Maebh Harding, *Conflict of Laws* (5th edn, Routledge 2014) 26.

of a child that is to be determined, the best interests of the child will be a relevant factor[107]. As a result, it is clear that the 'habitual centre of interests' may alter depending upon the circumstances and rights in issue: it is not a concept with a consistent application. This is clearly demonstrated within Brussels II bis itself, whereby "habitual residence is to be interpreted somewhat differently for adults … and for children".[108] When assessing a child's habitual residence for the purposes of Art 8(1) an assessment will be made taking into account all of the relevant circumstances, particularly the duration and stability of residence and familial and social integration[109]. This alternative method of assessment of habitual residence comes as a result of the problems surrounding the transposition of the CJEU and Borras Report definition to children; "since it places too much emphasis on the intention of the person concerned. That may be possible in the case of adults. … At least in the case of younger children, however, it is not the child's own will that is decisive but that of the parents, …"[110].

Arguably then, habitual residence does not have an autonomous and uniform meaning within Brussels II bis alone, never mind EU law as a whole. Whilst it may be stated that when dealing with adults uniformity can be seen through the definition regarding the propositus' habitual centre of interests, this is to be determined on a case-by-case basis, and what factors determine that centre of interests will vary from case to case. In essence, what we are left with is yet another connecting factor that does not in itself have a solid and uniform meaning. Without having a definitive formula or even a list of factors to be considered to determine one's 'habitual centre of interests', there is the potential for the same levels of uncertainty, identified in the likes of the most real and substantial connection test discussed and discarded in chapter 3.

These problems, combined with the earlier concern of a tenuous link which, may still be a cause for concern under EU law, demonstrates the limits of habitual residence. It is a connecting factor, "ideally suited for purposes such as divorce jurisdiction"[111], but is inappropriate as the choice of law rule for the essential validity of marriage. It may create tenuous and unexpected links with countries, be a vehicle for evading the laws that would otherwise apply, and fails to offer the certainty and predictability

[107] Ibid.
[108] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 338.
[109] C523/07 *Re Proceedings Brought by A* [2009] ECR I 2805.
[110] Ibid [36].
[111] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 341.

needed within the choice of law rule in this area; consequently, habitual residence would not provide a suitable alternative to dépeçage based interest analysis for the essential validity of marriage. With this determination, it is also important to recognise that this is yet another criticism of Rome III's attempts at harmonisation that would not apply to the unification sought by this author.

Coinciding with the previous reference to Regulation (EU) No 650/2012, it is also interesting to note that the regulation provides an exception to the use of habitual residence which could also be explored. This exception arises when 'it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected'[112] with another Member State. The choice of law rule of being 'manifestly more closely connected' in terms of its application within marriage validity offers no further certainty. There is no definition of a manifestly close connection, and would, like the most real and substantial connection test explored in chapter 3[113], require case-by-case examination, thereby failing to achieve the certainty and predictability sought.

A final option would be to assess the concept of 'automatic recognition' as was considered by the European Commission[114], in their assessment of how free movement rights could be improved through the recognition of civil status records. Aware of the problems that could arise as a result of not recognising the effect of such documents, the Commission considered whether automatic recognition of civil status situations established in other Member States would provide a suitable solution. If automatic recognition were to be utilised as the applicable choice of law rule within marriage validity it would put comity and mutual trust between Member States at the forefront in order to provide certainty for couples as they cross state borders. This would also be achieved without requiring any Member State, "to change its substantive law or modify its legal system."[115] This does not mean that such a solution would be without its problems. It may, like the application of the *lex loci,* bring with it risks of forum shopping, and therefore an increase in the level of public policy exceptions being applied, so as to allow other Member States to deny the marriage

[112] Council Regulation (EC) 650/2012 of 4 July 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 [2012] OJ L201/107, Chapter III, Art 21(1).
[113] See section 3.5.
[114] Commission 'Less Bureaucracy for Citizens: Promoting Free movement of public Documents and the Recognition of the effect of Civil Status Records' COM (2010) 747 final (Green Paper).
[115] Ibid para 4.3.

when the likes of forum shopping and evasion of local laws has occurred. This was a risk recognised at a general level by the European Commission, who asserted that compensatory measures may be needed to prevent abuse of public order rules, but they also went on to recognise that "This might prove to be more complicated in other civil status situations such as marriage"[116]. For these reasons it is apparent that despite the potential for certainty on the face of the theory, such certainty would be lost due to the undoubtable use of public policy exceptions. For that reason mutual recognition does not provide an appropriate choice of law rule for marriage validity.

This exploration of EU choice of law rules demonstrates that no such options would be appropriate for marriage validity purposes, and therefore it is necessary to return to the proposal of dépeçage based interest analysis set out for use in England in chapter 3.

5.6.3 The Law Under Dépeçage and Interest Analysis

The consideration of both existing choice of law rules in marriage validity, and connecting factors used within EU family law more widely, highlights that the most appropriate solution is that of dépeçage based interest analysis. Although such an approach requires the determination of the most appropriate choice of law rule for each incapacity, this has been considered in great lengths in chapters 3 and 4, and so for many of the incapacities this will be covered somewhat succinctly.

Taking a consistent approach to the reform suggested for England it is proposed that for the incapacity of age, the appropriate choice of law rule should be that of the dual domicile theory. The requirement to attain a certain age in accordance with a particular country's law is designed to allow the protection of those domicilaries from entering into a relationship, and commitment for which they are not yet mature enough to handle. It, therefore, follows that the country that would have the greatest concern in providing such protection, will be that of the propositus' domicile. It is also recognised that as a result of the clear preference of most Member States in applying a version of the dual domicile theory, such a proposal is unlikely to face much objection.

The application of the continued recognised relationship theory for consanguinity and affinity may, on the other hand, be subject to further debate. Member States must first

[116] Ibid para 4.3.

consider however, the fact that many EU Member States are going to have similar rules regarding these issues anyway. For instance, in exploring consanguinity, it is possible to identify a general prohibition on marriage between children and parents; children and grandparents; brothers and sisters; and also in some states aunts and uncles with nieces and nephews[117]. Therefore, unless it involves non-EU nationals, we are unlikely to see much difference on the ground as, regardless of the applicable law, the relationship is likely to be prohibited. The continued recognised relationship theory would just ensure that the applicable law is the one that can best take account of factors such as public policy concerns[118].

As with age, consent, given the nature of the incapacity is to protect the propositus, so it too should be governed by the dual domicile theory, which is unlikely to prove contentious across the Member States. Finally, before looking at polygamy and same-sex relationships in more detail, it is submitted that re-marriage after divorce should be governed by the *lex fori*. The application of the *lex fori* ensures that when the forum country recognises the propositus as single, they are then able to allow them to marry as a consequence. The application of an alternative law could produce very odd results indeed. For example, a country, may, by its laws, consider a person to be single, but on the application of the dual domicile theory to the incidental question not be able to allow them to marry as the domiciliary law does not recognise their divorce[119].

It is argued that in relation to polygamous marriages the appropriate choice of law rule is, as stated in chapter 3, the continued recognised relationship theory. Though such an approach would require Member States to recognise a relationship they would not allow in their borders, it does not require any change in the substantive law. Instead, what is required is a level of tolerance, tolerance as previously outlined in this chapter as being shown by some Member States. One such state is England, who have recognised polygamous marriages involving their own domicilaries when they have set up matrimonial home elsewhere, as England were not effected by the relationship[120]. In addition, they have also recognised polygamous marriages in

[117] In England the Marriage Act 1949 provides that a person cannot marry their parents, grandparents, siblings, their aunt or uncle by blood or nieces and nephews. Similarly, in France, Art 161 of the Civil Code prevents marriage of aunts and uncles with their nieces and nephews. Finally in the Netherlands according to the Marriage Conflicts of Laws Act, Art 3(1)(1b) a marriage cannot be contracted between prospective spouses related by blood or adoption in the direct line or by blood as brother and sister.
[118] For instance, the fact that any eugenic problems will be faced by the country in which the couple live as opposed to where they are domiciled at the time of the marriage, and therefore is the country most effected by the marriage.
[119] As discussed in more detail in section 3.7.4.5.
[120] *Radwan v Radwan (No2)* [1973] Fam 35.

England that have been validly entered into elsewhere[121], and it is accepted that the law has now developed to recognise polygamous marriages concluded in a foreign country unless there are strong reasons for not doing so[122]. As previously referenced, similar acceptance is shown by Member States such as Germany and the Netherlands. Therefore, not only can a level of tolerance already be seen within the EU, which offers a foundation on which to build, but the justification for such tolerance outlined earlier by Hirsch Ballin, as being centred around a subsisting relationship and the parties expectations[123], confirms that a choice of law rule such as the continued recognised relationship theory is the correct approach. While some Member States may be more reluctant than others, England is clearly not alone in its approach, and it would fulfil public policy arguments such as upholding the validity of marriage, fulfilling party expectations and international uniformity of decisions[124].

Finally, the incapacity of same-sex relationships must be considered. Even with the many Member States recognising a form of relationship for same-sex couples, its form is widely variable across the EU, as are the levels of rights and responsibilities attached. Although some unity has been achieved in recent case law, so far as every Member State must now allow same-sex couples to enter into either a civil union or a registered partnership[125], the extent to which they vary does not support the attainment of certainty and unity. In addition, regardless of the important step forward in the law *Oliaria* provides, it does not require that couples be able to enter into, or have, their same-sex marriage recognised. This could, nevertheless, mean that the recognition of a couple's marriage or civil union could alter as they cross state borders[126]. This is problematic for many reasons which, have been further explored in chapter 4, where, in addition to the general public policy concerns relevant to all of the incapacities, it was also deemed that when considering same-sex marriage it is

[121] *Hussain v Hussain* [1982] 3 WLR 679.
[122] *Mohammed v Knott* [1969] 1 QB 1.
[123] Government of Netherland, 2010 'Hirsch Ballin Restricts Recognition of Foreign Polygamous Marriages', Press Release (27 January 2010) available at www.government.nl/latest/news/2010/01/27/hirsch-ballin-restricts-recogntion-of-foreign-polygamous-marriages. Last accessed 21/04/17.
[124] All of which are supported by the Law Commission; Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) 2.35, but have also separately gained support for instance; Robert Leflar, 'Choice Influencing Considerations in Conflicts Law' (1966) 41 New York University Law Review 267, Michael Davie, The Breaking up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32 and Barbara Cox, 'Same-Sex Marriage and Choice of Law: If we Marry in Hawaii, Are we Still Married when we Return Home?' [1994] Wisconsin Law Review 1033.
[125] *Oliaria and Others v Italy*, Application Nos 18766/11 and 36030/11, 21 July 2015.
[126] As was recognised by Ian Curry-Sumner, 'Interstate Recognition of Same-Sex Relationships in Europe' (2009-2010) 13 The Journal of Gender, Race & Justice 59, 71 when he stated that "It is clear that the fate of same-sex couples travelling across international boundaries is somewhat precarious; the water should be tread with extreme trepidation."

possible to anticipate other relevant public policy concerns such as; citizenship, the symbolic nature of marriage and equality.

In assessing the need for certainty surrounding this incapacity at an EU level, it is also important to stress its relevance in relation to free movement. As evidenced in this chapter, the recognition of a couples' status can have dramatic impacts upon their rights to free movement. This point becomes particularly significant in the context of same-sex couples as a consequence of the definition of 'family' within the citizenship directive[127], as a spouse does not include a same-sex spouse due to the principles of subsidiarity[128]. While under Art 2(2)(b) family may also include those in a registered partnership, this need only be where the host Member State treats registered partnerships as equivalent to marriage. As a result of this, it may be that an EU citizen is denied access to their rights to free movement, as they are unable to be accompanied by their same-sex partner, or indeed spouse, who has no independent rights to free movement within the EU[129]. This, alongside the public policy concerns, highlights the need for a common choice of law rule regarding this incapacity at an EU level. It is imperative that couples understand their rights and are not frivolously denied recognition of their relationship, or indeed, free movement, through the invocation of public policy exceptions needed only as a result of ill-fitting, generic choice of law rules.

As a result of such aims it is promulgated that the most appropriate choice of law rule for this incapacity is the continued recognised relationship theory. This approach would allow couples who have been in their relationship for a reasonable period of time, to move around the EU without fears of their relationship being declared invalid, whilst not forcing Member States to change their substantive law[130]. It would require Member States to show that same level of tolerance that has been demonstrated by some of the other Member States in relation to polygamy, where years later a couple decide to move there. Meanwhile, it still gives the Member States the power not to

[127] Citizenship Directive, Art 2(2).
[128] 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."
[129] For a discussion see Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) European Journal of International Law 1023, 1026 referring to Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press, 1992).
[130] An important step that was recognised as unlikely to be achieved by the EU institutions themselves by Kate Spencer, 'Same Sex Couples and the Right to marry – European Perspectives' (2010) 6 Cambridge Student Law Review 155, 175.

allow such marriage or partnership ceremonies to occur within their borders, or recognise the relationships between those couples who had always intended that Member State to be their home. The theory recognises the implications of such relationships on the community, in that such an incapacity is about societal views, rather than the protection of the individual, whilst also recognising the need for certainty and access to rights. It is the balancing act between providing certainty for couples and respect for Member States' values. Though some may fear it is too big a leap for some Member States, it must be viewed as the stepping stone it really is; remembering it does not change substantive law surrounding same-sex marriage, but rather prevents couples losing a status they are accustomed to having.

5.7 Conclusion

It is clear that with the various potential choice of law rules at play across the EU, the only way to achieve certainty is to harmonise the choice of law rules for the essential validity of marriage at an EU level. This need has become more pertinent as a result of the increasing levels of migration and international marriages[131]. This increase in couples moving and marrying around the EU means there needs to be certainty within the law so a couple are able to determine whether their marriage will be recognised when they cross state borders. It has also become evident that, in refusing to recognise marriages, a couple may have restrictions placed on their rights of free movement. This, in its most extreme form, could prevent a couple from moving to a particular Member State, when one of the partners is a non-EU national, as to deny that partner their spousal status is to potentially deny them their only familial tie[132] to an EU national, and therefore emphasises the importance of this chapter. The impact of non-recognition around the EU means that despite Brexit, and the fact that the choice of law rules may not be applicable to England, this Chapter remained central to the thesis. The potential problem caused by non-recognition is particularly apparent when considering same-sex couples, due to the principle of subsidiarity. Under the principle of subsidiarity each Member State is able to determine for themselves

[131] Statistics from the centre for social justice, "European Family Law: Faster Divorce and Foreign Law" (2009) 5, available at http://www.centreforsocialjustice.org.uk/UserStorage/pdf/pdf%20reports/CSJEuropeanFamilyLaw.pdf (Last accessed 21/04/17) shows that of the annual 2.2 million EU marriages, 350,000 involve an international couple.

[132] Citizenship Directive, Art 2(2)(a) defines 'family member' and unless there is an alternative connection to that EU national under this definition or another EU national such as a child, the partner would not be able to exercise the rights of family members that are provided to EU nationals.

whether they recognise same-sex marriage, as the term ‘spouse’ is not deemed to include a same-sex spouse.

Although putting in place clear and consistent choice of law rules may not lead to the guaranteed recognition of a marriage, or an ascertained protection of the right to free movement, it will certainly have a positive impact, and more importantly it will achieve the objective of providing certainty to couples regarding the recognition of their marriage. The requirement to recognise those relationships that have already been subsisting for a reasonable period of time, when the applicable choice of law rule is that of the continued recognised relationship theory, will consequently mean that more relationships are recognised. The rules proposed demand a greater level of tolerance surrounding relationships that the new host Member State may not permit, and eliminates the current option of applying public policy exceptions to negate validity. Finally, as a result of the certainty and predictability accomplished for those couples otherwise facing the non-recognition of their marriage, they will have the ability to make an informed choice. Such an informed choice will mean they are aware, not only of the impact to their marital status, but also the ramifications in other areas such as tax, divorce and succession

The suggested rules that provide this level of certainty, and require a degree of tolerance on behalf of the Member States, are those based on the system of dépeçage based interest analysis. In mirroring the approach suggested for England, the choice of law rules will be a mixture of the dual domicile theory and the continued recognised relationship theory, depending on what incapacity is at issue. As with England, such a stance, would avoid the problems associated with the application of a universal choice of law rule[133], whilst benefitting from a more tailored approach. The system of dépeçage, combined with interest analysis, allows for a more considered application of choice of law rules. Each incapacity is allocated the choice of law rule which seeks to address the primary concerns of that incapacity, whether it be the parties to the marriage or society as a whole. This then circumvents the need for public policy exceptions that not only re-establish a level of uncertainty, but also provide the Member States with a loophole, or a gateway to invalidating a marriage. In assessing the appropriate rule for each of the incapacities a more stable system is

[133] These problems have been highlighted throughout the research and include; inflexibility, a lack of concern for the specific issue at hand and also the public policy issues raised by the individual incapacities.

created for the EU, than one which is based on a universal choice of law rule that may or may not be set aside by the invocation of an exception.

In spite of the certainty such choice of law rules would offer, whilst also providing a greater level of flexibility, it is anticipated that the theory may be criticised for going too far too fast. This line of argument would originate from the fact that many Member States apply a version of the dual domicile theory, and where this would validate a marriage which is contrary to their laws they apply a public policy exception. Essentially, they apply a much more conservative, and culturally protective theory, than that offered in the outlined approach. For that reason, it may be feared that requiring Member States to recognise marriages they do not allow, could be too forceful, and could in turn lead to a backlash, whereby that Member State runs in the opposite direction, moving us yet further away from achieving consistency within the recognition of relationships. An example of such a backlash can be seen in relation to same-sex marriage in the US, where, as a result of backlash to the more liberal views being introduced towards same-sex marriage, it took a great many years from the start of the recognition of same-sex marriage to get it declared as a fundamental right throughout the US[134]. However, the approach taken does not require Member States to change their substantive law. Rather, it requires a reflective equilibrium in respect of tolerating some marriages not permissible under their own laws. It is an incremental approach, which, is advocated as a more sensitive approach, and allows public opinion to adjust[135]. The choice of law rules proposed herein ask that the Member States each take a step and meet in the middle, by affording couples marital recognition that they might not have previously. At times, such a compromise may be needed to ensure all those within the EU benefit through the provision of certainty and predictability.

Marriage validity is an area of law that has been neglected, and has been in need of attention. Reed recognised in 2000 that "[T]he current parlous state of our law, confused and obscure in its treatment of essential validity, needs to be reformulated

[134] The first states began recognising same-sex marriage in 2003 in *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass 2003) but it did not become a fundamental right until the judgment in Supreme Court case of *Obergefell v Hodges* 135 S Ct 2071 (2015).

[135] See for instance Kees Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in Robert Wintemute & Mads Andenaes (eds) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001), William Eskridge Jr., *Equality Practices, Civil Unions and the Future of Gay Rights* (Routledge 2002) 119 and 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, 199-200.

for the next millennium."[136] Yet despite the time that has lapsed since this clarion call for reform no such development has occurred. A cathartic panacea is needed to cure current ills, and whilst Reed and the many others[137] who have looked at the area of marriage validity may have focused primarily on the legal position in England, this is no longer enough. In aiming to provide certainty, combined with the required level of flexibility, the only true way to attack the 'parlous' state of the law in the modern day is to do so at an EU level. In order to achieve that aim this chapter has created appropriate choice of law rules that would in turn provide couples wishing to cross EU state borders with certainty regarding the recognition of their marriage: a right that that goes to the very heart of many people's personal lives, and, provides a significant development in the law.

[136] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 450.
[137] See discussions in Chapter 3.

Chapter 6

A Unified Approach 'From This Day Forward'? Providing The Optimal Choice Of Law Rules For Essential Validity Across The US

6.1 Introduction

The exploration of domicile and choice of law rules for marriage validity in the previous chapters has led to the formulation of an optimal *de novo* approach centred around dépeçage based interest analysis, which is propounded as the correct approach for marriage validity in both England, and the EU. This chapter now builds on those foundations in order to assess to what extent such an approach could be replicated in the US. There are clear differences between the legal systems of England, the EU and the US as a consequence of the various legal structures in place. For example, the UK parliament is sovereign in all matters of UK law except those it chooses to delegate, whilst the US is a federation, meaning there is a combination of state law and federal law with some aspects of law falling outside the remit of the federal government. However, there are clear similarities when it comes to the laws surrounding marriage validity, and these will be critically analysed to see what can be learned from looking at the respective jurisdictions in a comparative manner[1].

