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NATIONAL REPORT: FRANCE

HUGUES FULCHIRON*

Same-sex Marriage in French Law: Rejection and/or Recognition?

In just a few years, the idea of opening marriage to two people of the same sex has become a major issue in civil and family law. Supported by the dynamics of fundamental rights and the concern for recognizing the dignity of all people regardless of their sexual orientation, this leads to the questioning of the very nature of an institution that is one of the foundations of every human society. Marriage has certainly assumed different forms, purposes and effects.¹ But one element seems to forge its continuity in both space and time: the difference of sex. What in the past appeared to be a foregone conclusion is no longer, at least not in the West.

More and more countries have changed their laws, and this tendency appears to be on the rise. The Netherlands in 2000, Belgium in February 2003, Spain and Canada in July 2005, South Africa in November 2006, Norway, Connecticut and Massachusetts in 2008,² Sweden, Iowa, Vermont, Maine and New Hampshire in 2009, Portugal, Washington, D.C. and soon Luxembourg in the first three months of 2010, have opened marriage to same-sex couples. The debate is raging in Mexico, Argentina and several other countries, with legal battles and “rogue” marriages being performed in order to bring about change in the law by calling more attention to the issue.

France has evidently not remained on the sidelines of this debate. One could certainly have thought that the recognition of a status of partnership

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1. See Ph. Malaurie and H. Fulchiron, *Family*, Defrénois, 3rd ed. 2009, no. 102 s.

2. In May 2008, the Supreme Court of California had authorized same-sex marriage, but on November 4, 2008, a referendum that was product of a popular initiative led to the affirmation of the heterosexual nature of marriage in the State Constitution. For the debate in the United States, see not. “Marriage Between People of the Same Sex, Study by the Court of Cassation,” Center of Comparative Law, Edouard Lambert de Lyon, RIDC 2008, p. 376 s. spec. p. 402 s.

for same-sex couples would have calmed tensions. Conceived as an alternative means of constructing a conjugal relationship open to all couples, both homosexual and heterosexual, the legal implications of *Pacs* (from the French *Pacte civil de solidarité*—*Civil Solidarity Pact*) have come ever closer to those of marriage.³ Homosexual couples thus have, as couples, access to a status comparable to that of marriage. However, the demand for full social recognition for same-sex couples through the opening of marriage itself has continued to make inroads: the Court of Cassation has reaffirmed that in current French law, marriage must be understood as the union of a man and a woman.⁴ Since then, there have been numerous proposed bills.⁵

In addition, in a world where people move around—live and die in a foreign country with their rights, assets and status—the opening of marriage to same-sex couples in certain countries inevitably has repercussions in other countries in general, and in France in particular. This is especially true because certain States undertake to ensure the influence of their internal choices due to particularly flexible regulations of private international law. In this way, the Dutch legislature opens significant doors to same-sex marriage to foreigners: for the marriage to be duly performed in the Netherlands, one of the spouses must simply be Dutch or normally reside in the Netherlands. The legal status of the marriage under the law in the home country of one or both of the spouses is irrelevant: if one of the parties holds Dutch citizenship or resides in the Netherlands, the marriage's conditions of validity are regulated by Dutch law.⁶ Taking this a step further, Belgian private international law nearly establishes the admission of same-sex marriage as a matter of public policy: foreign domestic law is discarded if it prohibits same-sex marriage, given that one of the parties holds citizenship or permanently resides in a State where the law allows this type of marriage.⁷ Two French citizens residing in Belgium can thus marry in Belgian territory. It remains to be seen if these marriages will be recognized as such in France.

3. See Ph. Malarie and H. Fulchiron, *op. cit.*, no. 350 and ref. cit.

4. 1st Civ. May 13, 2007, *infra*.

5. Bill to establish marriage rights for same-sex couples, attached to Minutes of the session of November 8, 2005; Bills tabled in the Senate and National Assembly in May 2006; Bill to open marriage to same-sex couples, registered to the presidency of the National Assembly, January 15, 2008; Bill to allow access to marriage for same-sex couples, registered at the Presidency of the National Assembly, November 26, 2008; Bill to open the right to marry to all couples, regardless of sex or gender, registered to the Presidency of the National Assembly on February 5, 2010.

6. The guide made available to interested parties by the Ministry of Justice of the Netherlands only warns potential spouses of the difficulties they may encounter in having their union recognized abroad.

7. Art. 46 of the Act dated July 16, 2004, affecting the Private International Law Code.

These questions are so vivid that they are often mixed in with debates on same-sex parenting and families. However, the issues are radically different: while it is one thing to open marriage to same-sex couples, it is another to allow them, whether married or not, to adopt a child or to receive medical care for procreation.⁸ In addition, the countries that have opened marriage to same-sex couples have begun redefining marriage by removing the connection to parentage, even though they reestablish the connection just as quickly by framing parentage as an “effect” of marriage. If there is a real inconsistency in this approach, the paradox is merely apparent: regardless of the discourse on the “modern” or “traditional” idea of marriage, there is a recognition of the close links between marriage and family, marriage and parenthood.

For the sake of thoroughness, this text will only address marriage itself without touching upon issues of parenthood and parental authority. French law seems to be divided between steadfastness and openness on this matter. Faithful to the traditional definition of marriage, it resists arguments based upon fundamental rights, and in a deeper sense, the movement towards the “individualization” of family law⁹ (I). However, respecting fundamental rights as well as community liberties will inevitably lead to a mass recognition of those unions legally performed abroad (II).

I. THE REFUSAL TO OPEN MARRIAGE TO SAME-SEX COUPLES

The Court of Cassation has emphatically affirmed that under French law, marriage is understood as the union of man and woman, thus ending the *de lege lata* debate (A). However, the issue has continued to be posed *de lege ferenda*. In France, and in other countries around the world, the most common argument cites respect for fundamental rights and liberties. One may wonder, however, if there is not a rhetorical element to this: perhaps it is less an issue of discrimination than an issue of definition, referring to a societal choice rather than a legal obligation (B).

A. *The Affirmation of the Heterosexual Nature of Marriage*

On June 5, 2004, a prominent politician, the mayor of the small town of Bègles near Bordeaux, performed with great media fanfare France’s first marriage between two individuals of the same sex, in spite of the opposition, which the Public Prosecutor had notified him of. Several weeks

8. On this issue, see not. *Marriage, Cohabitation; Family, Parenthood*, H. Fulchiron (dir.), Dalloz, coll. Topics and Comments, 2009.

9. On this evolution, see, for instance, H. Fulchiron, “*Marriage, Cohabitation; Family, Parenthood: Metamorphosis or Rupture?*,” in *Marriage, Cohabitation; Family, Parenthood*, *op. cit.* and *ref. cit.*

later, the marriage was annulled by the Bourdeaux Superior Court,¹⁰ and the decision was upheld by the Bourdeaux Court of Appeals on April 19, 2005.¹¹ In its ruling from March 13, 2007, The First Civil Chamber of the Court of Cassation¹² reaffirmed the heterosexual nature of marriage under French law. In a concise justification, it states: “*according to French law, marriage is the union of a man and a woman;*” “*this principle is not contradicted by any of the provisions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, which in France is not legally binding.*” Both propositions must be clarified.

1. “*According to French law, marriage is the union of a man and a woman.*”

For the French jurist, this affirmation seems obvious. However, it was challenged: the French Civil Code does not contain a definition of marriage, and the difference of sex does not appear as one of the substantive conditions for marriage or as grounds for annulment: *ubi lex non distinguit . . .* This literal reading would be laughable if it had not enjoyed a certain degree of success in the media, which was concerned with this alleged “legal vacuum,” and even in bills tabled in Parliament.¹³

This, however, amounts to denying the evidence. Until recently, no one doubted that the difference of sex was a basic condition for marriage. If this was not included in the Civil Code in 1804, it is because it seemed entirely natural. In the Preliminary Discourse on the Civil Code bill, Portalis provides an admirable definition, completely devoid of ambiguity: marriage is “the partnership of a man and a woman who come together for the perpetuation of their species, to help each other bear life’s burdens and to share in their common destiny.”¹⁴ In the 20th century, neither the drafters of the Universal Declaration of Human Rights (Art. 16), nor those of the European Convention on Human Rights (Art. 14) felt the need to state this explicitly. Specifying it would have risked causing either shock or laughter.

10. Bourdeaux SC, July 26, 2004, D. 2004, p. 2392, note E. Agostini, p. 2965, obs. J.J. Lemouland, JCP 2004, II, 10169, note G. Kessler, RTD civ. 2004, 719, obs. J. Hauser, Family Law 2004, no. 166, note M. Azavant.

11. Family Law 2005, no. 124, note M. Azavant.

12. D. 2007, p. 1389, concl. G. Pluyette, note E. Agostini, JCP 2007, I, 170, obs. Y. Favier, Defrénois 2007, p. 781, obs. J. Massip, RTD civ. 2007, p. 315, obs. J. Hauser, Family law 2007, no. 76, note H. Azavant, *adde* H. Fulchiron, “One Man, One Woman: The Court of Cassation Rejects Homosexual Marriage,” D. 2007, p. 1375.

13. See Bill permitting the marriage of same-sex couples, registered to the Presidency of the National Assembly on Nov. 26, 2008.

14. See I. Théry and Ch. Biet, “Portalis or the Spirit of the Centuries. The Rhetoric of Marriage in the Preliminary Discourse to the Civil Code Bill,” in *The Family, the Law of the State, on the Revolution of the Civil Code*, *op. cit.*, p. 104.

In the case of France, alleging silence on the part of the law on the issue is inaccurate. Many of the Civil Code's texts implicitly refer to the difference of sex. Thus, Article 75, paragraph 6 of the Civil Code states that when performing the marriage, the presiding civil officer "shall take statements from each party, one after the other, demonstrating that they wish to take each other as husband and wife."¹⁵ Article 144 on the age of marriage and Article 162 on impediments to marriage could also be cited. The General Dispositions on Civil Status, which regulate proceedings pertaining to civil status in general and the act of marriage in particular, is unequivocal.

Similarly, doctrine and jurisprudence have been consistent for two centuries. Thus, in an entirely different context, the Court of Cassation affirmed in 1903 that "marriage can only be legally contracted between two persons, one of whom is male and the other, female."¹⁶

In more technical terms, the appeal alleged that the Public Prosecutor's actions were inadmissible, since it may only act in terms of cases of nullity covered by the Civil Code (see Art. 184): the difference of sex is not included . . . More generally, the Public Prosecutor may, by virtue of Article 423 of the Civil Code of Procedure, act in the defense of public order. Nevertheless, the Court of Cassation states that the celebration of a marriage in defiance of the opposition of the Public Prosecutor evidently affects public order.

But regardless of the content and spirit of the French texts, they would be of little value if they clashed with France's international commitments, particularly in terms of the rights and liberties guaranteed by the ECHR. This was the second method used to support the marriages in Bègles.

2. *"This principle is not inconsistent with any of the provisions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, which in France is not legally binding."*

The appeal was based on Article 8 of the ECHR and Article 9 the Charter of Fundamental Rights of the European Union.

We know that the European Court of Human Rights has not yet ruled explicitly on same-sex marriage, which is still approached with extreme caution.¹⁷ The most commonly cited rulings involve transsexual persons:

15. The disappearance of the terms "husband" and "wife" in quite a few other texts only dates from the law of December 23, 1985. By replacing the terms with "spouses," the court sought to specifically attain equality in marriage between man and woman.

16. Civ. April 6, 1903, DP April 6, 1903, I, 395, concl. Baudoin, S. 1904, I, 273, note Wahl.

17. It should do so very shortly in connection with the case of *Schalk and Kopf v. Austria* (pet. No. 30141/04) venue for the hearing on Feb. 25, 2010, cf. *infra*. For the status of court jurisprudence, see not. M. Levinet, "Discriminations on Marriage in the

the issue is quite different, and any arguments based on analogy are particularly perilous.

On the one hand, this would have undermined Article 8 of the ECHR because the recognized right of all men is “to establish the characteristics of his or her identity as a human being” (based on the formula of the famous *Goodwin* ruling of July 11, 2002¹⁸) would imply, as the appeal states, “the right, for each and every person regardless of their sex and sexual orientation, to free choice and free access to marriage.”

On the other hand, this would have undermined Article 12 of the ECHR (combined with Article 14), which guarantees the fundamental right to marry and form a family: “the second aspect is not a condition of the first, and the inability of a couple to conceive or to raise a child cannot move in and of itself to deprive such a couple of the right covered under the first aspect of the provision in question;” “by excluding same-sex couples, whom nature did not provide with the possibility of reproduction, from the institution of marriage, when this biological reality does not in itself move to deprive these couples of the right to marriage, the Court of Appeals has violated Articles 12 and 14 of the ECHR.” This reasoning can be summarized as follows: access to marriage cannot be denied on the grounds that the couple cannot form a family due to a lack of ability to procreate; thus, same-sex couples, whom nature did not provide with the possibility of reproduction, cannot be denied access to marriage for the sole reason that they cannot form a family. But this entails falsely trying the French trial judges: they have not rejected “homosexual marriage” on the grounds that the couple cannot procreate as they have not stated that the objective of marriage is procreation and should thus be closed off to couples who cannot procreate in general and same-sex couples in particular. If they had, they would have risked censure by the Court of Cassation (under French law, a couple’s fertility does not contribute anything to the perfection of the marriage established by mutual consent) and, undoubtedly, by the ECHR within the framework of the *Goodwin* ruling. This is because there are now other ways to form a family than “natural” procreation.