Though choice of law rules within personal conflict of laws, particularly marriage, have remained largely untouched in the US, development of approaches is evident in areas such as tort and contract. In fact, as will be discussed later in the chapter, it is those areas in which there has been a great deal of attention focused on theory progression, in order to achieve the most appropriate choice of law rules[2]. Meanwhile, marriage

[1] As has been recognised by Symeon C Symeonides, 'A New Conflict Restatement: Why Not?' (2009) 5(3) Journal of Private International Law 383, 384 "in an international field such as conflicts law, the drafters can and should draw from the experience of other countries, especially Europe."
[2] This has involved for example, the development and refinement of what was interest analysis in accordance with Brainerd Currie.

validity appears to have been left behind somewhere in the shadows. However, the recent federal court pronouncement on same-sex marriage[3] could be the catalyst in reemphasising the importance of achieving certainty within marriage validity across the states. Consequently, the developments within the likes of tort and contract may be of assistance. In these areas, theories have been reviewed and altered in order to rectify some of the criticisms of the earlier theories. They are also the areas where we can see an abandonment of the traditional *lex loci* rule within case law, and instead see interest analysis being developed in a way similar to that proposed in previous chapters, on an issue-by-issue basis. Therefore, by considering these developments within contract and tort, alongside the outlined approach in the previous chapters, the elements that are transcendent can be identified to ensure they are incorporated into the choice of law rule proposed for marriage validity in the US. This comparative approach will assist in ensuring that the proposed choice of law rules entail certainty brought by fixed rules, and an element of flexibility provided by the issue-by-issue analysis, as opposed to a one rule fits all approach.

Under the current system there are various choice of law rules that could be applied by the courts when determining the essential validity of a marriage. This, combined with the differing substantive laws on aspects such as age and consanguinity across the states, has the potential to leave couples vulnerable to an unknown change in their marital status when they cross state borders. This risk is the by-product of state laws determining the applicable choice of law rule[4], and while such a move may be uncommon within family law, as family law is traditionally dealt with at state level, this chapter will seek to establish certainty and unity by proposing set choice of law rules that are to be enacted at a federal level. The need for certainty is, as demonstrated in the previous chapters, vital for couples to ensure they understand any potential ramifications a move may have on their marital status. This is especially important in the US given that there are 50 states that couples are able to freely move around, and statistics show that many individuals do take up such opportunities[5]. With such large scale potential movement, multistate cases are inevitable and without federal

[3] *Obergefell v Hodges* 135 S Ct 2071 (2015).
[4] "Because domestic relations belongs primarily to the localities of the states, America is a hotchpot of local and varying rules." Walter Wadlington & Raymond C O'Brien, *Family Law in Perspective* (2nd edn, The Foundation Press 2007) 19.
[5] From 2008-2009 12.6% of the population aged 1 year and over moved from a different state, David K Ihrke, Carol S Faber & William K Koerber, 'Geographical Mobility 2008 to 2009' (Issued November 2011, Report No. P20-565, pg 2) available at www.census.gov/library/publications/2011/demo/p20-565.html. Last accessed 01/08/2016. As provided at page 9 of the report this was a figure 7.2 million in 2008 and 6.9 million in 2009.

choice of law rules, what we are left with is a guessing game surrounding which choice of law rule the judiciary will pick; "a veritable jungle, [in] which, if the law can be found out, leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess'."[6]

Selecting the appropriate choice of law rules will, of course, require consideration of the dominant approaches to marriage validity in the US. This chapter considers the primary contenders of the Restatement First, interest analysis and the Restatement Second in their original format in order to assess their appropriateness. Assessment will highlight any criticisms of the approaches, before moving on to analyse any developments. Developments are particularly apparent in relation to interest analysis. The chapter explores these in detail, with a view to demonstrating how interest analysis in the modern day has changed from the determination of a true conflict with a subsequent reliance on the *lex fori*[7], to a more rules based approach[8], similar to that promoted in the proceeding chapters. The application of such versions of interest analysis will be evidenced in the areas of tort and contract, alongside a comparison between interest analysis and the use of the state with the 'most significant' relationship in the Restatement Second, to illustrate its feasibility and suitability within marriage validity.

Upon establishing the value of dépeçage based interest analysis as an approach, a selection of incapacities will be considered. The purpose of this is to ensure that the choice of law rules suggested for the incapacities in England and the EU, are able to be mirrored in the US. This analysis will also require the consideration of the relevant public policy concerns in the US, to guarantee alignment with the choice of law rule selected. It is important that the state most interested in advancing those policy concerns is able to do so, whether the policy be about protecting an individual or societal norms. In addition, such exploration of the incapacities will highlight the various laws in play across the states; further emphasising the need for set choice of law rules. The argument that such rules need to be actioned at a federal level will then be made. Although this may appear invasive and controversial when considering the current legal system in the US, there is in fact evidence of an increasing federal

[6] See *In re Paris Air Crash of March 3, 1974*, 399 F Supp 732, 739 (CD Cal 1975).
[7] In accordance with the works of Brainerd Currie in Brainerd Currie, *Selected Essays of the Conflict of Law* (Duke University Press 1963).
[8] As evidenced in the theories of David Cavers and Larry Krammer as discussed in Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) and Herma Hill Kay, Larry Krammer & Kermit Roosevelt, *Conflict of Laws Cases – Comments – Questions* (9th edn, West Publishing Co 2013) respectively.

role within the sphere of family law[9], which, could offer some support for such a notion. The recognition of same-sex marriage is particularly noteworthy here, as it demonstrates an area traditionally associated with controversy, but having been handled at a federal level, is one of the few incapacities that offers certainty. This certainty will be drawn upon to show how it is both necessary and achievable for the remaining incapacities within the US. Furthermore, its success will act as support for the arguments made in the EU chapter surrounding a unified choice of law rule across the Member States, indicating that the certainty sought within this thesis for couples crossing state borders is indeed achievable.

6.2 The Concept of Domicile in the US

Domicile continues to play an important role within marriage validity in the US[10], making it vital that the term is understood as it is meant across the states. Aside from this, if the choice of law rules proposed for England and the EU are to be considered as the potential solution for the US, it is necessary to explore domicile in order to understand how a rule such as the dual domicile rule would apply. Like England, there are three types of domicile that can be ascribed to an individual at any point in their life: domicile of origin; domicile of choice; and domicile by operation of the law. Domicile of choice appears to work much in the same way as extant English principles, in that, capacity permitting, a domicile of choice is obtained by arriving and therefore being physically present in the intended new domicile. This physical presence must also be combined with the intention to remain indefinitely, or at least no present intention to leave at a specified time[11]. In correlation to England, a mere wish to some day return to one's homeland is not enough to overcome ties with the community, and lacks a real intent to leave[12]. The major difference between the two jurisdictions is in relation to the domicile of origin. Though, like England, domicile of origin is derived from an individual's parents, the key difference is that, unlike England, there is no doctrine of revival. Instead, the rule of continuance is employed, resulting in the continued application of the domicile of choice until a new one is

[9] Such support comes in the form of both the United States Supreme Court pronouncements and enactments by congress, that will be discussed later in the chapter.
[10] This is as a result of the role in determining the validity of a marriage. For example it is evident in the comments accompanying the Restatement Second that the domicile of the parties prior to the marriage have an interest particularly when dealing with certain incapacities.
[11] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 42-43.
[12] *Penn Mutual Life Insurance Co. v Fields* 81 F Supp 54 (SD Cal 1948).

acquired[13]. Therefore, having left the previous domicile of choice, it will remain the propositus' domicile until a new one is acquired; the tenacity and hold of a domicile of origin is diminished.

This variance in the law regarding the rule of continuance, as opposed to the doctrine of revival that has primordial significance in England, is particularly interesting given the problems and criticisms identified in chapter 2, surrounding the doctrine of revival. In chapter 2, a reform was suggested that centred around the rule of continuance, and thus the utilisation of the rule in the US provides comparative support for this optimised approach: it is yet another jurisdiction identifying it as the most appropriate method of allocating an interim domicile. It prevents the application of the laws of a country that has long since been abandoned by the propositus, and has no real interest in applying its laws. In addition, the rule of continuance satisfies the mutual requirement amongst both jurisdictions, that a person never be without a domicile. With or without the adoption of the rule of continuance in England, it is evident that domicile operates in much the same way, and aside from revival, would be worked out in the same way in each of the jurisdictions, therefore, it does not provide an obstacle in the assessment of choice of law rules.

6.3 The Prevalent Choice of Law Rules

As with England, a whole host of potential choice of law rules can be seen in the US. Whilst various developments, which, will be discussed later in the chapter have provided sub-theories, there are three main competing choice of law rules that will be propounded as supererogatory: the Restatement First[14]; interest analysis[15]; and the Restatement Second[16].

Restatements of law are not binding in nature, but can be deontological in providing mechanistic bright-line choice determinations, and are consequently adopted in some states that promote practicality. The Restatement First was created by Joseph Beale and is often considered to be the traditional approach to conflict of laws in the US[17], and the traditional rule for determining marriage validity[18]. Beale's 'vested rights'

[13] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 41-42.
[14] Restatement (First) of Conflict of Laws (1934), hereafter referred to as the Restatement First.
[15] As first propounded by Brainerd Currie in various articles which have been collated in, Brainerd Currie, *Selected Essays and the Conflict of Laws* (Duke University Press 1963).
[16] Restatement (Second) Conflict of Laws (1971). Hereafter referred to as the Restatement Second.
[17] Clyde Spillenger, *Principles of Conflict of Laws* (Thomson Reuters 2010) 4.
[18] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 68.

theory was centred around two key principles: territoriality; and vested rights[19]. Territoriality being the idea that there can be no law in a state other than the law of that state[20], and consequently no foreign person may bring their personal law with them[21]. Vested rights is focused on where the issue arose, and if valid under those laws, it is valid everywhere[22], on the premise that, "A right having being created by the appropriate [i.e. territorial] law, the recognition of its existence should follow everywhere."[23]For instance, when considering Tort, it would be the *lex loci deliciti*[24], for Contract it would be the *lex loci contracti*[25] and for marriage it is the *lex loci celebrationis*[26]. The traditional approach provides that a marriage valid where celebrated is valid the world over[27], unless it falls under one of the exceptions contained in s.132 of the Restatement First, which sets out that:

"A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

a) Polygamous marriage,
b) Incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
c) Marriage between persons of different races where such marriages are at the domicil regarded as odious,
d) Marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state."

This will all be analysed later in terms of the effectiveness of the choice of law rule and any potential criticisms. At this stage the key element to be extracted is that the *lex loci celebrationis*[28] is one of the main choice of law rules that may be applied to issues of marriage validity in the US, and indeed it has been recognised that it, "remains in force in most states in areas other than torts and contracts."[29]

Interest analysis, or governmental interest analysis as introduced by Brainerd Currie, is an approach based on determining the interest a state has in having its laws applied to the dispute. In setting out the approach Currie describes 'interest' as resulting from

[19] Symeon C Symeonides, 'The First Conflicts Restatement Through the Eyes of Old: As Bad as it's Reputation?' (2007) 32 Southern Illinois University Law Journal 39, 57.
[20] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 68.
[21] Symeon C Symeonides, 'The First Conflicts Restatement Through the Eyes of Old: As Bad as it's Reputation?' (2007) 32 Southern Illinois University Law Journal 39, 57.
[22] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 68.
[23] Joseph Beale, *A Treatise on the Conflict of Laws* (Vol 3, Baker, Voorhis & Company 1935) 1969.
[24] The law of the place of the wrong.
[25] The law of the place of the contract.
[26] The law of the place where the marriage was celebrated, as set out in s.121 of the Restatement First.
[27] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 68.
[28] Hereafter referred to as the lex loci.
[29] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 63.

"(1) a governmental policy and (2) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties or the litigation."[30] In essence, in any of these circumstances, Currie would recognise that the state or country in question may have an interest in the outcome of that case. Therefore, the first stage of Currie's approach is to assess, "whether it is reasonable for each state to assert an interest in applying its respective law to effectuate its policies."[31] This has become known as determining whether there is a false conflict. A false conflict occurs where, on inspection, only one state has such an interest. In the case of a false conflict the law that is to be applied is that of the only state to have an interest. Where on the other hand there is a 'true' conflict, or there is no state that holds an interest, Currie provides that the applicable law is that of the *lex fori*[32]. In setting out interest analysis, Currie ended the analysis at the point of determining whether the case involved a true or false conflict, or was unprovided for. He did not, in the case of true conflict, propose a way in which the state's interests could be weighed against one another. In fact he insisted that this was not the role of the courts, and was instead a "political function of a very high order"[33].

In 1971, the Restatement Second was introduced into the order, and was the work of Willis L. Reese. Although it carried similar aims of achieving certainty and predictability as the Restatement First, this was not to be achieved by the same territorially focused approach[34]. Instead, it was to be "a conscious compromise and synthesis between the old and the new schools"[35]. S.283 deals with the validity of marriage, and provides under s.283(1) that: "The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in s.6." S.283(2) also then goes on to state that:

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

Of course, what is evident in s.283(1) is the need to determine in relation to the particular issue, the state with the 'most significant' relationship. This is where s.6

[30] Brainerd Currie, *Selected Essays on the Conflict of Law* (Duke University Press 1963) 621.
[31] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 98.
[32] Ibid 99.
[33] Brainerd Currie, *Selected Essays on the Conflict of Law* (Duke University Press 1963) 182.
[34] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 216.
[35] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 103.

comes into play. S.6 outlines the way in which this state is to be determined, and having set out in s.6(1) that they are to follow a statutory directive of its own state on choice of law, goes on in s.6(2) to provide the relevant factors when there is no such directive. These factors are: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states; protection of justified expectations; basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and finally, ease in the determination and application of the law to be applied.

The current position is that any of the states may apply any of the above choice of law rules. Some states may have a preference towards certain approaches, which will be examined further later, but the reality is the ability to 'cherry pick', to ensure the desired outcome is achieved. The result of this is that there is no unified approach within marriage validity; we are left without a "dominate view of how to mediate among the interests of the celebrating state, the domiciliary state and other states."[36] As a result, couples will find themselves unable to predict which choice of law rule will apply to them, and, subsequently, whether their marriage will be considered valid in a particular state, bringing with it all of the concerns raised in the previous chapters regarding the potential legal consequences of a marriage being declared invalid. This uncertainty is further propagated when looking more closely at these approaches and how they have developed, and the criticisms of these which, will be explored in the next section. There is the suggestion that the most popular choice of law rules within marriage validity are the two Restatements[37]. What will become clear in the next section is that despite what appear to be quite distinct choice of law rules, elements of the approaches may merge and cross-over with one another, making definitive statements surrounding the dominance of the Restatements somewhat misleading.

[36] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review, 1371, 1387.

[37] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) shows support for the Restatement First, Walter Wadlington & Raymond C O'Brien, *Domestic Relations cases & Materials* (4th edn, The Foundation Press 1998) shows support for the Restatement Second and Robert L Felix and Ralph U Whitten, *American Conflict of Laws: Cases and Materials* (6th edn, LexiNexis 2015) seems to suggest that there are 3 choice of law rules at play in relation to marriage, and they are the Restatement First, the Restatement Second and s.210 of the Uniform Marriage and Divorce Act (as amended in 1971 and 1973). Linda J Silberman, "Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can we Learn from Europe?' (2007-2008) 82 Tulane Law Review 1999, 2000 recognises that whilst there is no uniform choice of law rule in relation to marriage validity, the traditional rules was the lex loci, and that the more modern approach is that of the state with the most significant relationship to the spouses and the marriage under the Restatement Second.

6.4 Does Prevalence Prevent Criticism?

The aforementioned approaches may be the most prominent and popular choice of law rules, but they are not without criticism. The Restatement First provides a very clear general choice of law rule which allows for a level of certainty and predictability in its application. This arguably simple approach has been criticised for the assumption that all cases are black and white[38], cases can be more complex and such a neat and tidy categorisation does not take account of this factorisation. Of greater significance, are the criticisms surrounding the exceptions, or escape clauses provided by s.132. Baude described the reliance on such exceptions as potentially consuming the initial rule[39], and it has been suggested that the Restatement First's continued success is as a result of such escape devices: "[M]ore often, these rules remain in place only because [a] court is able to find a way to evade them by using one of the traditional escapes, such as characterization, substance versus procedure, renvoi, or more often, the [public policy] exception."[40] As was suggested in a previous chapter[41], the need to rely upon exceptions not only shrouds an arguably clear rule, bringing back the inherent uncertainty that is to be avoided, but also casts doubt on the effectiveness of the initial rule. The need for escape clauses such as public policy to be invoked by the judiciary casts doubt on the application of the Restatement First and the *lex loci*: "There is, however, a close correlation between the quality of a choice-of-law rule and the frequency with which judges seek to escape from it."[42]

As shall be demonstrated when looking at each of the incapacities, it is clear that public policy exceptions are indeed invoked by the courts. One such example is the contrasting outcomes in the cases of *Wilkins v Zelichowski*[43] and *In Re May's Estate*[44]. Both cases involved evasive action, as the couples travelled to alternative states in order to conduct a marriage that would not have been permitted by their home state. In *Wilkins*, the couple were avoiding the age requirement of their home state of New Jersey, which required them to be 18 to marry, and so travelled to Indiana where a female can marry from the age of 16 with parental consent. In *In Re May's Estate*, an uncle and niece of half blood wished to marry and would not have

[38] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 68.
[39] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review, 1371, 1387.
[40] Symeon C Symeonides, 'Choice of Law in the American Courts in 1998: Twelth Annual Survey' (1999) 47 American Journal of Comparative Law 327, 331.
[41] At section 5.6.1.
[42] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 75.
[43] 140 A 2d 65, 26 NJ 370 (1958).
[44] 144 NE 2d 4 (NY 1953).

been permitted to do so in their home state of New York, and so travelled to Rhode Island where such marriages were permitted in accordance with their Jewish faith. Both couples had valid marriages according to the *lex loci* and, therefore, *de facto* valid under the application of the Restatement First. However, in *Wilkins* an annulment was granted on the basis that the marriage was void due to non-age, whereas in *In Re May's Estate* the marriage was declared valid in accordance with the *lex loci*. Not only does *Wilkins* demonstrate the utilisation of the public policy exception, when considering the cases side by side, an illustration is provided of how unpredictable outcome determinativeness may be via the utilisation of escape clause manipulation. Both were examples of evasion cases, and both potential grounds for invalidity fell within the exceptions provided by s.132, and yet a contrasting approach was taken by the judiciary. Not only does this appear to wipe away the supposed certainty and predictability offered by the Restatement First[45], but it also hints at the level of discretion available to the judiciary when applying the Restatement First, and, the ability to' cherry pick' in order to reach the desired result. This assertion is yet further advanced upon a more detailed analysis of the judgments in each of the cases.

In Re May's Estate, is a case in which it can be envisaged that the will of the people would be to declare the marriage valid. Having celebrated their marriage, the couple lived together as man and wife for thirty two years, right up until the intestate's death and had six children together. It would therefore seem that the application of the *lex loci* produced the 'correct' outcome. Alternatively, *Wilkins* portrays a less picture perfect marriage. Though the couple had also had a child together, the husband was convicted of multiple offences and was imprisoned, undoubtedly making finding the marriage valid, a less attractive option to the judiciary than that *In Re May's Estate*. While this may appear to be limited evidence to support an assertion of judicial 'cherry picking', the argument gains momentum when exploring the judgment in *Wilkins*. The court openly considered what was in the best interests of the child and the plaintiff. In relation to the child, an annulment would not render him illegitimate, which would, at the time, have been an important consideration, and it was thought that in relation to the plaintiff, an annulment would go some way towards undoing mistakes made through immaturity: "The annulment will also serve to the plaintiff's best interest for it will tend to reduce the tragic consequences of her immature conduct and unfortunate marriage."[46] The court had clearly made a decision on what they believed to be the

[45] Which, Clyde Spillenger, *Principles of Conflict of Laws* (Thomson Reuters, 2010) 23 describes as a "major indictment" of the approach, if its main advantages are uniformity and predictability.
[46] 140 A 2d 65, 26 NJ 370 (1958) 378.

'right' outcome, and therefore, it could be submitted that they used the Restatement First in a way that allowed them to achieve that outcome in both cases.

Interest analysis on the other hand, offers no such escape clauses, and therefore avoids such criticism. With the tenet of the approach being based on the state having an interest in its laws being applied, public policy has already been factored into the determination of the applicable law, and so an exception is not needed. It has been stated that "in its basic core of making state interests the basis for resolving conflict of laws, Currie's analysis was both new to American conflicts law and fundamentally correct."[47] This does not mean that as an approach it is without its problems. These problems rise to the surface when considering the way in which true conflicts are dealt with. Currie insists on the application of the *lex fori*, rather than the courts weighing the competing interests[48]. This reliance on the application of forum law leads to criticism of forum shopping[49] and forum favouritism. The other main criticism of interest analysis under Currie stems from the case-by-case approach that he advocates. A case-by-case approach is highly unpredictable as each case is looked at separately, ultimately preventing uniformity of result[50]. In addition, it is suggested that case-by-case analysis places a heavy burden on the courts when dealing with the cases[51], as it is time consuming; any state with a potential connection would have to be considered by the courts to determine whether it has an interest.