In this sense, reading the *Goodwin* ruling is quite enlightening. The Court condemns the the United Kingdom for not accepting the marriage of a transsexual individual who, post-operation, obtained a change in gender at the Civil Registry. The Court reproaches United Kingdom’s inconsistency on one hand by authorizing the sex change, financing in part the operations, and consenting to the artificial insemination of a woman

Jurisprudence of the European Court of Human Rights,” in *Marriage, Cohabitation; Family, Parenthood, op. cit.*, p. 55 s. and ref. cit.

18. *Goodwin v. United Kingdom*, Main Chamber, July 11, 2002, *ECHR Major Rulings*, F. Sudre et al., PUF, 4th ed. 2007, No. 38 and ref. cit.

who lives with a transsexual person, and on the other hand, by refusing to follow through with this logic at the risk of placing the transsexual individual “in an abnormal situation that would generate feelings of vulnerability, humiliation and anxiety” (§ 77). The Court recognizes the right of a post-operative transsexual individual who is legally recognized as belonging to the other gender to have all the implications of his or her gender reassignment recognized.

All of the Court’s reasoning is thus founded upon the conception of marriage as the union of two opposite-sex individuals. The applicants were not seeking anything beyond this, which required a fully assumed sexual difference. By condemning a State that prohibited marriage of a transsexual individual and a person of the sex that was the opposite of the one recognized by that same State, the Court affirms that gender is not reduced to its biological component. But as regards the right to marry, its reasoning is constructed in terms of “heterosexual” marriage.

It is thus impossible to deduce anything about the issue of same-sex marriage. In this sense, the Court of Cassation’s somewhat elliptical ruling can be justified.

Lastly, the appeal stated that “if Article 12 of the ECHR specifically addresses the right of a man and a woman to marry, these terms do not necessarily imply that the spouses must be of different sex, as this would risk depriving homosexuals of the right to marry in any circumstances.” This reasoning is curious. Article 12 does in fact speak of a man and a woman, simply because this was the only foreseeable, and foreseen, conception at the time. However, inferring that marriage must be limited to people of different sex based on the convention is perilous: the convention is “a living instrument” that “is interpreted in light of ideas prevalent in our times in democratic States;”¹⁹ thus, a literal interpretation of the text is not coherent. But if a prohibition cannot be justified, it also cannot be inferred through a distributive interpretation that marriage must be opened to same-sex couples.

The appeal was also based on Article 9 of the Charter of Fundamental Rights of the European Union, according to which “the right to marry and form a family is guaranteed under domestic laws that regulate its exercise.” It is clear that the drafters of the Charter knowingly avoided any reference to man and woman in order to allow States to make marriage available to same-sex couples if they should so desire. But allowing States to decide on a new concept of marriage in terms of their own domestic law and seeking to impose same-sex marriage on other States are quite different matters. This interpretation of the text would be contrary to both its content and

19. On these formulas, see F. Sudre, *European and International Law on Human Rights*, PUF, 9th ed., 2009.

spirit: as Advocate General Mischo recalled in his conclusions regarding *Affair D. and the Kingdom of Sweden v. Council of the European Union*,²⁰ the explanations established under the tenure of the Presidium of the Convention, “explanations that have no legal value but rather are simply meant to clarify the provisions of the charter in light of the discussions held in the convention,” indicate that Article 9 “does not prohibit or grant marriage status to unions of persons of the same sex.”

Moreover, it was easy for the Court of Cassation to point out that, at the time of this ruling, the Charter was not yet legally binding in France.

The appeal was thus dismissed. If, however, nothing in the European regulations compels marriage to be opened to homosexual couples, would it not be necessary to take this a step further and explicitly pose the question of discrimination, as did those States that have admitted same-sex marriages?

B. Discrimination, or a New Concept of Marriage?

Those States that have modified their legislation have done so in the name of rejecting discrimination. But one may wonder if the issue of the definition of marriage does not necessitate that of discrimination. It is clearly not because of discrimination that the definition of marriage needed to be changed, but rather it is because the definition of marriage had changed, albeit implicitly, that its “traditional” conception is thus labeled as discriminatory. Thus, the ambiguity of the arguments based on discrimination is manifest. Most importantly, it has been shown that the French Court of Cassation has implicitly left this issue up to lawmakers.

1. A new definition of marriage

It is alleged that refusing to open marriage to same-sex couples constitutes discrimination based not on sex (after all, every man and woman can enter into union with any other person of the opposite sex: men and women are thus placed on equal footing²¹), but rather on sexual

20. ECJ May 31, 2001, for this see not. C. Nourissat and A. Devers, D. 2001, p. 3380 and ff.

21. ECJ rep. *Lisa Jacqueline Grant v. South West Train Ltd*, February 17, 1988, Rec. P. I-631: The plaintiff, who was in a relationship and cohabitating with another woman, challenged the internal regulation that limited transportation price discounts for workers, to her “spouse,” i.e. the person of the opposite sex with whom there exists a “significant” relationship for over two years, her children, persons of her family who are dependent on her and her surviving spouse. The court held that “*given that the conditions established by the company regulations apply equally to female and male employees, it cannot be regarded as constituting discrimination based directly on sex.*” The reasoning has been criticized on the grounds that the court did not use the right terms of comparison: the court compares a male homosexual couple to a female homosexual couple when it should have compared a male or female homosexual couple to a heterosexual couple (see R. Wintemute, “Fundamental Rights and Freedoms of

orientation, which is condemned in the EU by the ECHR²² and strictly prohibited by Article 21 of the Charter of Nice, which states that “any discrimination based especially on sex or sexual orientation is prohibited.”

But possible discrimination can only be understood in relation to the very institution of marriage, and thus to its definition.

Traditionally, marriage is defined as the union of man and woman. It is the legacy of centuries and millennia and one of the foundations of our history and our culture.²³ This also applies regardless of the attitude that a particular society, such as those of antiquity, for example,²⁴ may have had concerning homosexuality.²⁵ It would be futile to reduce the debate to a mere survival of “Judeo-Christian values:” at all times, and in all cultures, marriage has been regarded as the union of man and woman. Specific cases that anthropologists have discovered in certain societies²⁶ are in no way comparable to the normality of gay marriage as it is currently understood in the West.

While the purposes and structures of marriage may be varied, the difference of sex is at the very heart of the definition of marriage. The link between marriage and the difference of sex is born of the link between marriage and procreation and, fundamentally, between marriage and family.