Alternatively, the Restatement Second has been praised for taking a middle ground between the two attempting to avoid the perils of them both as it: "rejects the rigidity of the First Restatement's territorially – focused rule approach. At the same time, it also does not engage in open-ended interest analysis nor, for the most part, does it share the forum - bias of that approach."[52] In spite of this, and its apparent popularity, the Restatement Second it still subject to criticism[53]. The provisions of s.283(1) and

[47] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 101.
[48] As mentioned, this stems from Currie's belief that this is not the role of the courts, however, such a view can be criticised on the basis that "If judges are qualified and empowered to identify governmental interests, they neither lose or abdicate that power the moment they encounter a true conflict." Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning' (2015) 5 University of Illinois Law Review 1847, 1864.
[49] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 214.
[50] Herma Hill Kay, Larry Krammer & Kermit Roosevelt, *Conflict of Laws Cases – Comments – Questions* (9th edn, West Publishing Co 2013) 164-169.
[51] Ibid.
[52] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 216.
[53]"[P]opularity and qualitative success do not necessarily go together."; Symeon C Symeonides, 'A New Conflicts Restatement: Why Not?' (2009) 5(3) Journal of Private International Law 383, 394. Syemonides also goes on to suggest that some of the reasons for its popularity are not all that complimentary to the approach, for instance he states that it provides judges with virtually unlimited discretion.

s.283(2), as set out earlier, are the relevant sections when dealing with marriage validity. The provisions are read together, yet on inspection they are contradictory. S.283(1) suggests the application of the law of the state that has the most significant relationship, whilst s.283(2) appears to revert back to the application of the *lex loci*. These provisions, therefore, sit at odds with one another and are puzzling[54]. It is unclear which rule to apply, and it has been stated that s.283 "is really schizophrenic, and lays down two rules that are about as compatible with each other as Dr. Jekyll was with Mr. Hyde."[55] Dependent upon which provision is selected, the outcomes in respect of validity may completely contrast, and therefore they cannot be read together in the way the Act sets them out. For example, it may well be that if s.283(1) was applied the marriage would be deemed invalid because there was no capacity under the most interested state's law, but if s.283(2) was applied, it may be valid, as the couple had the capacity in accordance with the *lex loci*. This potential scenario was recognised by Baude, who questions what would happen if the state with the most significant relationship under s.283(1) was different to the state where the marriage was contracted[56]. The route that would be taken is unclear:

"if read literally, the Restatement (Second) adopts an alternative-reference type 'rule of validation' – a marriage is valid if it would be valid under the law of: (a) a state that had the most significant relationship, either at the time of the marriage or at a later time, (b) a state having a 'substantial' relation to the parties and the marriage, or (c) the state of contracting."[57]

Aside from the comment above, there is little guidance to determine whether the Restatement Second operates like the alternative reference test explored in chapter 3, in that the courts can apply whichever option would hold the marriage valid. Regardless, the presence alone of the alternative options means it can be criticised in much the same way as the alternative reference test, as it means that the laws of various states may have to be considered, which is time consuming for the court and results in greater expense. In addition, if the courts do not use the options in order to find the marriage valid, the presence of the two options causes uncertainty and a lack of predictability. The two pronged approach means many couples would be unaware whether their marriage would be valid or not where the two tests would produce different results, and determinative legal advice could not be provided. Though not in

[54] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review, 1371, 1389.
[55] Hans W Baade, 'Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)' (1972) 72 Columbia Law Review 329, 358.
[56] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review, 1371, 1389.
[57] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 235.

relation to marriage validity, a similar problem exists within Tort under the Restatement Second and Kay states that: "[T]he consumers of their hybrid product… may find it difficult to follow two separate paths at once."[58]This could equally be true of couples trying to assess the validity of their marriage, and further highlights the uncertainty in the application of the Restatement Second.

Briefly, it should also be mentioned that s.6 of the Restatement Second adds to this uncertainty, as a consequence of the open interpretation the courts are able to give in respect of the factors it considers to be relevant, in determining the state with the most significant relationship. These factors are not ranked in any order of priority, and the courts are able to shape and mould the factors they deem to be most relevant[59]. Some courts may consider factors such as party expectations, certainty and predictability to be most important, alternatively, others may be more interested in the forum's policies, and the policies of other states who have an interest in having their law applied[60]. It will depend upon the angle which the courts take to the factors in the given case, and highlights again that despite suggestions of greater certainty and predictability such advancements are from the truth; in fact, "the Restatement (Second) is broad and imperfect."[61] With the alternative reference type approach, and the discretionary nature of the factors to be considered relevant under s.6, it is apparent why some accuse the approach of providing too much judicial discretion[62], and of gaining popularity amongst the judiciary for reasons of selective outcome determinativeness:

"The Second Restatement, vague and unprincipled as it was, had the distinct virtue of suggesting to the judges that they are not bound by any hard and fast rules… Its eclectic jumble of … near rules [and] norms… furnished courts with any number of plausible reasons to support whatever results they wished to reach. That, no doubt, is the principal reason why judges like it and academics detest it."[63]

[58] Herma Hill Kay, 'Theory into Practice: Choice of Law in the Courts' (1982-1983) 34 Mercer Law Review 521, 556.
[59] See Symeon C Symeonides, 'A New Conflicts Restatement: Why Not?' (2009) 5(3) Journal of Private International Law 383, 394.
[60] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 218.
[61] Willis L M Reese, 'Marriage in American Conflict of Law' (2008) 26(4) International and Comparative Law Quarterly 952, 968.
[62] For instance, Symeon C Symeonides, 'A New Conflicts Restatement: Why Not?' (2009) 5(3) Journal of Private International Law 383, 394.
[63] Friedrich K Jeunger, 'A Third Conflicts Restatement?' (2000) 75 Indiana Law Journal 403, 405-406.

6.5 The Developments within Interest Analysis

Though the traditional approach to interest analysis, as propounded by Currie, has been criticised, there have been various modern developments that have seen interest analysis evolve. One of the key criticisms of Currie's standpoint was forum favouritism, generated by the refusal to weigh competing state interests. This is an aspect in which significant developments can be identified, building on the core foundations of true and false conflicts, and the consideration of state interests that have been considered advantageous within the conflict of laws[64]. These developments to the approach of interest analysis will now be considered to provide a representation of what is meant by the term interest analysis in the modern day.

Professor William F. Baxter introduced comparative impairment[65]. This approach is based on weighing the competing state interests and applying the law of the jurisdiction whose law would be most impaired by not having its law applied[66]. This is a clear departure from the application of the *lex fori* in cases of true conflict, and begins to show how the idea behind interest analysis was developed[67]. The 'better law' approach was then introduced by Professor Robert Leflar[68]. He sought to introduce a method by which true conflicts could be resolved, and so created a system of 'choice influencing considerations', these are; predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interest, and application of the better rule of law. The better rule of law is to be determined by reference to the problem at hand bearing in mind the present day conditions. Much like s.6 of the Restatement Second, the considerations are not listed in priority order. As a result, courts utilising the approach have tended to focus on the better rule of law consideration, thus "[A]lmost invariably, when presented with a conflict between the policies of forum law and those of another state, the court concluded that forum law and policy reflected the "better rule of law"."[69]

---

[64] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 101.
[65] William F Baxter, 'Choice of Law and the Federal System' (1963) 16 Stanford Law Review 1.
[66] See Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 215 and Herma Hill Kay, Larry Krammer & Kermit Roosevelt, *Conflict of Laws Cases – Comments – Questions* (9th edn, West Publishing Co 2013).
[67] In fact, most of the states that have adopted Currie's analysis have rejected the idea of not weighing state interests. For discussion see Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning' (2015) 5 University of Illinois Law Review 1847, 1864.
[68] See Robert Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 New York University Law Review 367 and Robert Leflar 'Conflicts of Law: More on Choice Influencing Considerations' (1966) 54(4) California Law Review 1584.
[69] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 224.

Therefore, despite Leflar's attempts to move away from, Currie's reliance on the *lex fori*, this is yet another approach that leads to forum favouritism.

In addition to tackling over reliance on the *lex fori*, two further approaches aspired to also address the ad hoc case-by-case approach for which interest analysis is also criticised. Professor David Cavers created a set of rules to determine the applicable law in certain areas of tort[70]. His principles of preference are rules that determine which state has the most interest in applying its law, though these rules are quite territorially-based[71]. Analysis of these rules could lead to the conclusion that they are likely to be avoided, as their application could return the law to a position of rigidity as seen under the Restatement First. Finally, this idea of rules based interest analysis can also be seen in Larry Krammer's policy selecting rules, which are based upon the application of the law that would uphold the shared policy[72]. Krammer appears to see the benefits behind a rules based approach rather than ad hoc case-by-case analysis, as it allows states to advance their most important interests, prevents forum shopping, and achieves uniformity and predictability[73]. Given the approach suggested for England and the EU, this development of rules, as opposed to case-by-case analysis, is particularly interesting, and will be returned to later.

Alongside the changes within the academic world, as discussed above, it is also possible to see the development of interest analysis as a core component in selecting choice of law rules within common law. The case of *Babcock v Jackson*[74] was the first tort case to openly abandon the application of the *lex loci*. The case involved a husband and wife from New York who took a trip to Ontario with their friend Babcock. During the trip the three of them were involved in a car accident in Ontario whilst the husband was driving. Babcock sought to sue Mr Jackson and it had to be decided which state's law applied, as New York would permit Babcock to sue as a passenger but Ontario would not. Under the traditional approach of the *lex loci deliciti*, Ontario, as the place of the accident, would have applied, but it was held that Ontario had very little to do with the case. Ontario was simply "the place of the fortuitous occurrence of the accident"[75], and actually, New York was the most connected state to the case, on

[70] As recognised by Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 229, Cavers was working towards "the elaboration of rules rather than to ad hoc adjudication."
[71] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th Edn, West Publishing Co. 2014)228-229.
[72] An example given by Spillinger is the general shared policy of enforcing contracts, and under Krammer's policy selecting rules, in the event of a conflict, the law of the state that would enforce the contract would be applied: Clyde Spillinger, *Principles of Conflict of Laws* (West Academic 2015) 105.
[73] Herma Hill Kay, Larry Krammer & Kermit Roosevelt, *Conflict of Laws Cases – Comments – Questions* (9th edn, West Publishing Co 2013) 205.
[74] 12 NY 2d 473 (1963).
[75] *Babcock v Jackson* 12 NY 2d 473 (1963) 483.

the basis of it being the place where the parties resided, and where the guest-host relationship arose, given Ontario was where the trip was to begin and end:

"Comparison of the relative "contracts" and "interests" of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal."[76]

On this basis New York was the applicable choice of law, and Babcock was able to bring action against Mr Jackson. The court advocated an approach based on grouping of contacts, in order to determine the most interested state. The case encouraged issue-by-issue, dépeçage and policy analysis. This preference for interest analysis continued to be identifiable in the case of *Neumeier v Kuehner*[77], in which the New York Court of Appeals adopted a rules based version of interest analysis. This case again involved a guest passenger in an automobile accident. The family of the deceased passenger wished to sue the family of the deceased driver. The passenger was from Ontario and the driver was from New York, and the choice of law needed to be determined. If New York Law were to apply the passenger's estate would be able to make a claim against the driver's estate, but if Ontario law was applicable the guest statute in operation in Ontario would immunise the driver. In accordance with the rules adopted in the case, Ontario was the applicable law and, provided a defence for the driver's estate. These rules were not territorially based or designed in a similar vein of rigidity as the Restatement First[78], they were reflective of the developments within interest analysis, and were designed to select the state with the greatest interest in a way that would have been achieved regardless of where the case was heard[79]. The rules were designed to provide a determination of the most interested state, resulting in the applicable law, rather than a methodology that,

[76] Ibid 482.
[77] 31 NY 2d 121 (1972).
[78] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 221.
[79] The rules were as follows: "1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest. 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not — in the absence of special circumstances — be permitted to interpose the law of his state as a defence. 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." (*Neumeier v Kuehner* 31 NY 2d 121 (1972) 128).

depending upon its application by the judiciary, may point towards a variety of choice of law rules[80].

Meanwhile, a similar occurrence could be seen within choice of law in contractual disputes. In the case of *Auten v Auten*[81], involving an ex-husband and wife who had entered in to a separation agreement, the *lex loci* was again abandoned in favour of the 'centre of gravity' idea. The couple had married in England and lived there as husband and wife with their children until the husband deserted her some fourteen years later and moved to New York. They later entered into a separation agreement which entitled Mrs Auten to £50 a month. The agreement also required that neither party sue the other, and that Mrs Auten should not lodge a complaint against Mr Auten. Mr Auten failed to make regular payments, leaving Mrs Auten near destitute. Mrs Auten thereby took action in England: first for separation under English law; and when this did not result in payment, to sue Mr Auten for the monies owed under the initial agreement. As a consequence of these actions, Mr Auten argued that under New York Law, as the *lex loci contracti*, the contract had been repudiated and forfeited Mrs Auten's right to payment. The court determined that by considering which state had the most interest in the problem, and where the 'centre of gravity' was predicated, that England was the applicable choice of law. Essentially, the 'centre of gravity' can be likened to the grouping of contacts in order to determine the most interested state. These developments further highlighted the changing perception of the applicable law. To this day, it is evident that a wide variety of choice of law rules are adopted by the US courts in relation to both tort and contract[82]. Whilst these areas are in no way connected to marriage validity, it is argued that they, along with the developing theories amidst the academicians, show what interest analysis means contemporarily. Interest analysis can mean determining the most interested state through tools like policy analysis and dépeçage. It can also mean creating rules that make it clear for all courts what law applies in a particular, and narrowly defined scenario[83]. This is the version of interest analysis promulgated throughout the

[80] This problem with some of the previous approaches is recognised by Symeonides who described such approaches as "formulae that do not prescribe solutions in advance but simply enumerate the factors that one should take into account in the judicial fashioning of an ad hoc solution." He also goes on to recognise that such ad hoc decisions leads to the dissimilar handling of like cases and therefore undermines legitimacy. (Symeon C Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons' (2007-2008) 82 Tulane Law Review 1741, 1795).
[81] 308 NY 155, 124 NE 2d 99 (1954).
[82] See the list of state and choice of law methodologies followed compiled table in Symeon C Symeonides, 'Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey' (2015) 63(2) American Journal of Comparative Law 299, 351.
[83] This is recognised by Clyde Spillenger, *Principles of Conflict of Laws* (Thomson Reuters, 2010) 100 who noted that "[B]oth courts and scholars, after some experience with interest analysis in a series of

proceeding chapters, and is indeed the approach suggested for marriage validity in the US.

In recognising that the Restatement Second is one of the more popular choice of law rules, and is the leading choice of law rule for essential validity of marriage, crossovers between it and other choice of law rules will be considered. In particular, similarities between it and interest analysis will be unpicked, as it is argued that, "interest analysis is often heavily employed in states that generally follow the Restatement (Second)"[84]. According to s.283(1) of the Restatement Second, the court is required to apply the law of the state with the most significant relationship. The state with the most significant relationship is determined by applying the factors set out in s.6. Concentrating on just s.283(1), a superficial resemblance can be seen in the requirement to determine the state with the most interest, and the state with the most significant relationships. These similarities are more apparent when exploring below the surface a little, by considering the s.6 factors. It has already been noted that there is a correlation between these factors, and those listed in the 'better law' sub-division of the interest analysis approach. It is argued that there is a clear overlap between the s.6 factors and the types of considerations that feature generally in the determination of the most interested state, thereby demonstrating that there is a commonality in the approaches of the Restatement Second and interest analysis, particularly when s.283(1) as opposed to s.283(2) is in operation:

"A great many, however, will speak in both "most-significant relationship" and interest analysis terms. Since s.6 of the Restatement Second contains an amalgam of policies, interest analysis can also be an important or even the principal element in a decision purporting to apply the Restatement Second."[85]

On that basis it would seem fair to argue that, whether outwardly, or on a more discrete level, interest analysis plays a significant role in the choice of law process for marriage validity in the US. "Few states follow "pure" interest analysis, but many use policy analysis as part of their resolution of true conflicts, for instance, as a factor in the determination of the law of the "place of the most significant relationship" (Restatement Second)."[86] Subsequently, this evidences that though it may not be

---

decisions, will be tempted to distil from these decisions a set of rules, for conflicts that are likely to arise with some frequency, that will obviate the need for a wholly case-by-case analysis."

[84] Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning' (2015) 5 University of Illinois Law Review 1847, 1891.

[85] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 231. The use of interest analysis within s.6 of the Restatement Second was also discussed by Herma Hill Kay, 'Theory into Practice: Choice of Law in the Courts' (1982-1983) 34 Mercer Law Review 521, 553-554.

[86] Peter Hay, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014) 214.

explicit, interest analysis plays a vital role. It has been argued that in its modified form, interest analysis has influenced much of the landscape of modern American conflict of laws[87], and as a result, putting it at the epicentre of the approach for marriage validity does not seem too inappropriate. The system of dépeçage based interest analysis, designed around creating a rule for each of the incapacities, draws on the best elements of modern interest analysis. It focuses on determining the most interested state, as well as providing rules, which allows for the balance of certainty and flexibility.

The crucial determination of the most interested state is achieved by considering relevant policy issues. Though developments within interest analysis have centred around selecting the most interested state, there has remained an almost fall back position of a territorial approach, despite attempts to avoid it. What is also apparent amongst these developments, and indeed the s.6 factors of the Restatement Second, is the role state policies play in the ascertainment of the most interested state. It is this role that dépeçage based interest analysis hones in on. The approach recognises that in order to understand which is the most interested state, it is first necessary to unpick the purpose behind any potentially applicable laws. Therefore, when looking specifically at the essential validity of marriage, determining the most interested state for each of the incapacities involves consideration of what the purpose behind the incapacity is truly addressing. Awareness of the purpose behind each of them will mean that it is possible to identify what policy concerns may be relevant, and, therefore, what choice of law rule should apply. For instance, some incapacities are centred around the protection of the individual parties to the marriage itself, and others are about social norms and the cultures of society, and so these will uncover very different policy issues which, thereby point towards the most applicable law. Meanwhile, tackling this through the creation of rules, as opposed to an ad hoc case-by-case basis, continues to satisfy the overarching policy objectives of certainty and predictability[88]. The next section will focus on exploring some of the incapacities within marriage validity with the aim of selecting the most appropriate choice of law rule.

[87] See for instance ibid, and Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning' (2015) 5 University of Illinois Law Review 1847, 1891.

[88] This was recognised by Krammer who discussed the advantages and disadvantages of both approaches before settling on rules as providing greater certainty, but expressed the need to avoid "reinvigorating the traditional rules, which practically everyone agrees are overbroad and arbitrary." Larry Krammer, On the Need for a Uniform Choice of Law Code' (1990-1991) 89 Michigan law Review 2134, 2138. Instead what is needed is new rules that provide the certainty without being broad rules that are applied to all incapacities.

6.6 The Incapacities

Dépeçage based interest analysis choice of law rules have already been laid out in relation to England and the EU, and much of the same is proposed for the US. For this reason not all incapacities will be reconsidered in this chapter as this would be somewhat repetitive. The incapacities that are likely to prove contentious, and or, can be evidenced to have utilised various approaches before, will be explored to ensure that the same public policy concerns are relevant. Such examination will also reinforce why the current system and lack of certainty is failing, and is in need of reform.

The specific incapacities that will now be considered are age, consanguinity and polygamy. Whilst same-sex marriage was dealt with as one of the incapacities in previous chapters, given the developments in this area in the US, this will be addressed separately later in the chapter. In addition, re-marriage after divorce will be analysed because of the apparent use of a dépeçage style system already in place, as this may add further weight to the argument that dépeçage based interest analysis should also be adopted within essential validity within the US.

6.6.1 Age

Age is an incapacity where, due to the various age requirements across the states, the potential for conflict is obvious. The minimum age at which a person can marry is determined by the individual state, and though many are in agreement that those ages are sixteen with parental consent and eighteen without, discrepancies across the US exist. For instance, Mississippi allows females to marry at the age of fifteen and males at seventeen with parental consent, yet they must each have attained the age of twenty-one to marry without[89]. In New Hampshire, females as young as thirteen and males as young as fourteen may marry with parental consent, and need be eighteen to do so without consent[90]. Finally, Washington requires a higher age than most states of seventeen to marry with parental consent and eighteen without[91]. Though just a small sample of state law, this demonstrates the differences that can be seen from one state to the next, and shows how conflict could arise. With these variances it is also possible to predict a problem with evasion of state law by couples

[89] Mississippi Code of 1972, s.93-1-5.
[90] New Hampshire Revised Statutes Annotated, s.457(4).
[91] Revised Code of Washington, 26.04.010.

wishing to marry younger than their state permits, if the choice of law rules are not designed to prevent it.

The problem of uncertainty caused by the differing ages across the states is exacerbated by the lack of consistency in the determination of the applicable law. Earlier in the chapter, the case *of Wilkins v Zelichowki* was discussed, and although the *lex loci* should have applied under the Restatement First, they cast that law aside on grounds of public policy and the annulment was granted. Yet in State of *Arkansas v Graves*[92]*,* the exact opposite approach was taken. *State of Arkansas v Graves* centred around the validity of the marriage between Sandra Spearman and Harold Graves aged thirteen and seventeen respectively. Though they had the consent of their parents, they were still too young to marry in Arkansas and so travelled to Mississippi, where they married before returning immediately to Arkansas. The majority decision in the case was that under the application of the *lex loci* in accordance with the Restatement First, the marriage was valid everywhere, including Arkansas. In assessing the validity, the court considered whether any of the exceptions in s.132 of the Restatement First applied, but held that they did not because the statute surrounding the minimum age to marry did not set out its application to marriages conducted outside the state. In reaching such a determination other evasion cases were considered[93], however those cases suggested that evasion was not a reason to invalidate a marriage. It was also stated that strong public policy alone, in the absence of statute, was not sufficient to invalidate a marriage on grounds of age, unlike in cases involving polygamy, incest and miscegenation[94]. This is a striking contrast to the *Wilkins* case, in which the marriage was declared invalid, and subsequently annulled, despite its validity under the *lex loci*, stating, "it seems clear to us that if New Jersey's public policy is to remain at all meaningful it must be considered equally applicable though their marriage took place in Indiana."[95] With these cases sitting at such odds with one another, what is left is undeniable uncertainty as to what choice of law rule will be applied.

In the case of *Graves*, recognition of their marriage, despite their evasionary action, almost permitted the couple to have total disregard for the laws, culture and social mores of the state to which they belonged, as all they had to do was hop across the border and find a state which would marry them. This could, as recognised by Harris

[92] 228 Arm 378, 307 SW 2d 545 (1957).
[93] See for instance *In Re Perez' Estate* 98 Cal App 2d 121 (1950).
[94] *State of Arkansas v Graves* (1957) 228 Arm 378, 307 SW 2d 545, 554 (George Rose Smith J).
[95] *Wilkins v Zelichowski* 140 A 2d 65, 26 NJ 320 (1958) 376.

C.J., have acted as encouragement to other youngsters to employ similar tactics in order to evade stricter laws in their domiciliary state[96], demonstrating that "referring all matters of essential validity to the law of the place of celebration seems the apotheosis of absurdity." [97] At worst, the same unhappy result could have also been reached under the Restatement Second as a consequence of s.283(2)[98], and would, at best, have resulted in uncertainty as to the applicable law given the contradictory nature of s.283 and the lack of certainty and clarity provided by the s.6 factors. Instead, relevant public policy concerns must be considered to identify the appropriate rule when dealing with the incapacity of age. This would then provide a rule that is tailored and policy sensitive, in combination with offering certainty regarding the applicable law.

The prevalent policy issues discussed in relation to age for England centred around protection of young and immature domicilairies. It was feared that they may not fully understand the responsibilities that come with marriage, and the country best able to determine what that all important age is, was deemed to be the domicile of each of the parties. The domicile is, after all, the country that is able to suggest the rate at which maturity is developed within that particular society, given its knowledge of the educational system and how early it encourages maturity and indepedence, culture and societal norms. It is also the country that would have the most interest in protecting that particular individual, which is demonstrated in the provision of statutes declaring a minimum age in the first instance. These same policy concerns and arguments surrounding the law most appropriate to deal with them can be seen in the US. Harris C.J. in his dissenting opinion in *State of Arkansas v Graves* stated that:

"Our own statute was undoubtedly passed because the legislature did not consider that boys and girls under the designated ages were normally or generally possessed of sufficient stability, logic or experience, to reasonably understand the full significance or responsibilities of the marital status."[99]

This clearly demonstrates that the policy concerns were, like England, about protecting potentially immature and unaware domicilairies. This is enhanced when turning back to the point discussed earlier in relation to *Wilkins*, in which the judiciary expressed that annulment would be in the best interests of the 'girl', and be a step

[96] *State of Arkansas v Graves* 228 Arm 378, 307 SW 2d 545 (1957) 550.
[97] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20(3) New York Law School Journal of International and Comparative Law, 387, 421.
[98] Ibid.
[99] (1957) 228 Arm 378, 307 SW 2d 545, 550.

towards undoing some of the damage caused by her immaturity. The protective nature of these policy concerns, combined with the specific knowledge needed to determine the minimum ages, clearly exhibits that it is the pre-nuptial domiciliary law of the parties that must be applied, signifying that the most appropriate choice of law rule for age is the dual domicile theory

6.6.2 Consanguinity

As with age, consanguinity is an area in which there is great potential for diversity across the states. An examination of just a handful of states demonstrates the types of differences that can occur. In the State of New Hampshire, the Revised Status Annotated at 457:3 makes it clear that any marriages contracted outside that state that are prohibited under 457:2 will not be recognised. 457:2 includes the prohibited degrees of relationship, which for the purposes of New Hampshire includes a prohibition on marriage between cousins. Similar prohibitions on marriage between first cousins can be seen in the states of Mississippi[100] and Washington[101]. Whereas, in the states of Georgia[102] and Florida[103] marriages between cousins appear to be permitted. As a result of these divergences it is important that the law is clear and predictable so that a couple would be able to establish whether their marriage would be recognised. At present the US is far from achieving such a position, and case law only highlights this problem due to the inconsistencies that litter the area: "inconsistencies which are illuminated in sharp focus by contrasting decisions on the validity of marriage between uncle/niece and first cousins."[104]

A great many of the cases appear to apply the *lex loci*, and therefore essentially the Restatement First[105]. However, with the Restatement First comes the escape clauses, which are then utilised by the courts. One such example is the case of *Catalano v Catalano*[106], in which the couple, who were uncle and niece married in Italy where such marriages were valid, yet the marriage was not recognised in Connecticut where the husband was domiciled, and the wife later moved to reside,

[100] Mississippi Code of 1972 s. 93-1-1.
[101] Revised Code of Washington 26.04.020.
[102] Georgia Code (2010) 19-3-3.
[103] Florida Statutes 2016 s.741.21.
[104] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20(3) New York Law School Journal of International and Comparative Law, 387, 431.
[105] See for instance *In Re May's Estate* 144 NE 2d 4 (NY 1953), *Catalano v Catalano* (1961) 148 Conn 288, *Re Estate of Loughmiller* 229 Kan 584 (1981), *Re Mortenson's Estate* (1957) 83 Ariz 87 and *Etheridge v Shaddock* 288 Ark 481 (1986).
[106] (1961) 148 Conn 288.

on public policy grounds. This stands firstly in direct contrast to cases such as *In Re May's Estate*, where no such public policy ground was invoked, but it also demonstrates the difficulty in predicting whether such policies will be invoked. *In Re May's Estate* is an example of an evasion case where the couple were purposefully avoiding the laws of their state when they married and the marriage was still held valid, whereas, *Catalano* does not appear to be an attempt at evasion as the wife continued to live in Italy where the marriage was permitted, for a further five years, yet public policy was invoked and the marriage denied. This appears to fly in the face of logic when considering which would be most likely to be deemed valid. *In Re Mortenson's Estate*[107], it was stated that "A marriage declared void by our statute cannot be purified or made valid by merely stepping across the state line for purposes of solemnization. We cannot permit the public policy of this state to be defeated by such tactics."[108] This is exactly what *In Re May's Estate* allows, whilst denying a marriage which by all accounts does not fit the profile of a typical evasion case. With such apparent lack of rationality, the use of the Restatement First, even if this were to be the sole choice of law rule, would not provide the levels of certainty and predictability sought, thereby leaving couples potentially unaware of problems with the validity of their marriage, and the legal consequences that may follow.

It is also clear that the Restatement Second may be applied by the courts. The case of *Cook v Cook*[109] is one such example. This case involved a marriage celebrated between two cousins in Virginia where such marriages were permitted. It was not until five years later that the couple decided to move to Arizona where such marriages were void, thus evasion was not their intention. Nevertheless, the law of Arizona was deemed to be applicable as a result of s.6(1) of the Restatement Second, regardless of the fact that the court recognised that Virginia had the most significant relationship to the parties at the time of the marriage[110]. This is an outcome that would have been difficult to predict given that Virginia was the state with the most significant relationship, and the *lex loci*. In his judgment Barker J sets out that "while Arizona invokes some principles from the Restatement, we do not follow it in certain significant regards."[111] As a result, not only is it difficult to know what choice of law rule will be applied, it is further complicated by the cherry picking, selective way in which the rule is applied. Like the Restatement First, even if the Restatement Second was

[107] (1957) 83 Ariz 87.
[108] (1957) 83 Ariz 87, 90.
[109] (2005) 209 Ariz 487.
[110] *Cook v Cook* (2005) 209 Ariz 487, 493.
[111] Ibid 490.

determined to be the appropriate choice of law rule, it is evident that certainty would still not be realised.

Finally, some cases take different approaches altogether. In *Ghassemi v Ghassemi*[112] a marriage in Iran between two cousins came before the courts of Louisiana. In this case, despite Louisiana not permitting marriages of this nature, a hybrid approach was taken by the court, as it was held that the marriage would be recognised if it were valid under the *lex loci* or the parties pre-nuptial domiciliary law unless, it violated a strong public policy of the state. This utilisation of domiciliary law can also be seen in the case of *Meisenholder v Chicago & NW Ry. Co.* [113] and, *Schutt v Siems*[114]. In *Meisenholder,* the parties to the alleged marriage were cousins and both domiciled in Illinois. Given such a degree of relationship was prohibited in Illinois, the parties married in Kentucky, before immediately returning to their home state. Sometime later, the 'husband' died in the course of his employment and so the 'wife' brought a suit under the Federal Employers' Liability Act. However, the marriage was declared invalid based on the domiciliary law of the parties. Likewise, in *Schutt v Siems,* a marriage between two cousins, one of whom was domiciled in Illinois, and the other in Minesotta (where the marriage took place, and where the couple then settled) was declared void when the couple sought to adopt a child, as the courts of Illinois applied the law of the pre-nuptial domicile of the party domiciled therein. These cases effectively demonstrate the important role domicile may take, even in cases such as *Schutt*, where the marriage does not offend the community where the couple actually live.

What all of the aforementioned cases on this incapacity demonstrate is that there is a lack of consistency over what choice of law rule will be applied. Across the few cases mentioned, the courts have adopted: the *lex loci* under the Restatement First[115]; the exceptions under s.132 of the Restatement First, to invalidate a marriage that would have been recognised had the *lex loci* been applied[116]; the Restatement Second[117]; a hybrid of the *lex loci* and the parties pre-nuptial domicile[118]; and the parties pre-nuptial domicile itself[119]. In essence, "they reveal a beguiling Hobson's

[112] 998 So. 2d 731 (2008).
[113] 213 NW 32 (1927).
[114] 198 III App 342 (1916).
[115] *In Re May's Estate* 144 NE 2d 4 (NY 1953).
[116] *Catalano v Catalano* (1961) 148 Conn 288.
[117] *Cook v Cook* (2005) 209 Ariz 487.
[118] *Ghassemi v Ghassemi* 998 So 2d 731 (2008).
[119] *Schutt v Siems* (1916) 198 111 App 342.

choice for the legal adviser"[120]. Instead, what is needed is a choice of law rule that is designed to cope with the specific policy issues of importance within consanguinity. Such a rule would avoid the lack of consistency demonstrated above, and would provide couples with certainty and predictability.

The policy concerns surrounding consanguinity are predominantly related to society and what it considers acceptable. This involves protecting society from a relationship it would find abhorrent, but also preventing the promotion of such relationships within that society. This is apparent when considering the case of *Etheridge v Shaddock*[121] that involved a marriage between two cousins. Though such marriages were not permitted in the host state, it was valid in accordance with the *lex loci*, and given such a marriage would not "create much social alarm"[122] it was deemed valid. It is evident that how society would react to the marriage was of primary importance to the judiciary in this case, as opposed to the protective nature with regards to the individuals involved. A mirrored thought process can also be seen in the case of *Devine v Rodgers*[123]. The case involved an uncle and niece who had married in Russia where such a marriage was permitted, however, when attempting to enter Pennsylvania as his wife, the marriage was declared invalid and entry was denied on the basis that their marriage would be offensive to the inhabitants of Pennsylvania:

"Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public."[124]

Alongside these concerns, it has also been suggested that religion and eugenics play a part[125]. Whether it is one or all of these factors that the court considers, it is the country that the couple intend to live in that will be impacted. It is that society that need be accepting of the relationship along with any predominant religious cultures, just as it is that society that will be impacted by any negative genetic predispositions. It is, therefore, that society that should determine the validity of the marriage; it is a

[120] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20(3) New York Law School Journal of International and Comparative Law, 387, 431.
[121] 288 Ark 481 (1986).
[122] *Etheridege v Shaddock* 288 Ark 481 (1986) 482.
[123] 109 F 886 (DC Pa 1901).
[124] *Devine v Rodgers* 109 F 886 (D.C. Pa) (1901) 888.
[125] See for instance; Walter Wadlington & Raymond C O'Brien, *Family Law in Perspective* (2nd edn, Foundation Press 2007) 26 "often justification for state prohibitions and the void consequences of an incestuous marriage is grounded in religious dogma, but the prohibition may also result from concern over genetics, competition among family members, and historical revulsion."

public interest rather than a private interest at stake[126], and the choice of law rule should reflect this. On that basis it is suggested that like England, the continued recognised relationship theory would be the most appropriate rule for this incapacity. It would mean that the law of the country where the couple intend to live, and therefore the impacted state will apply. This is the most policy sensitive option, and although the continued recognised relationship theory comes with the caveat that, should a couple later decide to move, the marriage will continue to be recognised if it has been subsisting for a reasonable period of time, there has to be some protection for couples who had not attempted to evade any laws. It is the rule that considers the relevant policies, but adds a little flexibility to ensure overarching aims such as marriage validity, stability, certainty and predictability are not lost when couples cross state borders.

6.6.3 Polygamy

Thirdly, if we look at the incapacity of polygamy, despite the fact that polygamous marriages are prohibited in all the US states[127], there are still divergences in treatment within the common law. In cases such as *Estate of Bir*[128] and *Re Estate of Shippy*[129]*,* polygamous marriages were recognised for the purpose of inheritance. Likewise, in *Estate of Fallou Diba*[130] a polygamous marriage was recognised to allow wrongful death proceeds to be split between the deceased's two wives. Thereby, highlighting that while the law in the US prohibits polygamous marriages, they may still be recognised for certain purposes. On the other hand, in *Moustafa v Moustafa*[131], a foreign bigamous marriage was refused recognition by the courts of Maryland, on the basis that it contravened public policy, showing that comity will not always mean a polygamous marriage is recognised. These opposing results mean that for couples who may have validly entered into a polygamous marriage, there is no certainty that it will be recognised in the US. Polygamy is still permitted and practiced in countries in Africa, the Middle East and South Asia, and so, for the couples migrating to the US from such countries the position surrounding the validity of their marriage is unclear.

[126] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20(3) New York Law School Journal of International and Comparative Law, 387, 433.
[127] Greggary E Hines, 'Polymmigration: Immigration Implications and Possibilities Post Brown v Buhman' [2016] 58 Arizona Law Review 477, 488.
[128] 188 P 2d 409 (Cal Ct App 1948).
[129] 678 P 2d (Wash Ct App 1984).
[130] 2010 NY Slip Op 51199 (u).
[131] 888 A 2d 1230 (Md Ct Spec App 2005).

This problem is exacerbated when one considers the fact that the US has seen high levels of immigration from said countries[132]; and it is, for that reason, vital that certainty of the applicable law is accomplished in the area.

In order to best determine the most appropriate law, it is important to understand the policy behind the non-recognition of polygamous relationships in the US. This denial stems from the desire to protect cultural, societal and religious norms as, "the Anglo-American tradition is the aim to universally prescribe the institution of monogamy."[133] This aim, whilst now embedded within US culture may very well stem from a religious 'undercurrent'[134]. As a Christian country, monogamy is a pre-requisite of marriage, and so has become quite matter of fact. However, in some of the countries mentioned above, different religions are prevelant, and polygamy may be accepted. For instance, under Islamic faith, polygamy is permitted in the Qur'an, and polygamous marriages are allowed in accordance with Shari'ah law[135]. On this premise it would seem that the purpose behind the denial and non-recognition of such marriages is about protecting US society, as opposed to the individuals that are party to the marriage. This is further supported by Lines' discussion of anti-polygamy laws within American immigration law[136]. He stated that those celebrating polygamous marriages were kept out of the US for fear that such practices and "its taint would challenge 'Christian monogamous marriage' and corrupt white civilized society."[137] It was thought that such marriages were repugnant to the laws of nature of Christian nations[138]. Therefore, like England, it is suggested that the appropriate choice of law rule is the continued recognised relationship theory. The application of the continued recognised relationship theory would provide recognition and show comity where couples have been subsisting in the relationship for a reasonable period of time, whilst not requiring the US to permit polygamous marriages in their territory. The application of the continued recognised relationship theory, would mean that in relation to couples who had intended to move to the US when they married, or did so quite quickly thereafter,

[132] A discussion of this can be seen at Greggary E Hines, 'Polymmigration: Immigration Implications and Possibilities Post Brown v Buhman' [2016] 58 Arizona Law Review 477, 482.
[133] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20(3) New York Law School Journal of International and Comparative Law, 387, 437.
[134] Ibid.
[135] Peter Nash Swisher, '"I Now Pronounce You Husband and Wives": The Case for Polygamous Marriage After United States v Windsor and Burwell v Hobby Lobby Stores' (2014-2015) 29 BYU Journal of Public Law 299, 308-309.
[136] Greggary E Lines, 'Polymmigration: Immigration Implications and Possibilities Post Brown v Buhman' [2016] 58 Arizona Law Review 477, 495.
[137] Ibid.
[138] *Matter of H 9 IN Dec*. 640 (BIA 1962).

the US, as the country with the greatest concern in the status and the validity of the marriage, would be able to deny recognition, just as they can prevent such marriages from occurring in their borders. Similarly, polygamous marriages celebrated in states such as Utah, in line with the Mormon faith, would continue to be legally invalid. It is suggested that the continued recognised relationship theory would carefully tred the line of providing certainty, recognition, comity and tolerance whilst also recognising and protecting the relevant public policy issues. As outlined above there are cases in which the US have been willing to recognise polygamous marriages, thus it is not absurd to think that the suggested approach could be achieved; " Given the United States' previous, limited recognition of polygamous marriages the idea of giving some degree of recognition to these relations is not entirely unsupported and the absolute ban is not entirely necessary."[139]

It is proposed that the choice of law rules created and advocated for England and the EU should also apply in the US. Although each incapacity has not been individually considered, it is evident that similar public policy concerns exist. While the continued recognised relationship theory may appear quite a shift from some of the existing choice of law rules, given there is no intended matrimonial home theory in the US, this can be likened to the most interested state, or the state with the most significant relationship. It is argued that the continued recognised relationship theory takes account of factors such as: party expectations; policies of the interested state; certainty and predictability of result; and the validation of marriages, and for that reason can be assimilated to what was sought to be achieved by the likes of the Restatement Second and the developing theory of interest analysis[140]. As with the position in England, it is also argued that no one rule, whether that be the Restatement First or the Restatement Second should be applied to marriage validity, as they do not take account of the varying public policy issues concerned[141]. Likewise, nor can the states continue to assess each case individually, as this causes problems for certainty, predictability and, of course, court time. Instead, the rules set out here, and in the previous chapters, provide the appropriate middle ground.

---

[139] Greggary E Lines, 'Polymmigration: Immigration Implications and Possibilities Post Brown v Buhman' [2016] 58 Arizona Law Review 477, 505.

[140] These important factors were also recognised by Willis L M Reese, 'Marriage in American Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 952, 965.

[141] As was recognised per Willis L M Reese, 'Marriage in American Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 952, 952 when he stated "Doubt will be expressed that the courts can "achieve socially desirable results if they apply the same conflicts rule" in all cases, where the validity of a marriage is in issue. Instead, the suggestion will be made that the validity of a marriage should be determined in the light of the particular issue involved."

6.6.4 Re-Marriage After Divorce

The incapacity of re-marriage after divorce offers an interesting insight into how dépeçage could work within marriage validity. While family law is on the whole dealt with at a state level, divorce recognition rules exist at a federal level. There are three firmly established rules of constitutional magnitude governing divorce recognition as laid out by Baade[142]. Firstly, the domiciliary state of either of the parties has the power to dissolve the marriage *ex parte* without the need to establish personal jurisdiction over the other spouse[143]. Second, a divorce obtained *ex parte* remains vulnerable to collateral attack in the domiciliary state of the respondent spouse, on the basis that domicile was incorrectly adjudged to prevail in the original set of proceedings[144]. Finally, if the other spouse appears in the proceedings, meaning the divorce is *inter partes*, then any divorce based on the jurisdictional requirement of domicile is binding on sister states to the same extent as it is in the issuing state[145]. Forum law is then applied by the court that has jurisdiction to grant the divorce, and as “”domicile” is the nexus for jurisdiction, application of forum law really means application of the law of the “domicile””[146]. This divorce must then be recognised by all sister- states under full faith and credit. Full faith and credit is a clause within s.1 of the US Constitution, and ensures that states honour the court judgments of other states. This, however, is not necessarily the case when dealing with foreign divorces. While no distinction is made in the Restatement Second between sister-state and international conflicts in the divorce sphere, meaning the rule could equally apply, this relies on comity. Some states may apply comity but there is no certainty of this unlike with the sister-states and, as was recognised by Reed, there has been some creativity employed by the judiciary in finding a marriage subsequent to a divorce valid for one purpose, and invalid for another[147].