The relationship between marriage and procreation is clearly one of the most delicate issues. It would be incorrect and decidedly reductionist to expect procreation to be the purpose of marriage. This is not the case in the French conception: the consummation of marriage and its fertility do not affect, it was said, its perfection; sealed by the exchange of consent before an officer of the civil registry. Rather than stating that the objective of marriage is carnal knowledge and procreation, it would seem more appropriate to say that the institution of marriage is traditionally regarded as the legal framework of relations between the man and woman and the

Gays, Lesbians and Bisexuals in Europe,” in D. Borillo (ed.), *Homosexuality and Law*, op. cit., p. 183 ff.). But the argument proves too much: equating homosexual couples and heterosexual couples shows that what is at issue is not sex, but the choice of partner, and thus, sexual orientation.

22. See ruling *Salgeiro Da Silva Mouta*, for this, see not. A. Gouttenoire, *Family Law* 2000, no. 45, J. Hauser, *RTD civ.* 2000, p. 313.

23. See J. Gaudemet, *Marriage in the West, Morals and Law*, CERF, 1987.

24. Traditional discourses on classical antiquity are highly ambiguous. The Greeks accepted relations between a boy and a mature man; but they regarded homosexual relationships between two adults with disdain. Today, relations between adults and minors are regarded with horror; and a relationship between two adults of the same sex is stated to be normal.

25. See not. on this issue F. Leroy-Forgeot, *History of Homosexuality in Europe*, PUF 1997.

26. *Add.* for the Western world, studies of J. Boswell, *Same-sex Unions in Ancient and Medieval Europe*, Fayard, 1996.

social framework of procreation. Nowadays, at least in the West, marriage is no longer the only legal framework of relations between the sexes; similarly, it is also no longer, in fact and/or in law, the only socially recognized framework for procreation. There remains, however, a fundamental difference with the various forms of partnerships and unions outside of marriage in general: marriage entails the children that will or could be born. It is not only the legal framework of personal and property relations between two partners: it constitutes the founding act of a family.²⁷ It forms a family based on the fact that the children that will be born, who will be accepted by the couple in advance, will automatically be attached to their parents as well as to their two lines of descent through the presumption of paternity. It forms a family in that it creates a bond between two families who come together to form a new family.

Marriage is also distinguished from partnerships and, more generally, from cohabitation, which establish neither parenthood nor union. It may be possible to attach union-related effects to partnership; this has been done in certain countries that, in limiting partnerships to same-sex couples, have created a status copying marriage in order to better preserve marriage in its traditional conception.²⁸ However, effects regarding parenthood cannot reasonably be attached to partnership due to the lack of a link to procreation: partnership and other statuses more or less created from cohabitation are merely statuses of a couple. Marriage is the status of a family. Similarly, opening marriage to gay couples assumes that the familial dimension of marriage is abandoned to render it with the simple status of a couple.

Indeed, since marriage is effectively refocused on the couple and the link to parenting is severed, the debate on discrimination acquires its full meaning. Reserving the status of a couple to certain couples may, in this instance, effectively entail discrimination based upon sexual orientation. Until this change in definition is reached, the debate is meaningless.

One may ask, is the traditional definition of marriage itself not discriminatory? This argument is made in countries where marriage has been made available to same-sex couples. This reasoning, however, presents a double ambiguity.

On one hand, if the details of this rationale are examined, it can be seen that the discrimination is constructed in terms of the couple and not the individual: the situation of a homosexual couple is compared to that of a heterosexual couple, and it can be seen that marriage is accessible to one of them and closed off to the other.²⁹ But is it not in terms of the individual, in

27. See Ph. Malaurie and H. Fulchiron, *Family, op. cit.*, no. 106.

28. This is notably the case in Germany and Great Britain.

29. See for instance the reasoning of the Canadian Supreme Court in its conclusive

terms of his or her *individual* rights and freedoms, that possible discrimination should be framed? Thus, from the point of view of an individual, the right to marriage is open to all in the same way.

On the other hand, when the rationales used are examined, it appears that a new definition of marriage is being proposed as opposed to adjusting the “traditional” definition of marriage to criteria of discrimination, which makes it automatically fall within the scope of such discrimination³⁰. Thus, the Belgian bill opening marriage to same-sex couples affirmed that, “in today’s world, marriage is experienced and felt as a (formal) relationship between two people whose main goal is the creation of a durable community of life. Marriage offers two partners the chance to reaffirm their relationship and their feelings for one another for all to see³¹.” Since marriage appears merely as “the intimate relationship of two people,” there is no reason to limit it to couples of different sex. In an appeal regarding the law of February 13, 2003, the Belgian Arbitration Court had no choice but to follow this rationale:

Based on preliminary works . . . , it now appears that the legislature regards marriage as an institution whose primary aim is the creation of a sustainable community of life between two people, whose effects are regulated by law. In light of this conception of marriage, the difference between people who wish to form a community of life with a person of the opposite sex and those who wish to form such a community with a person of same sex is not such that the latter should be prevented from

opinion on the conformity to the Canadian Charter of Fundamental Rights of the bill opening marriage to same-sex couples (*Opinion from December 9, 2004, on the appeal for marriage of same-sex couples*). On the evolution of Canadian jurisprudence, see not. “Marriage between people of the same sex, study by the Court of Cassation,” art. prev., spec. p. 402 s. The bill submitted to the French National Assembly in November 2008 (Bill to allow access to marriage for same-sex couples, registered to the Presidency of the National Assembly, November 26, 2008) opts for the same terms of comparison: “*for those homosexual individuals who wish to maintain a relationship, equality to the rest of the society, based on the heterosexual model, is not ensured. While heterosexual couples have a choice between three statuses (common-law, Pacs or marriage), the choices of lesbian or gay couples are limited to common-law or Pacs.*”

30. See the arguments of the petitioners in the case *Schalk and Kopf v. Austria, infra*: the claim that marriage has evolved over time and must today be understood as a permanent union encompassing all aspects of life, with procreation and raising of children in this sense no longer being a decisive factor (again, the redefinition of marriage precedes the assertion of discrimination), serves as a basis for the argument of discrimination.

31. Cited by the Belgian Court of Arbitration in its (favorable) decision on October 20, 2004, regarding the law in question (for the political context and the debates brought about by the passage of this law, see J.L. Renchon, “Marital Arrangements in Belgian Law,” in *From Pacs to New Living Arrangements: Where Is Europe?*, J. Flauss-Diem and G. Fauré (ed.), PUF, 2005, p. 85 s., *add.*, of the same author, “The prevalence of individualist and liberal ideology in recent reforms of personal and family law,” in *Marriage, Cohabitation; Family, Parenthood, op. cit.*, p. 209 s.

marrying.³²

This rationale does not prove anything: neither the fact that the conception of marriage has changed (which is presented as if it were obvious); nor, more importantly, the fact that the traditional conception is discriminatory. At most it can be deduced from this premise that the legal definition of marriage should be changed because it no longer reflects realities and social expectations.