It is an area where they have stepped away from the idea that one choice of law rule applies to all matters of essential validity, and replaced it with issue specific

[142] Hans W Baade, ‘Marriage and Divorce in American Conflicts Law: Governmental – Interests Analysis and the Restatement (Second)’ [1972] Columbia Law Review 329, 342-343.
[143] *Williams v North Carolina* 317 US 287 (1942), summarised in Restatement (Second) s.71.
[144] *Williams v North Carolina* 325 US 226 (1945).
[145] *Sherrer v Sherrer* 334 US 343 (1948), summarised in Restatement (Second) s.73.
[146] Linda J Silberman, ‘Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What can we Learn from Europe?’ (2007-2008) 82 Tulane Law Review 1999, 2009.
[147] Alan Reed, ‘Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules’ (2000) 20(3) New York Law School Journal of International and Comparative Law, 387, 428.

consideration; thereby providing yet further support for the proposed approach[148]. What Reed discusses is dépeçage already being utilised within one of the incapacities. In the case of *Estate of Borax v Commissioner of Internal Revenue*[149] the husband had obtained a divorce from his first wife in Mexico and re-married, but his first wife challenged the subsequent marriage in the New York courts on the premise that the divorce would not be recognised by the New York courts as a consequence of the somewhat liberal approach of Mexico, meaning the second marriage was not valid. The courts agreed and the second marriage was declared invalid. However, the husband and second wife were living together as husband and wife and claiming married person's allowance in respect of taxation benefits. As a result of the initial decision the Internal Revenue sought to claim for underpaid tax, but the United States Court of Appeals (Second Circuit) held that despite the decision in New York, the divorce in Mexico was valid and the second marriage also valid for tax purposes. What we see is a distinction being made between the issue of marital status and that of tax law. The courts used dépeçage to ensure that the most appropriate choice of law rule was used for each of the issues and that is, in essence, what is being proposed for the essential validity of marriage. Each of the incapacities should be dealt with as separate issues under dépeçage, with a choice of law rule in place for each of them and re-marriage after divorce should be viewed as an example of how this can be achieved; "[I]t should form a catalyst for policy-orientated reform of other impediment grounds to marital validity."[150]

6.7 Rules at a Federal Level

The identification of the appropriate choice of law rule for each of the incapacities also signals the need for these rules to be adopted at a federal level. The current position is that the states are able to determine the applicable law, not only does this cause a difference in treatment from one state to the next, but as we have also seen, there is a lack of consistency within the states and the incapacities:

"Courts tend to be less interested in theoretical purity and more interested in reaching what they perceive to be the proper result. The majority of cases that have abandoned

[148] For further discussion see ibid 430-437.
[149] 349 F 2d 666 (1965).
[150] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20(3) New York Law School Journal of International and Comparative Law, 387, 429.

the traditional approach tend to use modern approaches interchangeably and often as *a posteriori* rationalizations for results reached on other grounds."[151]

The dépeçage based interest analysis approach works on the premise that it is adopted by every state so as to produce the certainty it seeks to offer. Though this may appear to be a dramatic shift from the current position in the US, as has already been identified, there are some similarities and support for such an approach. Reese also recognised some time ago that, "The ideal solution, as would also be true in many other areas of choice of law, would be to develop a considerable number of relatively narrow rules of choice of law, each tailored to fit a particular or a number of specific issues."[152] He then went on to recognise that the current knowledge was not adequate for such a task, and that it might have to wait until more experience has been gathered. This author propounds that, in the approximate forty years that have passed, such knowledge and experience has been gathered, and the time has come to put these rules into place and satisfy such aspirations[153].

The suggestion of the adaptation of federal rules may, on the surface, appear controversial, and unlikely. Indeed in addition to marriage validity, much of family law is governed by the states. This has begun to evolve, and there is an expanding federal role within family law. The United States Supreme Court has made pronouncements which has led to federal law supervision of family law practices, such as pronouncements on interracial marriage[154], a right to privacy in marital relationships[155], and more recently, the ruling on same-sex marriage, requiring all member states to permit and recognise same-sex marriages[156]. Alongside the Supreme Court providing a federal backbone, so too has Congress, with enactments such as DOMA and the Violence Against Women Act. These Acts provide evidence that it is possible to regulate aspects of family law at a federal level, and there seems no obvious reason why this could not be achieved in relation to choice of law rules for marriage validity. This argument is further supported by the highly controversial outcome in *Obergefell v Hodges*. Despite the fact that same-sex marriage had begun

[151] Symeon C Symeonides & Wendy C Perdue, *Conflict of Laws: American, Comparative, International Cases and Materials* (3rd edn, West Academic Publishing 2012) 124.
[152] Willis L M Reese, 'Marriage in American Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 952, 966.
[153] Symeonides recognises that it is now "necessary and possible to articulate a new breed of smart, evolutionary choice-of-law rules… to restore a proper equilibrium between certainty and flexibility" in Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning' (2015) 5 University of Illinois Law Review 1847, 1907.
[154] *Loving v Virginia* 388 US 1 (1967).
[155] Walter Wadlington & Raymond C O'Brien, *Family Law in Perspective* (2nd edn, Foundation Press 2007) 7.
[156] *Obergefell v Hodges* 135 S Ct 2071 (2015).

to be permitted in many states[157], it remained subject to strong objection in others[158], and so it is argued that if a federal rule can be achieved in such a highly controversial area, it can be achieved within marriage validity. Baude, in this sphere, argues that "Congress should decide what law governs marriage for federal purposes, such a provision could cut across all of the regulatory and statutory definitions and provide a uniform and predictable approach."[159]

Finally, if such a proposal can be made for uniformity at an EU level, it can also be achieved at a federal level across the US[160]. Fundamentally, the EU is made up of Member States who each have their own laws, and primarily deal with areas pertaining to family law. Likewise the US is made up of multiple states that have many areas upon which they tend to govern at a state level, one of which being family law. What both jurisdictions also have in common is their submission to a system which, on certain matters, has overarching control. Thus, it might be "possible to come gradually to at least a degree of "rapprochement" between European and American systems"[161]. The similarities between the two legal systems are, it is argued, substantial enough to allow such arguments around rapprochement to be made. Silberman discusses how the United States can learn from Europe in relation to conflict of laws in marriage and divorce[162], and notes that there could be a basis for achieving a national federal standard[163]. She recognises the importance of domicile or nationality within the EU[164], however, unlike Silberman the focus of this research, when considering domicile, is not about the prevention of evasion cases, but about recognising that the domiciliary state is the best state at advancing certain policy concerns. For that reason, unlike Silberman, it is not considered that the law of the domicile is of importance when dealing with same-sex marriages. As highlighted in chapter 4, same-sex marriage and the recognition of them is about societal norms, and the continued recognised relationship theory was as a result, identified as the

[157] Examples include New York, California, Nevada and Utah.
[158] Including, North Dakota, Ohio, Kentucky and Tenesse.
[159] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review, 1371, 1401.
[160] Symeon C Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons' (2007-2008) 82 Tulane Law Review 1741, 1797 discusses generally the potential for statutory choice of law rules across the EU and believes it is achievable, and then goes on to state "[A] fortiori, they should be feasible at the federal level within the United States where the differences among the various states are not as deep as those among the member states of the European Union."
[161] Edorado Vitta, 'The Impact in Europe of the American "Conflicts Revolution"' (1982) 30 The American Journal of Comparative Law 1, 18.
[162] Linda J Silberman, 'Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can we Learn from Europe?' (2007-2008) 82 Tulane Law Review 1999.
[163] Ibid 2007.
[164] Ibid 2002-2003.

appropriate rule. What Silberman does show is recognition of the importance of domiciliary law, which does feature within the choice of law rules proposed to be adopted at a federal level, and so this understanding of its importance, and the role it has to play within marriage validity, is key. More importantly, Silberman notes that the US are able to learn from the EU, and that a federal approach could be developed. She also notes that there has been no movement within Europe to create a unified approach for marriage recognition[165], again implying that, if such uniformity can be achieved in one, it can be achieved in both.

6.8 Same-Sex Marriage in the US: Paving the Way for Choice of Law Success?

Until the recent decision in *Obergefell v Hodges*, the law on same-sex marriages in the US was plagued with uncertainty, and was somewhat of a "legislative Gordian knot for almost three decades"[166]. As with England, for a long time same-sex marriage was widely denied in the US, however, as set out in chapter 4, the case of *Baehr v Lewin*[167] in Hawaii looked set to change this, with a planned change to the definition of marriage applying the *Loving* Principle[168]. While the case was not fruitful in creating rights for same-sex couples to marry, it did lead to the status of reciprocal beneficiaries[169]. Simultaneously, such attempts to recognise same-sex marriage were subject to resistance and hostility: "met with countervailing efforts to undo the decisions that created them."[170] Congress created the Defence of Marriage Act[171] in 1996 which, as previously outlined, limited the definition of marriage to those of the opposite sex, and prevented those in a same-sex marriage from receiving federal economic benefits. Some states also went on to create mini-DOMAs, but as time passed more states began to allow same-sex marriage, which in turn lead to

[165] Ibid 2007-2008.
[166] Ian Curry-Sumner & Scott Curry-Sumner, 'Where will it all End? Common Trends in American Same-Sex Relationship Recognition' (2009) 28(3) Equal Opportunities International 233, 233.
[167] 852 P 2d 44 (Haw 1993).
[168] *Loving v Virginia* 388 US 1 (1967) was a case surrounding interracial marriage and lead to the prohibition of rules preventing couples from opposite races from marrying as such laws were held to be unconstitutional. The loving principle is that marriage must not be denied where it would be unconstitutional to do so in accordance with the Due Process Clause and the Equal Protection Clause of the constitution.
[169] Reciprocal beneficiaries was a status that provided similar economic and status benefits to those enjoyed by married persons (Haw Rev Stat S.572 C-4 & 5 (2008)).
[170] Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale University Press 2006) 10.
[171] Hereafter referred to as DOMA.

uncertainty of recognition when couples cross state borders. This uncertainty is heightened by the various choice of law rules at play in the US and the escape clauses provided by the public policy exception for the state with the most significant relationship. On this premise, the position prior to *Obergefell* appears to mirror the uncertainty spanning the EU when determining to what extent, if at all, a same-sex marriage would be considered valid when crossing state borders.

Regardless of the controversy in the US, and the fact that not all states had come around to allowing same-sex marriage[172], the judgment in *Obergefell* was transformatively determined. This judgment requires that all states recognise and permit same-sex marriage. This has, on the whole, been successful as every state now permits and recognises validly performed same-sex marriages. Though a few counties within the states of Alabama, Kentucky and Texas were still, as of the 21st August 2015 not issuing marriage licenses to same-sex couples, and as of the 21st June 2017 Alabama has seven counties that refuse to issue any marriage licenses, and one county in Texas that refuses to confirm whether marriage licenses would be issued to same-sex couples[173], this is not a state wide issue[174]. Thus, regardless of these issues, same-sex couples in the US now have certainty regarding their marriage and its validity, they need not fear that a move to an alternate state will see their marriage declared invalid.

This is such a dramatic shift, and one that has only been achieved as a result of it being dealt with at a federal level. The successful adaptation of such a controversial rule intensifies the belief that this can in some way be reflected across marriage validity in the US. The desired result can be achieved by implementing the aforementioned choice of law rules for each of the incapacities at a federal level in order to create the much needed unity, certainty and predictability.

Earlier in the chapter, it was considered what the US could learn from the EU in terms of choice of law rules, however, in relation to same-sex marriage the tables have been turned. As demonstrated, much of American conflict of laws, particularly in relation to family law, can be criticised for its lack of certainty. This is not something the EU

[172] Prior to *Obergefell v Hodges* same-sex marriage was banned in North Dakota, Michigan, Ohio, Kentucky, Tennessee, Georgia and Louisiana. The ban had also been ruled unconstitutional, but was still in place in Alabama, Arkansas, Mississippi, Missouri, Nebraska, South Dakota and Texas. See http://ballotpedia.org/local_government_responses_to_Obergefell_v._Hodges#Background_of_local_control_in_same-sex_marriage (accessed 23/03/16).
[173] http://ballotopedia.org/Local_government_responses_to_Obergefell_v._Hodges#Texas (accessed 28/06/17).
[174] http://ballotpedia.org/local_government_responses_to_Obergefell_v._Hodges#Background_of_local_control_in_same-sex_marriage (accessed 23/03/16).

would wish to replicate, but credit must be given when it is due and "European scholars should attempt to evaluate what is useful about American precedents and ideas."[175] *Obergefell* clearly represents a precedent that has changed the law for the better, it has created a unified position in relation to marriage validity, and this should encourage the EU to do the same. Although the US and the EU are far from carbon copies of each other's legal systems, the earlier similarities must be echoed. They are a group of states with differing, and at times controversial laws, however, if these hurdles can be overcome across the fifty states of the US they can across the current twenty eight Member States of the EU.

The US should act as an inspiration for the EU, lighting the way to certainty and predictability in an area bedevilled by conflict and uncertainty. Concerns regarding some Member States, and how far away they seem from accepting same-sex marriage, must be balanced against the more limited proposal advocated for the EU. The US have achieved a position allowing same-sex couples to marry in all states, whereas the aim of this research in relation to the EU is to achieve the policy aims of certainty, and predictability. Though the goal posts may shift in the future, the first step, and the one sought in this research, is to achieve the already discussed policy objectives of certainty and predictability for same-sex couples. These policy objectives have been the primary concern throughout this research, and in chapter 5 it was thought that they could be accomplished throughout the EU in relation to marriage validity through harmonisation. *Obergefell,* and the unified position it created, is yet further support that harmonisation, even if on a more limited choice of law basis, is the way forward. In previous chapters other public policy issues have been discussed that are relevant to same-sex marriage, such as equality and the symbolic status of marriage. These are issues that were also tackled in the *Obergefell* ruling, and is, therefore, additional evidence that the EU should seek to replicate this by a unified choice of law rule, as proposed in chapter 5.

6.9 Conclusion

One of the key facts that has been evident throughout this chapter is the abundance of possible approaches to choice of law the judiciary could, and do, take across the individuated US states. Though there are three primary choice of law rules that are

[175] Edorado Vitta, 'The Impact in Europe of the American "Conflicts Revolution"' (1982) 30 The American Journal of Comparative Law 1, 14.

favoured, there appears to be little by way of consensus when examining previous case law, to determine which will be utilised[176]. There is simply "no dominant view of how to mediate among the interests of the celebrating state, the domiciliary state and other states."[177] With the potential to create entirely different outcomes, the disparate approaches bring with them uncertainty and a lack of predictability. This is exacerbated by the various ways in which interest analysis has been developed, with some approaches remaining focused on a case-by-case analysis such as the better law approach, and others opting for a more rules based approach; for instance, Larry Krammer's policy selecting rules. All of this, combined with the fact that each state is able to implement its own choice of law rule, means that the ease of crossing state lines around the US, may be complicated by ramifications to a couple's marital status.

In assessing the choice of law rules it was apparent that each could be criticised. The Restatement First leads to a heavy reliance on exceptions and escape clauses which, are recognised as merely prolonging the life of bad choice of law rules[178]. The Restatement Second causes uncertainty due to its alternative reference style approach[179], and interest analysis under Currie has the potential to lead to forum shopping and forum favouritism. However, the academic and common law developments within interest analysis highlight that it has progressed to be more reflective of the approach laid out in the previous chapters. Attempts to determine the most interested state in true conflicts, and a move towards rules based analysis as opposed to case-by-case, indicates that dépeçage based interest analysis could too be the optimal solution in the US.

The proposed implementation of a dépeçage based interest analysis approach in the US required consideration of at least some of the incapacities. This was essential to ensure that relevant public policy concerns were borne in mind before replicating the rules proposed for England and the EU. The incapacities that were considered were, age, consanguinity and polygamy. In exploring age it was apparent that the associated policy concerns were about the protection of the parties entering into the marriage, and whether they were mature enough to handle all that comes with such a status. Consequently, it was determined that the state most concerned with

[176] See for instance *In Re May's Estate* 144 NE 2d 4 (NY 1953) that applied the Restatement First, *Cook v Cook* (2005) 209 Ariz 487 in which the Restatement Second was applied, and *Ghassemi v Ghassemi* 998 SO 2d 731 (2008) where a hybrid of the lex loci and where the parties were first domiciled as husband and wife was applied.
[177] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review 1371, 1387.
[178] Symeon C Symeonides, *American Private International Law* (Kluwar Law International 2008) 75.
[179] Ibid 235.

protecting the individuals would be the domiciliary state, and it would also be the state best able to asses the age at which such maturity is achieved, given the impact of its social and educational system. In contrast when exploring consanguinity and polygamy it was found that the policy concerns are more about how society would view such a marriage. The policies are about protecting society from a marriage it would find abhorrent, and preventing the promotion of such relationships. For these reasons a choice of law rule whereby the society within which the couple plan on living, and, so, the one needing to be accepting of the relationship is more appropriate. On this basis the continued recognised relationship theory was suggested for these incapacities. Finally, re-marriage after divorce was considered, albeit, from a different angle to the aforementioned incapacities. While under Federal law all sister state divorces must be recognised as a result of full faith and credit, this is not necessarily the case for foreign divorces, and in some cases the courts have taken a compartmentalised perspective that is issue specific[180], and therefore supportive of the policy orientated reform of dépeçage based interest analysis promulgated for essential validity throughout this chapter.

The detailed exploration of these incapacities also highlighted the need for a federal choice of law rule. The combination of unknown, state determined choice of law rules, and differing substantive law, means that under the current system a couple could move from one state to another, and not have their relationships status follow them. This could be as a result of differing laws on age or consanguinity between the states, but without knowing the choice of law rule in operation in the new state, the couple could be completely unaware that their marriage is no longer recognised. A federal rule would at least mean the couple were aware of the applicable law. This knowledge would then provide them with an informed choice, and if the move would result in their marriage not being recognised, the couple is able to determine their next step accordingly. Federal choice of law rules for marriage validity would offer couples the certainty and predictability they deserve surrounding their marital status, and are both possible and desirable[181].

The decision in *Obergefell v Hodges* exemplifies exactly how this can be achieved. Despite the existing controversy at the time, a federal rule was created requiring all states to permit and recognise same-sex marriages. This ruling in turn provides same-

[180] Peter North, *Private International Law Problems in Common Law Jurisdictions* (Springer Netherlands 1993) 38.
[181] William Baude, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review 1371, 1401.

sex couples with the certainty they deserve surrounding their marital status, certainty that needs establishing across the marriage validity spectrum. Subsequently, it is submitted that if such a monumental step can be achieved in an area fraught with contention, it can be accomplished for each of the incapacities. It is this same step towards unity and certainty that the EU should take note of. This research focuses on achieving the most favourable choice of law rule for the essential validity of marriage, and does so through a comparative lens. This approach to the research was designed to ensure that lessons could be learned between the comparators, and clearly the united stance achieved across the US in relation to the same-sex marriage incapacity, is not only a lesson for the US in relation to the remaining incapacities, but is a lesson to the EU, that a unified approach can be achieved across the Member States.

With the same lack of certainty and predictability as England and the EU, it was palpable that the issue of marriage validity also needed to be explored in the US. Essential validity within marriage is "a choice of law matter that has been appallingly neglected on both sides of the Atlantic and is certainly ripe for a fresh reconsideration."[182] It is that reconsideration that this chapter set out to achieve, and in selecting dépeçage based interest analysis, that is exactly what it has done. Creating a rule for each of the incapacities under such an approach, provides the parties with the ability to determine the validity of their marriage, whilst also being sensitive to the public policy issues relevant to that incapacity. Like England and the EU, the adoption of the proposed approach would provide a significant development within the law, and is undeniably an important step in achieving the aim of this thesis, of providing couples with certainty regarding their marital status when they cross state borders.

[182] Alan Reed 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387, 414.

Chapter 7

Overall Conclusions

7.1 Achieving the Aim

This thesis set out to analyse the choice of law rules within the essential validity of marriage, in order to suggest reforms to the law through the creation of optimal choice of law rules. The purpose of these rules was to provide couples with certainty regarding their marital status whilst maintaining some of the flexibility needed to accommodate the various familial setups including, but not limited to, children of same-sex partners and single parent families. This quest for certainty has primarily, from this author's perspective, been about the legal consequences of finding a marriage invalid, however the reasons why people marry, and the subsequent emotional impact of invalidity has also been borne in mind. Furthermore, as a consequence of increased migration and mobility, this study then sought to extend this certainty beyond the borders of England by examining how this system could be replicated, and the law harmonised across the EU and the US. As a result of its multi-dimensional nature, the aim was framed into a series of objectives, which will now be explored to determine whether the research has been successful in attaining its aim.

1) *To explore and suggest reforms to the law on domicile, to ensure the connecting factor is developed to make it more reflective of modern society.*

Analysis of the law on domicile in chapter 2 unveiled a concept that appeared outdated and unfit for purpose. At present there are three distinct categories of domicile: domicile of origin; domicile of choice; and domicile of dependency, and each were examined in turn to establish the aspects in need of reform. In doing so, difficulties were identified with the tenacity of the domicile of origin, the intention element of the domicile of choice, and the rules surrounding how a domicile of origin, or a domicile of dependency are acquired. Reform was therefore suggested in each of these areas. Firstly, in relation to the tenacity of the domicile of origin, this research proposed the abolition of the doctrine of revival and suggested it be replaced by the continuance rule that is evident in other jurisdictions. Secondly, having identified the difficulties associated with satisfying the intention element of the domicile of choice,

a rebuttable presumption based on a propositus having made their home there, and thus having the intention to remain indefinitely was suggested. Finally, in regards to the outdated gender specific roles of mother and father, that feature within the provision of a domicile of origin and a domicile of dependency, this study instead promulgates a reform based on the place which the child is most closely connected to, and in order to determine this, proposes a rebuttable presumption centred around where the parent or parents they live with are domiciled.

These reforms, along with other amendments set out within the chapter, evidence how domicile could be developed so as to become a connecting factor that appropriately determines which country a person is connected to, and should therefore be governed by. In implementing these reformulations the determination of a person's domicile could be done with certainty regardless of their familial situation, which, would, finally, bring the law on domicile in line with the various legal developments and modern society. Chapter 2 sets out how domicile could, once again be fit for purpose, and able to serve its general function, and importantly for this research, serve its role within marriage validity.

2) *To evaluate and analyse the various choice of law rules and policy objectives within essential validity, to begin working towards a reformulation of the law. Within this reformulation, a new and original choice of law rule will be created that will be instrumental in establishing a policy sensitive selection, within a dépeçage based system, that looks at the incapacities of; age, consanguinity and affinity, polygamy, consent and re-marriage after divorce as separate issues to allow for a tailored, and therefore more flexible approach, whilst also achieving the certainty desired.*

Chapter 3 evaluates the various choice of law rules within the essential validity of marriage and notes that despite recommendations from the Law Commission[1], no single choice of law rule does, nor is able to, operate universally. To do so would mean that the policy concerns relevant to each of the incapacities were not considered. On that basis this research analyses the concept of interest analysis. This begins with Brainerd Currie and his idea of true and false conflicts that are to be assessed on a case-by-case basis, before exploring what has now developed into

[1] Law Commission and Scottish Law Commission, *Private International Law: Choice of Law Rules in Marriage* (Law Com No 89, 1985) para 3.36.

issue by issue analysis on a dépeçage basis. It is the latter that this author then focuses on to show how dépeçage based interest analysis would allow for the creation of policy sensitive optimal choice of law rules, by providing each of the incapacities with its own rule. It was recognised that such an approach would not only allow for a policy sensitive application of the law, but would also provide couples with certainty as to what law would be applied, whilst offering a level of flexibility not possible within a universal choice of law rule.

In order to establish the appropriate choice of law rule for each of the incapacities, a new and original choice of law rule was needed. This rule needed to uphold the sentiment of the intended matrimonial home theory, in its protection of the cultural and societal norms of the impacted state, whilst eradicating the favouritism of the husband's domicile, and the need to reassess validity upon each relocation, and so the continued recognised relationship theory was created. This theory applies the law of the country where the couple intend to live or that of the country where they have lived if their relationship has been subsisting for a reasonable period of time. This theory is then combined with the dual domicile theory, to form the choice of law framework promulgated as appropriate throughout this research under dépeçage based interest analysis. When looking at each of the incapacities, age and consent were deemed to be primarily concerned with the protection of the parties' to the marriage and so the dual domicile theory was selected as the most appropriate choice of law rule. In contrast, consanguinity and affinity, and polygamy were held to raise concerns that involved the society within which they planned to live and their acceptance of their marriage, and so the continued recognised relationship theory was considered to be the most appropriate choice of law rule. Lastly, the incidental question within re-marriage after divorce was thought to raise entirely different concerns, surrounding how their status is viewed in the country they wished to marry in, and so the *lex fori* was considered vital. In looking at each of these in turn, the chapter provided a detailed reformulation of the law that allowed for the most appropriate law to be applied based on the incapacity at hand, whilst also attaining the necessary balance between certainty and flexibility.

3) *To tackle essential validity as a whole by considering same-sex couples and the choice of law rule that should govern their relationships.*

The literature around essential validity and the various incapacities therein pre-dates the legal developments concerning same-sex couples contained in the CPA and the M(SSC)A, and therefore fails to address what choice of law rule should apply. Chapter 4 therefore analyses the law on the area with the intention of creating a set choice of law rule, that like the other incapacities explored within chapter 3, is policy sensitive and provides couples with certainty regarding whether their relationship will be recognised in England. In addition to the policy concerns highlighted in chapter 3, it was also recognised that additional policy concerns surrounding equality, citizenship and the symbolic status of marriage were also relevant to same-sex relationships, and so were also considered in determining the appropriate choice of law rule. In making the final determination the various potential rules identified in chapter 3 were considered, however, it was recognised that same-sex relationships as an incapacity was about the protection of society and its established norms, as opposed to protecting the parties to the relationship, and consequently, the continued recognised relationship theory was selected as the most appropriate choice of law rule. A set choice of law rule is particularly important within same-sex relationships, as they lack international recognition. Not every country recognises same-sex marriage and there are a variety of relationship statuses similar to a civil partnership but with various rights and obligations. For that reason, the protection from having the status reassessed if a couple later move is an important aspect of the continued recognised relationship theory in providing same-sex couples certainty, and recognising the importance of the status in terms of citizenship and symbolism.

The chapter also undertook a comparative analysis of the choice of law rules utilised within the EU and the US. While this unveiled a whole host of potential choice of law rules, the reference to the host state in article 2 of Directive 2004/38 made for an interesting comparison. Similarly, while the law in the US regarding same-sex marriage has recently changed, it was apparent that prior to this change, academics across the Atlantic were also striving to achieve certainty through a uniform standard[2], and therefore offers support for a set choice of law rule as promoted within chapter 4.

[2] Linda J Silberman, 'Same-Sex Marriage Refining the Conflict of laws Analysis' (2004-2005) 153 University of Pennslyvania Law Review, 2195 and Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale University Press 2006).

4) *Critically evaluate the concept of harmonisation to see how the certainty sought in England could, through the application of unified choice of law rules, be replicated at an EU level.*

As a result of the increase in the number of couples moving and marrying around the EU[3], it is important that they are able to determine the status of their marriage as they move across state borders, and where possible avoid limping marriages. This is important regardless of Brexit for the many couples moving around the EU. With this as its motive, chapter 5 analysed the concept of harmonisation, to assess whether the choice of law rules on essential validity could be harmonised across the EU. Historically, the EU has not been concerned with the regulation of family law, however, with the emergence of the likes of Brussels II and Brussels II bis it is apparent that this is changing, in a bid to prevent limping relationships[4] and to make life simpler for citizens[5] . With this in mind chapter 5 argued that the same approach should be taken with the essential validity of marriage by creating a harmonised approach to choice of law, as was attempted within divorce by Rome III. Aside from the arguments made above in relation to certainty, it was also deemed necessary for the purpose of free movement. Under the current position couples may feel unable to exercise their right to free movement for fear of their relationship not being recognised[6], or worse, may, as a consequence of their relationship not being recognised, be unable to relocate to the desired state with their family[7]. The solution of harmonisation is also Art 8 compliant, and could be argued to be the next logical step following the judgment in *Oliari v Italy*[8].

Having established that the route to reform is in harmonisation, the chapter then focused on determining what choice of law rules should be put in place. Despite the apparent use of nationality in some of the member states, it was proposed that the dépeçage based interest analysis approach suggested for England should be mirrored across the EU. At first sight this may appear controversial, but like England,

[3] Commission of the European Communities, *on applicable law and jurisdiction in divorce matters* (Green paper COM (2005) 82) Para 1.
[4] See section 5.2.
[5] Official Journal of the European Communities 'Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice' C19/1, 23/01/1999, para 39.
[6] Maria Tenreiro & Monika Ekstrom, 'Unification of Private International Law in Family Law Matters Within the European Union' in Katharina Boele-Woelki (ed) *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Vol. 4, Intersentia 2003) 187.
[7] This was recognised as a potential risk in section 5.5.1 in relation to same-sex couples where one of the parties is a non-EU national as a consequence of Art 2 of the Citizenship Directive.
[8] Application Nos 18766/11 and 36030/11, 21 July 2015.

some of the member states were identified as showing tolerance to polygamous marriages when they have been validly entered into, and the couple have later decided to relocate. This not only shows signs that the continued recognised relationship theory may not be too drastic a change, it also highlights the exceptions at play across the member states that make the policy sensitive dépeçage based choice of law rules vital in providing certainty for couples. A couple cannot be expected to rely on a state voluntarily showing tolerance and favouring the public policy of upholding the validity of their marriage, they should be able to predict with a degree of certainty the applicable law, and thus the status of their relationship. It is argued that the dépeçage based system proposed for England, should also be applied at an EU level as it offers the balance between state interests and certainty for couples, whilst removing the need for the invocation of public policy exceptions due to its policy sensitive nature. While its implementation may require some member states to recognise marriages it would not permit, it does not seek to change their substantive laws. It is an incremental approach that will at times require member states to show tolerance, but will in turn provide certainty and predictability to all those within the EU. It is also noteworthy, that such a solution would, regardless of England's position in the EU, continue to provide English domicilaries with certainty across the EU, as they would be subject to the same choice of law rules in operation in England.

5) *Reflect on the rules proposed for England and the EU and assess whether they could be of assistance, or an example to the US on how certainty and unification of optimal solutions could be achieved across the states, to alleviate the problems caused by high levels of state migration and various substantive laws. Of course, whilst looking at the US, it will also be considered what England and the EU is able to learn from the US approach to marriage recognition, particularly same-sex marriage.*

As with the EU, family law within the US is an area that has traditionally been dealt with at a state level as opposed to federally. This has included the determination of whether a marriage is valid. As a consequence of this, it has been open to the states themselves to select the applicable choice of law rule. Chapter 6 began by exploring the main competing choice of law rules, and it was apparent that there was no general consensus on which the states would apply, and so couples were left in a position of uncertainty and unpredictability. In addition to this, each of the competing rules were

open to criticism. However, the chapter then went on to explore how the concept of interest analysis had developed both amongst academics, and within other areas of law such as Tort and Contract, and it became apparent that with such developments, it appeared, at least on some level, to reflect the dépeçage based approach discussed in the earlier chapters, indicating that dépeçage based interest analysis could also be the optimal approach in the US. With this in mind, the chapter analysed to what extent the same approach that had been designed for England and advocated for the EU, could also be adopted across the US. In looking at the incapacities it was apparent that much of the same policy issues were relevant, and could therefore be mirrored, and so focus was moved on to assessing whether the choice of law rules could be adopted at a federal level. Although at first glance this may have appeared a step too far, support for such an argument can be seen in the form of Supreme Court pronouncements[9] and enactments from Congress[10]. Owing to the clear precedent for federal involvement within family law, and the obvious need for unification as a result of the various substantive laws, and choice of law rules across the states, it was considered that the US was in stark need of reform in the area, and the dépeçage based interest analysis approach promulgated for England and the EU appeared entirely appropriate.

Having suggested how the US might be able to learn from England and the EU, Chapter 6 then considered how this might be reciprocated. Aside from offering support of harmonisation at a federal level, it was felt that *Obergefell* could also be of assistance in demonstrating how a unified approach to choice of law, particularly in respect of same-sex relationships, could be achieved across the EU. Undeterred by the controversy surrounding the topic of same-sex marriage in the US, a unified law was created, thereby offering support to the suggestion that the choice of law rules for same-sex marriage could be harmonised across the EU. *Obergefell* went further than requiring the states to recognise validly entered into same-sex marriages, it actually required all states to permit same-sex marriage within their borders. This subsequently demonstrates the extent of what can be achieved even amidst conflicting states, and should certainty be an example to the EU that a more conservative harmonisation of only the choice of law rules, as opposed to substantive law, can certainly be accomplished under the reform proposed.

[9] For instance in *Obergefell v Hodges* 135 S Ct 2071 (2015).
[10] Such as the Defence of Marriage Act 1996.

7.2 Concluding Remarks

In adopting a dépeçage based interest analysis approach to the essential validity of marriage, this thesis provides a reformulation of the law by setting out the optimal choice of law rules for each of the incapacities. In doing so, same-sex relationships were treated the same as any of the other incapacities, to ensure that the proposed reform encapsulated all marital relationships so as to provide certainty for all couples in England regarding their marital status. The selection of each of these rules was done on a policy sensitive basis, and consequently a new choice of law rule was created to ensure that where appropriate, the state and society most effected by the relationship could have its laws and policies taken into consideration without raising some of the problems caused by the intended matrimonial home theory. Therefore, despite previous assertions by scholars such as Reed[11] and Davie[12] that an issue by issue approach should be taken, this thesis further develops this point by moving away from the traditional use of the intended matrimonial home theory, within a dépeçage based approach as promulgated by these academics, and instead creates a more optimal choice of law rule.

The aim in creating these rules was to provide couples with certainty, and so the research then turned its attention to looking at how such an approach could be replicated across the EU and the US, to ensure the certainty was extended to couples crossing state borders. In considering both of these jurisdictions it was felt that a process of harmonisation was needed to ensure that couples have the certainty desired, but are also able to avoid the current risk of limping marriages. Exploration of the legal landscape in respect of essential validity of marriage in both of the jurisdictions, lead to the conclusion that the optimal choice of law rules established for England should form the basis of this harmonisation.

In suggesting this reform this thesis achieves its aim of providing certainty for couples regarding their marital status in England and when they cross state borders. Though it is recognised that the approach suggested may be criticised for going too far in respect of expecting states to recognise relationships it would not permit, or that a universal choice of law rule for essential validity in England could have produced

[11] Alan Reed, 'Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.
[12] Michael Davie, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32.

certainty, these points have been addressed throughout. The research does not seek to change the substantive laws of any state, and instead urges tolerance already shown by many, and while a universal choice of law rule may have produced certainty it would never have allowed for the policy sensitive approach this area needs as a result of the, different policy concerns that the various incapacities raise. For these reasons it is submitted that while a 'perfect' solution has not been achieved, such a solution does not exist. Instead, this author asserts that the optimal solution is achieved, and although this is not accomplished on a worldwide scale, despite its attractiveness, this was not within the ambit of this study, and would far exceed the limitations of such a thesis.

7.3 Future Works

The thesis has propounded that significant reforms are required to the marriage validity aspect of the conflict of laws, and in so doing, has highlighted avenues for further discussion. As mentioned in chapter 6, a federal rule has been created in relation to same-sex marriage that requires all states to recognise and permit same-sex marriages. While this was briefly explored within the chapter in terms of this being an example to the US for other aspects of unification, and indeed the EU, this argument could be further analysed and expanded upon. While the article I co-authored with Frances Hamilton[13] (available in the appendix) analysed the need for a set choice of law rule for same-sex relationships at an EU level, the position of the law in the US regarding harmonisation of marriage validity more generally, and the role the developments in same-sex marriage can play, still awaits a more detailed exploration. Greater analysis of the *Obergefell* decision would allow for further discussion as to whether the case has lit the bluetouch paper for harmonisation of the laws on marriage validity across the US. The research in chapter 6 focuses on the need for reform due to the uncertainty caused by the differing laws across the states, and the most appropriate reform option, as this is the focus of the thesis as a whole. However the focal point of future study could be on supporting the implementation of such reform, through the analysis of the developments within same-sex marriage to demonstrate how the federal rule has not only provided authorisation for federal rules

[13] Frances Hamilton and Lauren Clayton-Helm, 'Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1.

on marriage, but has accentuated its necessity to prevent limping marriages and uncertainty for couples.

In addition, the law on domicile in England has not undergone fresh academic scrutiny for a considerable period of time. Despite the rules on determining one's domicile of origin being out of date in failing to reflect modern families, particularly children of same-sex relationships, de novo reform has not been suggested. The area is therefore ripe for academic commentary, and in addition to the reforms suggested within chapter 2, further research would provide an opportunity for a more detailed analysis of the most appropriate rules for the provision of domicile of origin/dependency. This research could also further explore the human rights aspect of the need for reform, and the extent to which reform is necessary to ensure Convention compliance.

Appendix

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

Frances Hamilton and Lauren Clayton-Helm*

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

* Frances Hamilton is a Senior Lecturer in Law. Lauren Clayton-Helm is a graduate tutor and PhD candidate. Both are based at Northumbria University Law School, UK.

1 The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (2009) 5, available at http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJEuropeanFamilyLaw.pdf (visited 27 May 2016).

2 Michele Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) European Journal of International Law 1023, 1026 referring to Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, California: Stanford University Press, 1992).

JICL-3(1)-04.Same-Sex Relationships.indd 1 08/06/16 2:13 pm

marriage and civil partnership. Different states across Europe have had a diversity of legal responses across Europe to these new statuses.[3] 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.[4] The need to settle this question is underlined by the "unparalleled importance of marriage".[5] Many international cases stress this factorisation.[6] In 2015 US Supreme Court judgment of *Obergefell v Hodges*,[7] which licensed same-sex marriage across all states of the US, the majority opinion stressed that the right to marry was "fundamental".[8] The reasons why marriage was given this status included an emphasis upon "individual autonomy",[9] the unique support which marriage gives to a two-person union,[10] the safeguarding which marriage gives to children[11] and the fact that marriage is regarded as a "keystone of …social order".[12]

Marriage is often connected to citizenship[13] and is necessary for "full membership of society".[14] Some authors stress the public nature of marriage.[15] As well as being considered a fundamental right[16] marriage also has strong symbolical importance. For many in the Western world it is seen as the "gold standard"[17] or having a privileged status.[18] Gay rights groups were initially reluctant to embrace marriage as a goal.[19] 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.

4 In *Estin v Estin*, 334 US 541, 553 (1948) Robert Jackson J commented that "one thing that people are entitled to know from the law is whether they are formally married". See also Barbara Stark, "When Globalization Hits Home: International Family Law Comes of Age" (2006) 36 Vanderbilt Journal of Transnational Law 1551.

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

6 See eg *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass 2003); *Loving v Virginia*, 388 US 1 (1967) and *Obergefell v Hodges* 576 US __ (2015).

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.

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

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

16 See *Obergefell v Hodges* (n.6); Elizabeth Scott, "A World Without Marriage" (2007–2008) 41 Family Law Quarterly 537, 541.

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.

19 See Yvonne Zylan, *States of Passion: Law, Identity and Social Construction of Desire* (Oxford: Oxford University Press, 2011) which comments on the changing positions of Stonewall in the UK and Lambda Legal in the US to favour same-sex marriage as a goal.

JICL-3(1)-04.Same-Sex Relationships.indd 2 08/06/16 2:13 pm

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.[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.[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.[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.[23] Non-recognition of a foreign marriage means that the right to same-sex marriage is a "meagre right indeed".[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*.[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

20 See Aloni, ''Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15), p.110 referring to Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago, Illinois: University of Chicago Press, 2002) pp.55–56.

21 See Directive 2004/38 art.2(2).

22 (Application Nos 18766/11 and 36030/11, 21 July 2015).

23 Helen Stalford, "Regulating Family Life in Post-Amsterdam Europe" (2003) 28 European Law Review 39.

24 Barbara Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (1994) Wisconsin Law Review 1033, 1040.

25 Place of celebration.

JICL-3(1)-04.Same-Sex Relationships.indd 3 08/06/16 2:13 pm

the next section. Most commentators agree that the current law is "baffling"[26] and in need of "reformulat[ion] …"[27] Perhaps the necessity of dealing with same-sex relationships[28] can be the "new momentum required to re-examine the subject …".[29]

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[30] coupled with a system of rules-based depecage[31] allows us to give each incapacity to marry an appropriate choice of law rule.[32] 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

26 Friedrich Juenger, "Conflict of Laws: A Critique of Interest Analysis" (1984) 32 American Journal of Comparative Law 1, 1 referring to Cardozo, *The Paradoxes of Legal Science* (New York: Columbia University Press, 1928) 67.

27 Alan Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (2000) 20 New York Law School Journal of International and Comparative Law 387, 450. See also Michael Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (1994) 23 Anglo-American Law Review 32.

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).

JICL-3(1)-04.Same-Sex Relationships.indd 4 08/06/16 2:13 pm

with the *lex loci registrationis*,[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.