The order of causality can be defined as follows: a State can deem it “fair” to change the definition of marriage. This is a political choice motivated by considerations of equality or by the concern to take into account particularly prominent social realities and expectations.³³ Such a choice may seem timely and sometimes appropriate in terms of the principles that serve as the base of this society’s organization.³⁴ But this cannot be turned into an obligation imposed upon States in the name of

32. The bill to establish the right to marriage for same-sex couples filed before the French Senate in November 2005 (Proposed bill to create a right to marriage for same-sex couples, attached to the Minutes of the November 8, 2005 session), displays the same type of reasoning: in the same vein, see the two identical bills filed in the Senate and National Assembly in May 2006 (“After the decriminalization of homosexuality, after giving the homosexual citizen the tools of equality through anti-discrimination laws, after recognizing that the bond of love that is a couple’s foundation does not have a sex under the *Pacs* (sic) the construction of a new republican response to the expectations of same-sex couples wishing to marry and those LGBT families aspiring to equality of rights is proposed”), or the bill tabled in the National Assembly in February 2010, *infra*.

33. In its opinion on December 9, 2004 *prev.*, the Canadian Supreme Court refuses to see marriage as a “fixed concept.” “From the perspective of the State, marriage is a civil institution. Reasoning based on the existence of “fixed concepts” goes against one of the most fundamental principles of the interpretation of the Canadian Constitution: our constitution is a living tree that, thanks to a progressive interpretation, is adapted and responds to the realities of modern life.”

34. Thus, in his decision on December 2, 1999, Justice Ackermann based his position on South Africa’s judicial and political evolutions in order to propose the redefinition of marriage as a union that creates “a physical, moral and spiritual community life,” imposing duties of “cohabitation and fidelity” (CCT 10/99, *The national coalition for Gay and Lesbian Equality and others v. The Minister of Home Affairs*, December 2, 1999; for this decision, see not. S. Garnieri, “Constitutional Law and Discriminations Based on Sexual Orientation,” *French Constitutional Law Review*, 1999, p. 725 s. and 2000, p. 67 s.). The bill introduced by left-wing parties in the French National Assembly in January 2008 (Bill to allow access to marriage for same-sex couples, registered to the Presidency of the National Assembly on January 15, 2008) states that “the opening of marriage to same-sex couples responds to a social demand that is part of a general movement toward the reinforcement of the principle of Equality, the development of which simultaneously addresses the fight against discrimination, the reinforcement of existing rights, and the creation of new rights.” For the authors of the bill, “the act of limiting marriage to different-sex [sic] couples is clearly a mechanism of social regulation,” incompatible with the freedom that is now recognized for individuals. “Consecration of love”—marriage cannot be denied to same-sex couples because the couple cannot procreate. Far from responding to demands of the European community, the bill would constitute “a republican and universal contribution to the fight for equal rights.” The argument of discrimination is merely rhetorical.

complying with fundamental rights. In some ways, the option is open, and one can endlessly discuss its applicability; but, it is not *necessary* and certainly not *obligatory*.

Given how ominous the argument of discrimination may seem in an age dominated by the glorification of individual rights and freedoms, it is important not to exaggerate its impact: the issue is fundamentally linked to a choice of a society.

In general, such a decision falls upon the lawmaker. In France, it is left to Parliament.

2. A legislature's choice

The opening of marriage to same-sex couples cannot be reduced to a simple issue of interpretation, even for those who create the law. It entails the redefinition of an institution that is essential to our laws. The French Court of Cassation is not endowed with this power because it is not charged with such a mission. The temptation was great, despite, as evidenced, to better discard it, the conclusions of the reporting Judge.³⁵ The Judge took care to point out the series of consequences for family law if legal recognition of same-sex marriage were to be attained. The French judges wisely concluded that the Court of Cassation is neither an American-style supreme court nor a constitutional court, and that the Canadian or South African experiences are not applicable to France.³⁶ Neglecting this would have risked destabilizing our entire legal system.

The ball is thus in the legislature's court. One candidate in the presidential election of 2007 had put it on the agenda, but this has yet to translate into actions. Several bills have been introduced in the National Assembly³⁷ and in the Senate.³⁸

35. G. Pluyette, D. 2007, p. 1389. This position was clarified by the study performed by the Institute for Comparative Law of Lyon upon the Court of Cassation's request, "Marriage between People of the Same Sex," *prev.*

36. See P. Deumier, D. 2008, p. 438.

37. See *supra*. The last bill to date (Bill to open the right to marry to all couples regardless of sex or gender, registered to the Presidency of the National Assembly on February 5, 2010), states, "In our Republic, which claims to be an expression of liberty and equality, certain individuals are being deprived of their right to express their love through the means they esteem most convenient;" "There is no reason to prohibit these couples from marrying. Those who refuse it most often take refuge in a biologizing idea of the family, insidiously reducing the meaning of marriage to biological parentage and thus denying the right to adopt. By regarding marriage not as a right but as an institution, they attempt to impose the criteria of a religious sacrament upon a civil act enshrined in the legal order of a secular Republic;" "from now on, it is necessary to think of marriage above all as a union whose goal is mutual solidarity founded on shared affection." The proponents of the bill demand its passage, and they are convinced that "the freedom of each and every person to chose his or her lifestyle, to live his or her sexual orientation and gender identity must be guaranteed and protected by law, given that any discrimination based on sexual orientation and gender identity must be forbidden and combatted, and the best guarantee of equal rights lies in

The underlying question remains: is the French lawmaker free to decide, or could he or she be constrained if the ECHR or the ECJ happen to be seduced by the argument of discrimination?

It has been said that the European Court of Human Rights approaches these issues with caution.³⁹ Does it risk taking the step in the upcoming *Schalk and Kopf v. Austria* ruling?⁴⁰ Predicting the future clearly has its hazards, considering that when dealing with such matters the sense of compassion that occasionally envelops the Court may prevail over reason. Nevertheless, a prediction can be ventured.⁴¹ Even if the Court would agree with discrimination, which given the state of its jurisprudence is nothing less than certain,⁴² it is likely that it will give States a wide range of discretion. In a matter this sensitive, and in the absence of consensus between States, it seems necessary to take into account traditions and policies undertaken by the different component States. Furthermore, if it remains faithful to its pragmatic approach, the Court should take into consideration the entire legal system in question: what status does the Austrian legal system grant same-sex couples, and is there a type of partnership that allows same-sex couples to obtain recognition of their status and places them in a position comparable, through the rights and benefits available to them, to married heterosexual couples? If it is unlikely for the Court to impose same-sex marriage as a necessity for a democratic society, it could instead require that the component States offer same-sex couples the social recognition and protection to which all people have the right in a society governed by principles of tolerance and respect of individual rights and freedoms.⁴³

The Court of Justice of the European Union adheres to a more traditional idea of marriage. Thus, in the ruling *D. and Kingdom of Sweden v.*

the existence of universal institutions, open to all, rather than in the implementation of various institutions.”