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.[34] The dual domicile theory[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[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[37] and academic[38] support. The dual domicile theory is propounded by the Law Commission as the most appropriate policy construct.[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.[40] Conversely, the intended matrimonial home theory considers the society that the marriage will impact upon and may also uphold party expectations.[41] In addition, as

33 Similar to the *lex loci celebrationis* for hetereosexual 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.

34 Geoffrey Cheshire, Peter North and James Fawcett, *Private International Law* (14th ed., by James Fawcett and Janeen M Carruthers, 2008) p.895.

35 Albert Venn Dicey, *Dicey Morris and Collins on the Conflict of Laws* (8th ed., by JHC Morris and Others, 1967) r.31, pp.254–255.

36 Geoffrey Cheshire, *Private International Law* (Oxford: Oxford University Press, 7th ed., 1965) pp.227–228.

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.

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).

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

40 *Ibid.*, p.93.

41 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.

JICL-3(1)-04.Same-Sex Relationships.indd 5 08/06/16 2:13 pm

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

42 See Law Commission Report, *Private International Law Choice of Law Rules* (n.39), pp.88–89.

43 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27).

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

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

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

47 See for instance, suggestions for reform dating back to 1954 and 1985; Private International Law Committee, *First Report of the Private International Law Committee* (Cmnd No 9068, 1954) and Law Commission Report, *Private International Law: The Law of Domicile* (n.45).

48 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.397.

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.

JICL-3(1)-04.Same-Sex Relationships.indd 6 08/06/16 2:13 pm

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

52 Chris MV Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford: Oxford University Press, 4th ed., 2011) p.359.

53 It can be seen in cases such as *Vervaeke v Smith* [1983] 1 AC 145; *Lawrence v Lawrence* [1985] Fam 106 (at first instance) and *Westminster City Council v C* [2009] Fam 11. Academic support can also be seen in Richard Fentiman, "Activity in the Law of Status: Domicile, Marriage and the Law Commission" (1986) 6(3) Oxford Journal of Legal Studies 353 and Richard Fentiman, "The Validity of Marriage and the Proper Law" (1985) 44(2) Cambridge Law Journal 256.

54 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27) and the Law Commission Report, *Private International Law Choice of Law Rules* (n.39), para 3.2.

55 *Ibid.*

56 *Ibid.*, Law Commission Report, *Private International Law Choice of Law Rules* (n.39), para 3.37.

57 Cheshire, North and Fawcett, *Private International Law* (n.34), p.913.

JICL-3(1)-04.Same-Sex Relationships.indd 7 08/06/16 2:13 pm

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

58 See Clarkson and Hill, *The Conflict of Laws* (n.52), p.360.

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.

60 See Law Commission Report, *Private International Law Choice of Law Rules* (n.39), para 3.38.

61 See works referred to in note 25.

62 Martina Melcher "(Mutual) Recognition of Registered Relationships via EU Private International Law" (2013) 9(1) Journal of Private International Law 149, 161–162.

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.

JICL-3(1)-04.Same-Sex Relationships.indd 8 08/06/16 2:13 pm

vein as heterosexual marriages.[69] 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.[70] This dissent from the dual domicile theory continued even after the Law Commission confirmed it as their preferred template.[71] It, therefore, appears rudimentary to declare its application as a mere continuation of the norm.[72] 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.[73]

C. Choice of law rules considered in EU law

The concept of "automatic recognition" is considered by the European Commission[74] 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".[75] 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".[76] 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

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).

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

75 *Ibid.*, para.1.

76 *Ibid.*, para.4.3.

JICL-3(1)-04.Same-Sex Relationships.indd 9 08/06/16 2:13 pm

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".[77]

Alternate options also emerge in EU law. In the area of enforcement of matrimonial judgments, Rome III[78] was proposed to bring in choice of law rules. The earlier convention (Brussels II bis)[79] 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.[80] The regulation provided that the parties could choose the applicable law on divorce,[81] 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.[82] 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.[83] It is an amorphous notion and therefore does not provide the unity required in a set choice of law rule.[84] Habitual residence requires concurrence of physical residence and a mental status of having a settled purpose of remaining.[85] The length of residence required to satisfy physical presence is difficult to determine.[86] It is based on the facts of the individual case and, therefore, "the subjective element tends to lead to unpredictability".[87] The intention

77 *Ibid.*

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

79 Council Regulation (EC) No 2201/2003.

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]).

84 Aude Fiorini, "Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?" (2008) 22(2) International Journal of Law, Policy and the Family 178.

85 *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309, 344.

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.

87 Pippa Rogerson, "Habitual Residence: The New Domicile" (2000) 49 International and Comparative Law Quarterly 86, 90.

JICL-3(1)-04.Same-Sex Relationships.indd 10 08/06/16 2:13 pm

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 partnerships[94]

88 For instance, see *Re R (Abduction: Habitual Residence)* [2004] 1 FLR 216 and *Kapur v Kapur* [1984] FLR 920.

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.

JICL-3(1)-04.Same-Sex Relationships.indd 11 08/06/16 2:13 pm

which were perceived by many as a lesser status.[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 *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.[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.[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,[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.

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.[99] Using any of them as a universal choice of law rule is inappropriate.[100] Having one inflexible choice of law rule would mean that rules are selected "without regard to the underlying specific

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.

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.

97 *Ibid.*, p.4.

98 See *Wilkinson v Kitzinger* (n.17).

99 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), p.32.

100 See Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5), p.231.

JICL-3(1)-04.Same-Sex Relationships.indd 12 08/06/16 2:13 pm

issue at hand".[101] 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".[102] 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.[103]

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.[104] 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.[105] It has been suggested that it is appropriate to apply this to the incapacities of marriage.[106] Supporters of interest analysis argue that it produces fair solutions in each of the different cases it is used in because of its flexibility.[107] Richard Fentiman outlines the importance of having a test which can respond to the needs of particular cases.[108] 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,[109] 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[110] 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.

---

101 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390. See also Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26).

102 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.1090 referring to Gregory Smith, "Choice of Law in the United States" (1987) 38 Hastings Law Journal 1041, 1047. See also Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5).

103 See Currie, *Selected Essays on the Conflict of Laws* (n.30).

104 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.4.

105 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390.

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: "[t]hus Currie's methodology supplies a subterfuge to promote the very result-orientation that he deplored" (p.49).

108 See Fentiman, "Activity in the Law of Status: Domicile, Marriage and the Law Commission" (n.53).

109 *Ibid.*

110 *Ibid.*

JICL-3(1)-04.Same-Sex Relationships.indd 13 08/06/16 2:13 pm

Criticisms of interest analysis remain. Critics argue that if applied alone it could lead to confusion, lack of consistency and limited predictability.[111] 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".[112] Interest analysis can therefore lead to confusion.[113] US judges acknowledge the lack of consistency.[114] 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.[115] 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.[116] A further criticism of interest analysis is that it can result in a balance towards the forum determining the case. [117] These criticisms show that interest analysis alone cannot be a solution. Instead a system of rules-based depecage[118] balances the competing interests of flexibility and certainty.[119]

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",[120] but we argue that this approach offers the right

111 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.27 refers to comments from Chief Judge Fuld in *Neumeier v Kuehner* 31 NY 2d 121, 127 (1972) who explains that in a US context "our decisions … it must be acknowledged, lacked consistency". See also Lea Brilmayer, "Interest Analysis and the Myth of Legislative Intent" (1980) 78 Michigan Law Review 392 and J Skelly Wright, "The Federal Courts and Nature and Quality of State Law" (1967) 13 Wayne Law Review 317, 334.

112 *Tooker v Lopez* 24 NY 2d 569, 584 (1969).

113 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26).

114 See works referred to in note 111; see also *Tooker v Lopez* (n.112).

115 See Brilmayer, Interest Analysis and the Myth of Legislative Intent" (n.111); see also Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390.

116 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), p.43. See also Scott Fruehwald, "Choice of Law and Same-Sex Marriage" (1999) 51 Florida Law Review 799.

117 Courtland Peterson, "Proposals of Marriage between Jurisdiction and Choice of Law" (1980–1981) 14 UC Davis Law Review 869, 871. See also Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.29.

118 See works referred to in note 31.

119 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27) and Fruehwald, "Choice of Law and Same-Sex Marriage" (n.116).

120 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.41.

JICL-3(1)-04.Same-Sex Relationships.indd 14 08/06/16 2:13 pm

balance between the competing concerns. Reed suggests that a rules-based theory should avoid "excessive judicial particularistic intuitionism".[121] Theorists have suggested looking at each incapacity to marry in turn.[122] 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 apposite 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.[123] 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.[124] Another important issue, which is of particular relevance to the EU is to have uniformity internationally as to the validity of a marriage.[125] 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.[126] Objections to different types of marriage based on "sociological, religious and moral grounds" can also be relevant.[127] These can be seen from the rules prohibiting consanguinity[128] and

121 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390.

122 See *Ibid.*, and Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27).

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).

124 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), p.47.

125 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.391. See also Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24) and Robert Leflar, "Choice Influencing Considerations in Conflicts Law" (1966) 41 New York University Law Review 267.

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".

127 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.430.

128 Where there is a blood relationship between the parties, for example uncle and niece.

JICL-3(1)-04.Same-Sex Relationships.indd 15 08/06/16 2:13 pm

affinity.[129] 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

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".

131 *Cheni v Cheni* [1965] P 85, 99 (Simon J).

132 *Alhaji Mohamed v Knott* [1969] 1 QB 1.

133 See Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5), p.234.

134 *Hussain v Hussain* [1983] Fam 26.

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).

JICL-3(1)-04.Same-Sex Relationships.indd 16 08/06/16 2:13 pm

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

138 Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5), p.237 referring to *Ibid.* (Ormrod LJ).

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".

JICL-3(1)-04.Same-Sex Relationships.indd 17 08/06/16 2:13 pm

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.[141] Equal citizenship involves inclusion, enfranchisement and equity and justice.[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".[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.[144] In turn because of the public nature of marriage this has constitutional importance. The right to marriage is given protection by international conventions[145] and leading cases,[146] and many countries have legalised same-sex marriage.[147] Same-sex couples who cannot access the status of marriage will not

141 Nicholas Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (2012) 10(2) Int'l J Const L 477, 478 referring to Thomas H Marshall, "Citizenship and Social Class" in Thomas H Marshall and Tom Bottomore (eds), *Citizenship and Social Class* (London: Pluto Press, 1992) p.18. See also Michael Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (2012) 10(2) IJCL 340; Conor O'Mahoney, "There Is No Such Thing as a Right to Dignity" (2012) 10(2) IJCL 551, 555 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [132] (Baroness Hale of Richmond).

142 See Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.141), p.483 referring to Jeffrey Weeks, "The Sexual Citizen" (1998) 15 Theory, Culture and Society 38, 39.

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.

144 *Ibid*., p.481 referring to Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Massachusetts: Harvard University Press, 2000) pp.2, 1.

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".

146 See eg *Goodridge v Department of Public Health* (n.6) and *Loving v Virginia* (n.6).

147 The following list shows which countries and US states currently recognise same-sex marriage. Netherlands (2001), Belgium (2003), Massachusetts (2003), Spain (2004), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Mexico (2010), Denmark (2011), Brazil (2013), France (2013), Uruguay (2013), New Zealand (2013), England and Wales (2013), Scotland (2014), Luxembourg (2015), US nationwide (2015) and Finland (effective from 2017).

JICL-3(1)-04.Same-Sex Relationships.indd 18 08/06/16 2:13 pm

have the full level of constitutional protections and can therefore be regarded as partial citizens only.[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,[149] access to Member State's social assistance scheme[150] and equality in relation to employment[151] and self-employment.[152] Alison O'Neil argues that the EU's free movement provisions entail the right of same-sex couples to move around Europe.[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.[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.[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.[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

148 See Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.141), p.483 referring to Diane Richardson, "Sexuality and Citizenship" (1998) 32 Sociology 83, 88.

149 Citizenship Directive 2004/38 art.14(1).

150 *Ibid.*, art.14(3).

151 *Ibid.*, art.24.

152 *Ibid.*, art.23.

153 Alisson O'Neill, "Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy" (2004) 37 Cornell Int'l L J 199, 201.

154 Zvi Triger, "Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships" (2012) 8(2) International Journal of Law in Context 268.

155 See Aloni, ''Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15), p.110. See also the Equality Network, "Equal Marriage: Report of the Equality Network Survey of LGBT People's Views on Marriage Equality" (2011), available at http://www.equality-network.org/wp-content/uploads/2013/08/Equal-Marriage-Report-26.1.11.pdf (visited 27 May 2016).

156 See Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings" (n.95), p.1275. See also Aloni, ''Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15), p.150 and Misha Isaak, "What's in a Name? Civil Unions and the Constitutional Significance of Marriage" (2008) 10 University of Pennsylvania Journal of Constitutional Law 607.

JICL-3(1)-04.Same-Sex Relationships.indd 19 08/06/16 2:13 pm

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.[157] In many international cases where arguments in relation to same-sex marriage have been made successfully, equality has often been the deciding argument.[158] This can be seen from the latest cases in the US Supreme Court[159] as well as leading decisions from Canada[160] and South Africa.[161] 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.[162] Other marriage reforms which demonstrate the changing nature of marriage[163] concern the reversal of laws which did not allow women to own property during marriage and recognition of transsexuals in their new sex.[164] 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.[165] Barbara

157 See eg Marshall, "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (n.140) and Mary Dunlap, "The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties" (1991) 1 Law and Sexuality Review Lesbian and Gay Legal Issues 63.

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).

160 *Halpern v Toronto* 65 OR (3d) 161 (CA) (2003). For discussion, see Claire L'Heureux-Dube, "Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective" (2003) 1(1) International Journal of Constitutional Law 35.

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

162 See eg David Richards, "Carl F Stychin Book Review: Governing Sexuality: The Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon" (2004) 2(3) International Journal of Constitutional Law 727; Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings" (n.95); Scott, "A World Without Marriage" (n.16); Marshall, "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (n.140) and Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24).

163 See eg Cindy Tobisman, "Marriage vs Domestic Partnership: Will We Ever Protect Lesbians' Families" (1997) 12 Berkeley Women's Law Journal 112 on the changing nature of marriage.

164 See eg, *Goodwin v United Kingdom* (2002) 35 EHRR 18.

165 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) referring to Arthur von Mehren and Donald Trautman, *The Law of Multistate Problems: Cases and Materials on Conflicts of Laws* (Boston, Massachusetts: Little, Brown and Co, 1965) pp.342–375 and Arthur von Mehren, "Recent Trends in Choice-of Methodology" (1975) 60 Cornell Law Review 927.

JICL-3(1)-04.Same-Sex Relationships.indd 20 08/06/16 2:13 pm

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".[166] 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.[167] 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.[168] The ECtHR has long had a policy of weighing competing arguments.[169] Human rights arguments are given greater weight than those of commercial interests, for example.[170] 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 ECtHR in *Oliari v Italy*.[171] All ECtHR 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 ECtHR continues to be bound by the margin of appreciation[172] (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.

167 See Fruehwald, "Choice of Law and Same-Sex Marriage" (n.116), p.838. He also refers to Douglas Laycock, "Equal Citizens of Equal and Territorial States; The Constitutional Foundations of Choice of Law" (1992) 92 Columbia Law Review 249.

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 ECtHR. 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 ECtHR 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).

172 *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

JICL-3(1)-04.Same-Sex Relationships.indd 21 08/06/16 2:13 pm

V. European Union

The right to free movement across the EU, and the need to avoid limping marriages,[173] advocates in favour of EU involvement. Problems are caused by "divergences between Member States",[174] 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.[175] Even following *Oliari v Italy*[176] 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,[177] but others argue that international comparisons are not appropriate in family law.[178] This is because of the heavy influence which religious and other racial and political considerations have had on the shaping of family law.[179] There are legitimate concerns that a single European approach would result in unnecessary homogeneity.[180] Political reality also has to be faced. It remains controversial as to whether Member States will support further expansion of free movement laws.[181]

---

173 See works referred to in note 59.

174 Gordon Moir and Paul Beaumont, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (1995) 20(3) European Law Review 268, 269.

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).

177 See eg Richards, "Carl F Stychin Book Review: Governing Sexuality: The Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon" (n.162) and William Eskridge Jr, *Equality Practices, Civil Unions and the Future of Gay Rights* (Oxon: Routledge, 2002).

178 See eg Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (New York: Clarendon Press, 1998) and David Bradley, "Comparative Law, Family Law and Common Law" (2003) 33(1) Oxford Journal of Legal Studies 127.

179 See Bradley, "Comparative Law, Family Law and Common Law" (n.178) referring to HC Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press, 1946) pp.31–32. See also the Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (n.1); Niamh Nic Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (2009) 34(2) European Law Review 230 and Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15).

180 See Moir and Beaumont, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (n.174), p.280. Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.238 states that "constitutional differences remind us that they 'are often that part of social identity about which people care a great deal …" referring to Joseph Weiler, "Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space" in his *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999).

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.

JICL-3(1)-04.Same-Sex Relationships.indd 22 08/06/16 2:13 pm

A. EU emphasis on subsidiarity

The EU recognises the strength of these arguments and continues to emphasise subsidiarity.[182] The EU has to act within and cannot exceed the bounds of its competency.[183] 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,[184] these policies allow a "degree of discretion" afforded to Member States[185] 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.[186] The EU's traditional position which determined that gender discrimination did not cover sexual orientation[187] has been reformed, but the EU Citizenship Directive[188] continues to have a narrow interpretation of family members.[189] Spouses are included within the category of family members,[190] but this does not include same-sex spouse. The term is gender-neutral and some argue that it should include same-sex partners,[191] 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).

185 For discussion, see Emily Wada, "A Pretty Picture. The Margin of Appreciation and the Right to Assisted Suicide" (2005) 27 Loyola Los Angeles International and Comparative Law Review 275 and Petra Butler, "Margin of Appreciation: A Note towards a Solution for the Pacific" (2008–2009) Victoria University Wellington Law Review 687.

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.

188 Directive 2004/38.

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.

191 Dimitry Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism" (2009) 33(1) Fordham International Law Review 156, 190 referring to Mark Bell, "EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process", 2005 *ILGA Europe*, available at www.ilga-europe.org/sites/default/files/Attachments/eu_directive_free_movement_guidelines_2005.pdf (visited 27 May 2016).

JICL-3(1)-04.Same-Sex Relationships.indd 23 08/06/16 2:13 pm

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

192 See works referred to in note 182.

193 Directive 2004/38 art.2(2)(b).

194 See *Oliari v Italy* (n.22).

195 For discussion, see Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (n.2).

196 See eg Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?"(2005) 16(5) European Journal of International Law 907 and Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 New York University Journal of International Law and Policy 843.

197 See Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (n.196), pp.920–921.

198 Peter McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (2004) 53(3) International and Comparative Law Quarterly 605. See also Spencer, "Same-Sex Couples and the Right to Marry: European Perspectives" (n.175).

JICL-3(1)-04.Same-Sex Relationships.indd 24 08/06/16 2:13 pm

countries.[199] The Brussels II legislation has been referred to as a "watershed in the evolution of EU law".[200] Other developments include those concerning succession laws.[201] 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.[202] Further proposals concerning recognition of public documents,[203] and on the free movement of citizens,[204] 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.[205] 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".[206] This advantage is less since the growth in size of the EU, other bodies often struggle to secure agreement to conventions. This can

199 See eg Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters, 26 September 1968; Council Regulation (EC) No 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of both Spouses of 29 May 2000 (known as Brussels II); Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (known as Brussels II bis).

200 Maire Ni Shuilleabhain, "Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective" (2010) 59(4) International and Comparative Law Quarterly 1021, 1022.

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.

202 The European Commission proposed in COM(2011) 127,"Bringing Legal Clarity to Property Rights for International Couples", 16 March 2011 and two further regulations; COM(2011) 125, a Council Regulation on Jurisdiction, Applicable Law and Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes, 16 March 2011 and COM(2011) 126, a Council Regulation on Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships, 16 March 2011.

203 COM(2010) 747, "Less Bureaucracy for Citizens Promoting Free Movement of Public Documents and Recognition of the Effect of Civil Status Records" (n.74).

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

205 For discussion, see McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (n.198).

206 See Moir and Beaumont, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (n.174), p.288.

JICL-3(1)-04.Same-Sex Relationships.indd 25 08/06/16 2:13 pm

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).

210 Alegria Borras, "Explanatory Report on the Brussels II Convention … on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters" (16 July 1998) Official Journal C 221 para.1.

211 See McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (n.198).

212 The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (n.1).

213 See Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.230.

214 Mark Dawson, Elise Muir and Monica Claes, "Enforcing the EU's Rights Revolution: The Case of Equality" (2012) 3 European Human Rights Law Review 276. See also Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.233 referring to S Douglas-Scott, *Constitutional Law of the European Union* (Essex: Longman, 2002) p.431.

JICL-3(1)-04.Same-Sex Relationships.indd 26 08/06/16 2:13 pm

but it remains important to avoid over generalisations[215] 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.[216] The EU and the ECtHR also work together[217] and cross-refer to each other's judgments.[218] 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 domicilaries 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".[219] There are examples of backlash occurring within the recognition of same-sex marriages. In the US although the first states began

215 See Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.236 referring to Oliver and Roth, "The Internal Market and the Four Freedoms" (2004) 41 Common Market Law Review 407, 408.

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

217 See eg CM(2007)74, "Memorandum of Understanding between the Council of Europe and the European Union" prepared at the 117th Session of the Committee of Ministers (Strasbourg, 10–11 May 2007), available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2007)74&Language=lanEnglish (visited 27 May 2016).

218 See eg *Stauder v City of Ulm* [1969] ECR 419, *Selma Kadiman v Freistaat Bayern* [1997] ECR I-2133 and *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000] 3 CMLR 1049.

219 Dale Carpenter, "A Traditionalist Case for Gay Marriage" (2008–2009) 50 South Texas Law Review 93 referring to Edmund Burke, *Reflections on the Revolution in France* (London: James Dodsley, 1790).

JICL-3(1)-04.Same-Sex Relationships.indd 27 08/06/16 2:13 pm

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 Windsor*[222] 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 approach[224] 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).

224 This follows the theory of small change. This was first advanced by Kees Waaldijk, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands" in Robert Wintemute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships: A study of National, European and International Law* (North America, US: Hart Publishing, 2001) pp.437–464 and later advanced by Eskridge, *Equality Practices, Civil Unions and the Future of Gay Rights* (n.177) and Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (n.20) who advocated recognition of same-sex marriage on a step-by-step approach.

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.

JICL-3(1)-04.Same-Sex Relationships.indd 28 08/06/16 2:13 pm

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

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

229 Kenneth Mck Norrie, "Recognition of Foreign Relationships Under the Civil Partnership Act 2004" (2006) 2(1) Journal of Private International Law 137, 166.

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

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

232 This point was considered by M Harper and K Landells, "The Civil Partnership Act 2004 in Force" [2005] Family Law 963.

JICL-3(1)-04.Same-Sex Relationships.indd 29 08/06/16 2:13 pm

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 dommicilaries 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 domicilaries 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 depecage, 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 marriages[236] 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.

JICL-3(1)-04.Same-Sex Relationships.indd 30 08/06/16 2:13 pm

of migration and marriages involving international couples,[237] it is not difficult to see the benefits that would be gained from the harmonisation of this matter.[238] 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 domicilaries 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.

---

237 The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (n.1).

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."

JICL-3(1)-04.Same-Sex Relationships.indd 31 08/06/16 2:13 pm

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.[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.

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.

JICL-3(1)-04.Same-Sex Relationships.indd 32 08/06/16 2:13 pm

Bibliography

Books

Bararsma NA, *The Europeanisation of International Family Law* (T.M.C. Asser Press 2011)

Beale J, *A Treatise on the Conflict of Laws* (Vol 3, Baker, Voorhis & Company 1935)

Boele-Woelki K (ed), *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Volume 4, Intersentia 2003).

Brubaker R, *Citizenship and Nationhood in France and Germany* (Harvard University press 1992)

Cheshire GC, *Private International Law* (7th edn, Oxford University Press 1965)

Clarkson CMV & Hill J, *The Conflict of Laws* (3rd edn, Oxford University Press 2006)

-- and Hill J, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 359

Collins and others, *Dicey, Morris & Collins: Conflict of Laws* (14th edn, Sweet & Maxwell 2006)

-- and others, *Dicey, Morris & Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2012)

Currie B, *Selected Essays on the Conflict of Laws* (Duke University Press 1863)

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1977)

-- *A Matter of Principle* (Harvard University Press 1985)

Dyzenhaus D and Thorburn M (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016)

Eskridge W, *Equality Practices, Civil Unions and the Future of Gay Rights* (Routledge 2002)

Falconbridge J, *Essays on the Conflict of Laws* (Canada Law Book Company 1954)

Faulks K, *Citizenship in Modern Britain* (Edinburgh University Press 1998)

Fawcett J, Carruther JM and North P, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008)

Felix RL and Whitten RU, *American Conflict of Laws: Cases and Materials* (6th edn, LexiNexis 2015)

Giddens A, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press, 1992).

Gittins D, *The Family in Question Changing Households & Familiar Ideology* (2nd edn, Palgrave Macmillan 1993)

Harding M, *Conflict of Laws* (5th edn, Routledge 2014)

Hay P, *Conflict of Laws Black Letter Outlines* (7th edn, West Publishing Co. 2014)

Hill J and Shuilleabhain MN, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016)

Isin EF & Wood PK, *Citizenship & Identity* (Sage Publications 1999)

Kay HH, Krammer L and Roosevelt K, *Conflict of Laws Cases – Comments – Questions* (9th edn, West Publishing Co 2013)

Koppelman A, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines,* (Yale University Press 2006)

McClean D and Beavers K, *Morris: The Conflict of Laws* (6th edn, Thomson Reuters (Legal) Limted 2005)

-- and Beevers K, *Morris: The Conflict of Laws* (7th edn, Thomson Reuters (Legal) Limited 2009)

-- and Abou-Nigm VR, *Morris: The Conflict of Laws* (9th edn, Sweet & Maxwell 2016)

McConville M and Chui WH (eds), *Research Methods for Law* (Edinburgh 2007)

Morris J, *Dicey and Morris on the Conflict of Laws* (8th edn, London: Stevens 1967)

North P, *Private International Law Problems in Common Law Jurisdictions* (Springer Netherlands 1993)

O'Brien J, *Conflict of Laws* (2nd edn, Cavendish Publishing Ltd 1999)

Raz J, *Authority of Law: Essays on Law and Morality* (Clarendon Press 1979).

Scherpe JM (ed) *Family Law Volume III: Family Law in Perspective* (Edward Elgar Publishing Ltd 2016)

Shaw J (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000)

Spillenger C, *Principles of Conflict of Laws* (Thomson Reuters 2010)

-- *Principles of Conflict of Laws* (West Academic 2015)

Steel L, Kidd W & Brown A, *The Family* (2nd edn, Palgrave Macmillan 2012)

Symeonides SC, *American Private International Law* (Kluwar Law International 2008)

-- Wendy C Perdue, *Conflict of Laws: American, Comparative, International Cases and Materials* (3rd edn, West Academic Publishing 2012)

Toner H, *Partnership Rights, Free Movement and EU Law*, (Hart Publishing 2004)

Wadlington W & O'Brien RC, *Domestic Relations cases & Materials* (4th edn, The Foundation Press 1998)

-- and O'Brien RC, *Family Law in Perspective* (2nd edn, The Foundation Press 2007)

Watkins D and Burton M (eds), *Research Methods in Law* (Routledge 2013)

Wintemute R and Andenaes M (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001)

Zweigert K and Kotz H, *An Introduction to Comparative Law* (Translated by Tony Weir, 3rd edn, Oxford University Press 2011)

Journal Articles

Abowitz KK and Harnish J, 'Contemporary Discourses of Citizenship' (2006) 76(4) Review of Educatioal Research 653

Abrams K, 'Citizen Spouse' (2013) 101(2) California Law Review 407

Appleton SF, 'Leaving Home? Domicile, Family, and Gender' (2013-2014) 47(5) UC Davis Law Review 1453

Baade HW, 'Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)' (1972) 72 Columbia Law Review 329

Bamforth N, 'Sexuality and Citizenship in Contemporary Constitutional Argument'. (20012) 10(2) International Journal of Constitutional Law, 477

Baude W, 'Beyond DOMA: Choice of State Law in Federal Statutes' (2012) 64 Stanford Law Review 1371

Baxter WF, 'Choice of Law and the Federal System' (1963) 16 Stanford Law Review 1

Beigel HG, 'Romantic Love' (1951) 16(3) American Sociological Review 326

Boele-Woelki K, 'To Be or Not to Be: Enhanced Cooperation in International Divorce Law within the European Union' (2008-2009) 39 Victoria University Wellington Law Review 779

Carothers T, 'The Rule of Law Revival' (1998) 77 Foreign Affairs 95

Carter PB, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 International and Comparative Law Quarterly 713

Cherlin AJ, 'The Deinstitutionalization of American Marriage' (2004) 66(4) Journal of Marriage and Family 848

Clarkson CMV, 'Marriage in England: Favouring the Lex Fori; (1990) 10 Legal Studies 80

Cox B, 'Same-Sex Marriage and Choice of Law: If we Marry I Hawaii, Are we still Married when we Return Home?' [1994] Wisconsin Law Review 1033

Curry-Sumner I, 'Interstate Recognition of Same-Sex Relationships in Europe' (2009-2010) 13 The Journal of Gender, Race & Justice 59

-- and Curry-Sumner S, 'Where will it all End? Common Trends in American Same-Sex Relationship Recognition' (2009) 28(3) Equal Opportunities International 233

Dane P, 'Whereof One Cannot Speak: Legal Diversity and the Limits of a Restatement of Conflict of Laws' (2000) 75(2) Indiana Law Journal 511

Davie M, 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32

Dorf MC, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review 1267

Downes TA, 'Recognition of Divorce and Capacity to remarry' (1986) 35(1) International Comparative Law Quarterly 170

Fawcett J, 'Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems? (1982) 31 International and Comparative Law Quarterly 150

-- 'Result Selection in Domicile Cases' (1985) 5(3) Oxford Journal of Legal Studies 378

Fentiman R, 'The Validity of Marriage and the Proper Law' (1985) 44(2) Cambridge Law Journal 256

-- 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Law Journal 353

-- 'Domicile Revisited' (1991) 50(3) Cambridge Law Journal 445

Fiorini A, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 International Journal of Law, Policy and the Family 178

Fowler AC, 'Love and Marriage Through the Lens of Sociological Theories' [2007] Human Architecture: Journal of the Sociology of Self-Knowledge 61

Frimston R, 'Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law' (2006) 6 Private Client Business 352

Glennon T, 'An American Perspective on the Debate Over the Harmonisation or Unification of Family Law in Europe' (2004-2005) 38(1) Family Law Quarterly 185

Grigolo M, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) 14(5) European Journal of International Law 1023

Hamilton F and Clayton-Helm L, ‘Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory’ (2016) 3(1) Journal of International and Comparative Law 1

Harder S, ‘Domicile of Children: The New Law in Scotland’ (2006) 10(3) Edinburgh Law Review 386

Harper M and Landells K, ‘The Civil Partnership Act 2004 in Force’ [2005] Family Law 963

Harris AP, ‘Loving Before and After the Law’ (2007-2008) 76 Fordham International Law Review 2821

Hartley TC, ‘The Policy Basis of the English Conflict of Laws of Marriage’ (1972) 53 Modern Law review 571

Henderson T, ‘From Brussels to Rome: The Necessity of Resolving Divorce Law Conflicts Across the European Union’ (2010-2011) 28(4) Wisconsin International Law Journal 768

Hines GE, ‘Polymmigration: Immigration Implications and Possibilities Post Brown v Buhman’ [2016] 58 Arizona Law Review 477

Hoecke MV, ‘Methodology of Comparative Legal Research’ [2015] Law and Method 1

Hutchinson T and Duncan N, ‘Defining and Describing What we Do: Doctrinal Legal Research’ (2012) 17 Deakin Law Review 83

Jaffey AJE, ‘The Essential Validity of Marriage in the English Conflict of Laws’ [1978] Modern Law Review 38

-- ‘The Foundation of Rules for the Choice of Law’ (1982) 2 Oxford Journal of Legal Studies 368

Juenger FK, ‘Conflict of Laws: A Critique of Interest Analysis’ (1984) 32 American Journal of Comparative Law 1

-- ‘A Third Conflicts Restatement?’ (2000) 75 Indiana Law Journal 403

Karsten IGF, ‘Capacity to Contract a Polygamous Marriage’ (1973) 36 Modern Law Review 291

Kay HH, ‘Theory into Practice: Choice of Law in the Courts’ (1982-1983) 34 Mercer Law Review 521

Knauer NJ, ‘LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality’ (2014) 24(1) Texas Journal of Women and the Law 101

Kochenov D, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’ (2009) 33(1) Fordham International Law Review 156

Koppelman A, ‘Why Discrimination Against Lesbians and Gay Men is Sex Discrimination’ (1994) 69 New York University Law Review 197

Krammer L, On the Need for a Uniform Choice of Law Code’ (1990-1991) 89 Michigan law Review 2134

Leflar RA, ‘Choice Influencing Considerations in Conflicts Law’ (1966) 41 New York University Law Review 267

-- ‘Conflicts of Law: More on Choice Influencing Considerations’ (1966) 54(4) California Law Review 1584

Lister R, ‘Why Citizenship: Where, How and Why Children’ (2007) 8 Theoretical Inquires in Law 693.

Marshall K ‘Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed’ (2010) 2 William and Mary policy Review 194

Maxwell NG, ‘Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison’ (2001) 28 Arizona Journal of International and Comparative Law 141

McEleavy P, ‘The Brussels II Regulation: How the European Community has Moved into Family Law’ (2002) 51(4) International and Comparative law Quarterly 883

-- ‘The Communitarization of Divorce Rules: What Impact for English and Scottish Law?’ (2004) 53(3) International and Comparative Law Quarterly 605

Melcher M, ‘(Mutual) Recognition of Registered Relationships Via EU Private International Law’ (2013) 9(1) Journal of Private International Law, 149

Neuhaus PH, ‘Legal Certainty Versus Equity in the Conflict of Laws’ (1963) 28 Law and Contemporary problems 795

Nicola FG, ‘Family Law Exceptionalism in Comparative Law’ (2010) 58 The American Journal of Comparative Law 777

Norrie KMK, ‘Recognition of Foreign Relationships Under the Civil Partnership Act 2004’ (2006) 2(1) Journal of Private International Law 137

Pearl D, ‘Capacity for Polygamy’ [1973] Cambridge Law Journal 43

Probert R, ‘Hanging on the Telephone: City of Westminster v IC’ (2008) 20 Child and Family Law Quarterly 295

Reed A, ‘Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rues’ (2000) 20 New York Law School Journal of International and Comparative Law 387

Reese WLM, ‘Marriage in American Conflict of Laws’ (1977) 26(4) International and Comparative Law Quarterly 952

Rogerson P, ‘Habitual Residence: The New Domicile’ (2000) 49 International and Comparative Law Quarterly 86

Sacco R, ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 American Journal of Comparative Law 1

Shuilleabhain MN, “Ten Years of European Family Law: Retrospective Reflections From a Common Law Perspective” (2010) 59(4) International Comparative Law Quarterly 1021

Silberman LJ, ‘Same-Sex Marriage Refining the Conflict of Laws Analysis’ (2004-2005) 153 University of Pennslyvania Law Review 2195

-- “Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can we Learn from Europe?’ (2007-2008) 82 Tulane Law Review 1999

Smart P St J, ‘Interest Analysis, False Conflicts, and the Essential Validity of Marriage’ (1985) 14 Anglo-American Law Review 225

Spencer K, ‘Same Sex Couples and the Right to Marry – European Perspectives’ (2010) 6 Cambridge Student Law Review 155

Stalford H, ‘Regulating Family Life in Post-Amsterdam Europe’ (2003) 28(1) European Law Review 39

Stone P, ‘The Concept of Habitual Residence in Private International Law’ (2000) 29 Anglo-American Law Review 342

Swisher PN, ‘”I Now Pronounce You Husband and Wives”: The Case for Polygamous Marriage After United States v Windsor and Burwell v Hobby Lobby Stores’ (2014-2015) 29 BYU Journal of Public Law 299

Symeonides SC, ‘Choice of Law in the American Courts in 1998: Twelfth Annual Survey’ (1999) 47 American Journal of Comparative Law 327

-- ‘The First Conflicts Restatement Through the Eyes of Old: As Bad as it’s Reputation?’ (2007) 32 Southern Illinois University Law Journal 39

-- ‘The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons’ (2007-2008) 82 Tulane Law Review 1741

-- ‘A New Conflict Restatement: Why Not?’ (2009) 5(3) Journal of Private International Law 383

-- ‘Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect’ (2013-2014) 45 University of Toledo Law Review 751

-- ‘Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey’ (2015) 63(2) American Journal of Comparative Law 299

-- ‘The Choice of Law Revolution Fifty Years After Currie: An End and a Beginning’ (2015) 5 University of Illinois Law Review 1847

Taintor CW, ‘Marriage in the Conflict of Laws’ (1955-1956) 9 Vanderbilt Law Review 607

Vitta E, ‘The Impact in Europe of the American “Conflicts Revolution”’ (1982) 30 The American Journal of Comparative Law 1

Wade JA, ‘Capacity to Marry: Choice of Law Rules and Polygamous Marriages’ (1973) 22(1) International Comparative Law Quarterly 571

Wardle LD, 'From Slavery to Same-Sex Marriage: Comity versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations' [2008] Brigham Young University Law Review 1855

Yuval-Davis N, 'Women, Citizenship and Difference' (1997) 57 Feminist Review 4

Newspaper Articles

Adam Liptak, 'Supreme Court Bolsters Gay Marriage with Two Major Rulings' *N.Y. Times*, (New York June 26 2013) http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all

Online Journals

Hodson D, 'Rome III: Subsidiarity, Proportionality and the House of Lords' (2007) 1 International Family Law Online http://onlineservices.jordanpublishing.co.uk/web/pub.xql?action=home&pub=FAMILYpa&lang=en#addHistory=true&filename=Family_IFLONLINE_IFL_2007_03_12.dita.xml&docid=Family_IFLONLINE_IFL_2007_03_12&inner_id=&tid=&query=&scope=&resource=&toc=false&eventType=lcContent.loadDocFamily_IFLONLINE_IFL_2007_03_12

Martiny D, 'Is the Unification of Family Law Feasible or even Desirable?' (2010) SSRN: http://ssrn.com/abstract=1612157

Waldon J, 'Thoughtfulness and the Rule of Law' (2011) New York University Public Law and Legal Theory Working Papers, paper 263, 4 http://lsr.nellco.org/nyu_plltwp/263

Reports

Bell M, EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process', 2005 *ILGA Europe, and Gay Association* www.ilga-europe.org/content/download/1448/9061/file/freedom.pdf last accessed 21/04/17

Borras A, Explanatory report, 'on the Convention, drawn up on the basis of Art K.3 of the Treaty on the European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters', [1998] OJ C221/27

Commission, 'Proposal for Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters' COM (2006) 399 final

-- 'on applicable law and jurisdiction in divorce matters' COM (2005) 82 final (Green Paper)

-- 'Less Bureaucracy for Citizens: Promoting Free movement of public Documents and the Recognition of the effect of Civil Status Records' COM (2010) 747 final (Green Paper)

-- 'Proposal for a Regulation on Promoting the Free Movement of Citizens' COM (2013) 228

Corselli-Nordblad L and Geoffrey A, 'Marriage and Birth Statistics – New Ways of Living Together in the EU' http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_birth_statistics_-_new_ways_of_living_together_in_the_EU

Crawford EB and Carruthers JM, 'Family Law (Scotland) Act 2006: Post-Legislative Scrutiny' (Feb 2016) http://eprints.gla.ac.uk/122339/1/122339.pdf

Davis S, *Marriage (Same Sex Couples) Bill Memorandum* (2013) https://publications.parliament.uk/pa/cm201213/cmpublic/marriage/memo/m11.htm

Government of Netherland, 2010 'Hirsch Ballin Restricts Recognition of Foreign Polygamous Marriages', Press Release (27 January 2010) www.government.nl/latest/news/2010/01/27/hirsch-ballin-restricts-recogntion-of-foreign-polygamous-marriages

House of Lords European Union Committee Report 52nd Report of Session 2005-06, *Rome III – Choice of Law in Divorce* HL paper 272 7th December 2006

Ihrke DK, Faber CS and Koerber WK, 'Geographical Mobility 2008 to 2009' (Issued November 2011, Report No. P20-565) www.census.gov/library/publications/2011/demo/p20-565.html

Law Commission, *Thirtieth Annual Report* (Law Com No. 239, 1996)

Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile* (Law Com No 88, 1985)

-- *Private International Law: Choice of Law Rules* in Marriage (Law Com No 89, 1985)

-- *Private International Law: the Law of Domicile* (Law Com No 168, 1987)

Office of National Statistics, 'Population by Legal Marital Status and Cohabitate Status by Age and Sex for England and Wales' www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/population/estimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2002to2015

Official Journal of the European Communities 'Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice' C19/1, 23/01/1999

Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954)

-- *Seventh Report of the Private International Law Committee, 1963* (Cmnd 1955)

Restatement (First) of Conflict of Laws (1934)

Restatement (Second) Conflict of Laws (1971)

Scottish Law Commission, *Family Law* (Scot Law Com No 135, 1992)

The Centre for Social Justice, 'European Family Law: Faster Divorce and Foreign Law' (2009) http://www.centreforsocialjustice.org.uk/UsterStorage/pdf/pdf%20reports/CSJEuropeanFamilyLaw.pdf

The Royal Commission, *Marriage and Divorce* (Cmd. 9678, 1956)

Whitehead D and Popenoe B, 'Who Wants to Marry a Soul Mate? In *The State of Our Unions*, 2001 (National Marriage Project)