38. See *supra*.

39. See *supra*.

40. *Schalk and Kopf v. Austria*, pet. no. 30141/04, in this case the two Austrian plaintiffs file a complaint regarding the Austrian authorities' refusal to the performance of their marriage. By stating that marriage has evolved over time and that today it should be comprised of a permanent union encompassing all aspects of life because procreation and child rearing are no longer a determining factor in this sense, they allege a violation of Article 12 of the ECHR. Furthermore, in terms of Article 14 together with Article 8, they claim to have suffered discrimination based on sexual orientation in that they were refused the right to marry and they have no other opportunity to have their union legally recognized. Finally, in terms of Article 1 of Protocol no. 1 (protection of property) of the Convention, they allege that they are in a disadvantageous financial situation compared to married couples. The hearing on the admissibility and the grounds was held on February 25, 2010.

41. Inc. more pessimistic analysis of Mr. Levinet, *prev. art.*

42. See M. Levinet, *prev. art. and ref. cit.*

43. See also the plaintiffs' argument in the *Schalk and Kopf v. Austria* case, *supra*.

Council,⁴⁴ it affirms that “the term of marriage, in its definition commonly accepted by the Member States, has consistently implied the union between two people of opposite sex.” The disappearance of the difference of sex from Article 9 of the Charter of Fundamental Rights does not change anything.⁴⁵ On the other hand, one might expect the Court to compel Member States to recognize a union that was legally performed in another Member State. But the issue is entirely different: it entails the recognition in France of a same-sex marriage legally performed outside the country.

II. ADMISSION OF SAME-SEX MARRIAGES PERFORMED ABROAD

The multiplication of countries that open marriage to same-sex couples and the dissemination of certain regulations of private international law pose with ever-increasing frequency the issue of admission of these unions in a country that, like France, retains a traditional definition of marriage. A marriage between two people of the same sex cannot, of course, be performed on French soil, even when the laws of the country of origin of each of the two parties, which are applicable according to the principles of French private international law regarding the prerequisites of marriage, would admit such a union; French public policy in terms of international issues would prevent the creation of a situation in France that is inconsistent with the fundamental principles of its family law.⁴⁶ But what happens with a marriage that was performed outside the country, in accordance with local laws, and for which the spouses or a third party request recognition? Even though there is neither a specific conflict of laws nor even jurisprudence on the matter, the position of French law appears to take shape little by little. A certain doctrinal consensus is being sketched out in favor of a mass admission of marriages between people of the same sex performed legally outside the country.⁴⁷ However, it is

44. ECJ May 31, 2001, spec.

45. See *supra*.

46. For the impact of ECJ jurisprudence, see *infra*.

47. For gay marriage in private international law, see not. H. Fulchiron, *Homosexual Marriage and French Law (Regarding the Dutch Laws of December 21, 2000)*, D. 2001, p. 1628, E. Fongaro, *Review of the Effects in France of a Homosexual Union Performed Abroad*, JCP Not., 2005, no. 1258; F. Brulé-Gadioux and E. Lamothe, *Homosexual Marriage in Europe*, Defrénois 2005, p. 647; M. Revillard, *Pacs, Registered Partnerships and Homosexual Marriages in Private International Law*, Defrénois 2005, p. 461; H. Fulchiron, *Homosexual Marriage and Partnerships in Private International Law*, RIDC 2006, p. 409; E. Fongaro, *Homosexual Marriage at the Test of Private International Law*, Clunet 2006, p. 477; H. Fulchiron, *French Law and Foreign Homosexual Marriages*, D. 2006, p. 1253, M. Schmitt, *Treaty of Lisbon: Towards a New Approach to Homosexual Marriage in the International Order*, JCP Not. 2008, 1312, E. Fongaro, *The Lack of Hereditary Effects in France for the Homosexual Marriage of a French Citizen in the Netherlands (Regarding the Ministerial Response of January 24, 2008)*, Family Law, 2008, Et., no. 16.

necessary to specify the conditions of this admission, i.e. reflecting upon the principle of recognition (A), prior to analysis of the extent (B), both questions acquire a particular significance when examined in light of European Union rights and freedoms.

A. *The Principle of Recognition*

For the union performed outside the country to be recognized as a marriage in France, the most important step is for it to be categorized as a marriage. In this case, it will be necessary to verify that the union was performed legally. Finally, it will also be necessary to evaluate the reaction of public policy doctrine. These different issues take on a particular depth in the EU, where this method of recognition is taking hold little by little.⁴⁸

1. *A marriage*

Can a union performed in Spain, Belgium, or the Netherlands as a marriage between two individuals of the same sex be placed in the category of marriage in terms of French private international law?

In private international law, it is recognized that this forum's categories should be broadened to incorporate foreign institutions not addressed in domestic law, or whose structures and methodologies are different. In this case, the category of marriage is traditionally opened to polygamy, even though domestic law prohibits such a union. It is very tempting to follow the same logic in terms of homosexual marriage. But in the case of polygamy, there is no doubt that it is a marriage: it is simply the multiple bonds that contrast with the monogamous nature of French marriage. This is not true of a union between two persons of the same sex. It is no longer a simple adaptation or broadening of categories of domestic law in order to incorporate certain particular forms of marriage: in this case, it is once again the very definition of marriage that is in question.⁴⁹

There are, therefore, two possibilities: either the affirmation is made that in France only those unions fulfilling the intrinsically heterosexual definition of marriage are recognized *as marriages*, or it is accepted that a

48. For this, see not. P. Lagarde, *Recognition, Guide to Usage*, in *Meetings in Honor of H. Gaudemet-Tallon*, Dalloz 2008, p. 481 s.; P. Mayer, *Methods of Recognition in Private International Law*, in *Meetings in Honor of Paul Lagarde*, Dalloz, 2005, p. 547 and for a general presentation, H. Muir Watt and D. Bureau, *Private International Law*, t. 1, *General Part*, PUF, coll. Thémis, 2007, n°575 and ref. cit. *Add.* for the application of the method to same-sex partnerships and marriages, A. Devers, *The Distribution of Couple Statutes in Europe*, in *Marriage, Cohabitation; Family, Parenthood*, *op. cit.*, p. 81 s. Certain French legislators seem to be seduced, see the bill introduced in the Senate in November 2008 (Senate Doc. no. 111), "to allow the recognition of unions performed in another EU Member State between any couples, regardless of their sexual orientation."

49. See *supra*.

category of “marriage” that is radically different from that stipulated by domestic law shall be created based on the demands of private international law.

In the first case, given that it cannot be designated as a marriage, the union performed outside the country could not be admitted as such in France. However, it is not necessarily devoid of all effects. In fact, if it is not a *more gallico* marriage, it is a union of two people contracted according to certain structures and to which foreign law attaches a certain number of effects. There is, thus, a category of French law that can accommodate this legal situation: registered partnerships. The foreign same-sex “marriage” must be “recategorized” as a partnership.⁵⁰ Once recategorized, the institution must be submitted to the laws applicable to the category to which it is assigned under French private international law. As a partnership, “*the material provisions of the State of the authority who has registered it*”⁵¹ would be applicable in accordance with Article 515-7-1 of the Civil Code (Act of May 12, 2009). The foreign “marriage” would thus produce the effects associated with a foreign registered partnership.⁵²

In the second case, the “marriage” performed outside the country between two individuals of the same sex would be recognized in France as a marriage. Reversing the traditional perspective that maintains that the categories of private international law are only, with the exception of some adaptations, the projection of institutions of domestic law in the international arena, the category of marriage in domestic law would be indirectly, but radically, modified as a result of the effects of private international law.

This seems to be the approach that has been adopted little by little, rather than by force, in French law. Several ministerial responses have thus

50. Rep. the reasoning followed in August 2006 by the High Court of London: faced with recognition in England of a same-sex marriage performed in Canada between two women, Judge Potter, after recalling the definition of “traditional” marriage, states that the union performed in Canada must be received in England as a registered partnership, governed by the provisions of the laws regarding civil partnership: according to him, “by withholding from same-sex partners the actual title and status of marriage, the Government declined to alter the almost universal recognition of marriage, but without in any way failing to recognize the right of same-sex couple” (*Wilkinson & Kitzinger*, High court, Family division, August 31, 2006, EWHC 2002 (Fam)).

51. See. not. on this rule, P. Callé, *Introduction in French Law of a Rule of Conflict for Registered Partnerships*, Defrénois 2009, no. 38989; P. Hammje, *Reflections on Article 515-7-1 of the Civil Code, Act no. 2009-526 of May 12, 2009*, Crit. rev. PIL 200ç, p. 483.

52. Rep. Article 45 of the Swiss PIL Act, according to which, “A marriage performed legally in another country between people of the same sex is recognized in Switzerland as a registered partnership.” But, by virtue of the rule of conflict established for partnerships, it will be governed by the laws of the domicile of the partners, most commonly Swiss law.

permitted a marriage legally performed in another country to produce a certain number of effects in France.⁵³ Similarly, in a decision dated July 11, 2008, the General Department of Public Finance of the Budget Ministry⁵⁴ authorized a same-sex Dutch couple married in the Netherlands to file a joint income tax declaration like any married couple.

Furthermore, are the classic questions of categorization appropriate in the Union order? Based on a broad interpretation of the *Grunkin-Paul* ruling rendered by the ECJ on October 16, 2008,⁵⁵ would it not be possible to expect a European citizen to have the right to have all the elements that make up his or her civil status recognized in every Member State? The categorizations particular to each State would thus be unimportant. In this sense, German authorities refused to recognize the double last name that was given to a German child born of German parents and recorded in Danish records in his place of birth in accordance with Danish law based on the jurisdiction of German law by virtue of German rule of conflict. For the Court of Justice, the refusal to recognize the name granted and registered by the administrative authorities of the individual's state of residence is contrary to EU law. It is, however, important to point out that, in such a hypothetical situation, the institution in question was not alleging issues of categorization: there were no doubts regarding its regime. The method of recognition assumes an identified object (last name, partnership, descent); it does not remove the attempt at categorization. In addition, it should be noted that in this case, at issue was not the *creation* of an actual legal situation, but the establishment of the legal consequences (in terms of the last name) of an uncontested situation (descent). The resolution imposed by the Court can be justified in the second hypothetical situation, but it is more difficult than in the first situation.

If one accepts the categorization of "marriage" for a union between two persons of the same sex performed outside of the country, it is still necessary for the "marriage" to be legally contracted in terms of the French regulations of private international law.

2. A legally performed marriage

In accordance with French regulations of private international law, the prerequisites of the marriage are submitted to the law of the place of the marriage (which by definition accepts same-sex marriage); the

53. Min. resp. no. 41533, Min. Justice, OB AN, Q, July 26, 2005, p. 7437, Family law, 2055, no. 255, note E. Fongaro; Min. resp. No. 00 886 (OB Senate January 24, 2008), p. 161, see E. Fongaro, Family law 2008, no. 16.

54. See M. Lamarche, Family Law 2008, Focus, no. 79.

55. ECJ Main Chamber, October 14, 2008, case C-353/06, Clunet 2009, p. 203 s, note L. d'Avout, JCP 2009, II, 1007, note A. Devers.

prerequisites are regulated by domestic spousal laws; and the law of one nation common to both, or the nations of each spouse. In this last hypothetical situation, the difference in sex as it affects the bond of marriage itself will result in the cumulative application of domestic laws; the lack of an impediment in both legal systems will be verified. What if the domestic law of the country of one of the spouses does not accept same-sex marriage, but, under the rules of private international law enacted by the government of the country in which the marriage was performed, the marriage can be validly contracted on its soil? This can be, for instance, the case for a French citizen and a Dutch citizen who marry in Amsterdam, or a marriage between two Italian citizens who are permanent residents of Belgium. The marriage has certainly been performed legally in terms of the regulations of Dutch and Belgian private international law,⁵⁶ but it cannot produce any effects in France; in French private international law, the only applicable laws are the domestic laws of the countries of both interested parties; one of them prohibits same-sex marriage.

In the event of an individual with dual French and foreign citizenship, the solution had thus far appeared to be established; except in certain circumstances, French authorities took only French citizenship into account. Thus, a marriage performed in Spain between a Spanish citizen and a dual Spanish-French citizen would be devoid of any effect in France. In conclusion, in the event that an individual holds dual citizenship, traditional jurisprudence orders French authorities to uphold the *effective* citizenship.

These classic arguments have met with the approval of the Keeper of the Seals: in a response regarding the rights of inheritance in France in a marriage between a Dutch citizen and a French citizen performed in the Netherlands, the Minister stated that in order to produce rights of inheritance for the surviving spouse, the marriage must be valid under applicable rules of conflict of laws, which cannot be the case when at least one party holds French citizenship.⁵⁷

These certainties today may nevertheless be questioned, particularly in the context of the European Union.

In the Court of Justice of the European Union's famous and hotly debated *Garcia Avello* ruling,⁵⁸ issued on October 3, 2003, regarding family names, the court seemed to state that under Articles 12 EC

56. See *supra*.

57. Min. resp. no. 00 886 prev. The Keeper of the Seals states that in addition, the act of marriage cannot be transcribed in the records of the French civil state and will thus not be binding on third parties.

58. *Garcia Avello v. Belgian State*, ECJ October 2, 2003, case C-148/02, D. 2004, p. 1476, note M. Audit, Crit. rev. PIL 2004, note P. Lagarde, Clunet 2004, p. 1225, note S. Poillot-Peruzzetto.

(principle of non-discrimination based on nationality) and 17 EC (European citizenship), the authorities of a Member State could not deprive its citizens of the rights to which they are entitled based on the laws of another Member State whose citizenship they also possess. One could conclude that the French authorities cannot deprive a dual Spanish-French or Belgian-French citizen of the rights that are made available to him or her under Spanish or Belgian law. Given that the *Garcia Avello* ruling does not make reference to effective nationality (in this instance, the situation demonstrated the closest ties with Belgium, as the child in question was born and lived in Belgium), one may wonder if the issue of such a conflict is not left up to individual will, which would open the door to recognition of the marriage in France.

This interpretation, which would give the method of recognition considerable reach, may well have been reinforced by the *Hadadi* ruling of July 16, 2009.⁵⁹ In this case, a Hungarian couple living in France had acquired French citizenship. In 2002, the husband requested divorce from the court in Pest; a year later, his wife referred the matter to a court in Meaux. The Hungarian judge issued a divorce in 2004, and in 2005 the French judge declared the wife's action inadmissible. On appeal, the Paris Court of Appeals ruled that the Hungarian decision cannot be recognized in France on the grounds that only the French judge's jurisdiction was applicable due to the wife's French citizenship. When referred to the French Court of Cassation as a prejudicial issue, the ECJ ruled that under Brussels Regulation 2-bis, the courts of the Member State in question may consider spouses who both hold citizenship of that State as well as of the Member State where the decision is being made solely as nationals of the Member State in question. In addition, the Court held that when each of the spouses holds citizenship of two Member States, the provisions of the Regulation in question are opposed to the fact that the jurisdiction of the courts of one of these Member States is excluded because the plaintiff has no other connections with that State; the couple may instead refer the issue to the jurisdiction of the Member State of their choosing.

The decision is clearly made in view of specific provisions of Brussels Regulation 2-bis and applies only to international jurisdiction. However, there is a significant temptation to extend this reasoning to all cases where two legal systems or two judges potentially have jurisdiction within the order of the Union because of the dual nationality of the parties.

Based on an uncompromising synthesis of the *Garcia Avello* and *Hadadi* rulings, a French national with dual citizenship could claim his or her foreign citizenship in order to obtain recognition of a marriage performed

59. ECJ 3rd Chamber, July 16, 2009, case C-168/08, for this see not. L. d'Avout, *Clunet*, 2010, p. 158.

in accordance with local laws, even if the foreign citizenship in question is not effective. For instance, for a dual French-Belgian citizen married in Belgium to a Belgian national, and both reside in France; the marriage must be recognized in France notwithstanding the French citizenship of one of the spouses.

The impact of such reasoning would be devastating in the event of conflict between foreign nationalities of two EU member states. As mentioned, according to traditional jurisprudence, French authorities must uphold the *effective* nationality in such a situation. This criterion, however, does not seem to attract much attention from the ECJ. Assume, for instance, a marriage between a Belgian and a dual English-Spanish citizen who still lives in the United Kingdom. Can the Anglo-Spanish spouse claim Spanish nationality before a French judge for recognition of a marriage performed in Belgium? A broad interpretation of the *Hadadi* and *Garcia Avello* rulings can support this.

Are certain safeguards, such as fraud or abuse of rights, conceivable when, for instance, the interested parties have always lived in France and only claim their dual citizenship in order to obtain abroad what they could not obtain in France?⁶⁰ Nothing is less certain. Only those situations where French citizenship and extra-EU citizenship, or citizenship of two extra-EU states, is in question would be governed by traditional regulations of conflicts of citizenship.

By taking this a step further, one may ask if through the application of the method of recognition, a union legally constituted in a member country must not be recognized in all the other States of the EU, regardless of the law applicable to the prerequisites of marriage, regardless of the citizenship or normal residence of the interested parties. In some ways, EU citizenship and its associated liberties would transcend domestic law in both substantive regulations and rules of conflict.⁶¹ Thus, the Swedish marriage of two Italian women would have to be recognized in France, as would the marriage of a French man and a German man legally constituted in the Netherlands or the marriage of two French women residing in Barcelona.⁶² Any other solution would be a hindrance to the freedom bestowed upon every EU citizen to move and reside freely within EU territory.

60. Postmodern version of the famous *Princesse de Bauffremont* (GADIP, *op. cit.*, no. 6) ruling: a French woman living with a Belgian woman who acquires Belgian citizenship with the sole purpose of obtaining the recognition of a union that would not have been accepted if the interested party had only been French.

61. In the *Grunkin-Paul* ruling, *prev.*, the ECJ pays no mind to the German rule of conflict that submits family name to German law.

62. See the reflections of P. Lagarde, *prev. art.*, no. 9 s. and *ref. cit.*, questioning whether this reasoning should not be extended to situations created outside of the EU: "One must ask if the free circulation of EU citizens does not imply recognition of elements of their personal status constituted outside of the Union."

This reasoning can prove attractive in both its radicality and false simplicity. It should nevertheless be noted that what may seem convenient when an institution shared by different Member States (divorce, last name, “traditional” marriage, etc.) is in question, it is no longer convenient when the institution gives rise to radical differences between States: for there to be recognition, the object must in some way be recognizable. Thus, as observed earlier, the recognition of same-sex marriage calls into question not only the regime of marriage, but its very nature.⁶³

It is also important to reflect upon the necessary framework of the mechanism of recognition. It seems particularly necessary for the situation in question to demonstrate a certain number of links with the countries in which recognition was attained; permanent residence in the country in question serves as a minimum threshold, but one can then argue in terms of citizenship.⁶⁴ This holds true unless alternative links are used⁶⁵.

It would also be best for recognition only to be granted in the absence of fraud, which would at least entail the existence of bonds that tie the spouses to the country in which the marriage was performed.⁶⁶ Most importantly, the method of recognition does not imply that there should not be questions regarding the framework of the situation that is intended for recognition under French public policy on international issues.

3. The role of the public policy doctrine in international matters

According to a classical approach concerning the attenuated effect of French public policy in terms of international issues, a distinction should be made between the creation of a situation in France and the reception in France of a situation that was validly created abroad. In the first case, the response of French public policy in international issues is entirely clear: homosexual marriage cannot be legally performed in France. But when faced with a situation that was legally created abroad in accordance with applicable laws and without fraudulent intent, the reaction of public policy shall be “attenuated”: only those effects that are excessively inconsistent

63. For the same reason, we cannot invoke the precedent set by the Hague Convention of March 14, 1978, on the performance and recognition of the validity of marriages: the principle that “a marriage that was validly entered into under the law of the State in which it was performed or becomes valid under that law shall be considered as such in all Contracting States . . . ” (Art. 9), is only applicable if the countries concerned have a common or at least comparable definition of marriage.

64. See P. Lagarde, *prev. art.*, no. 11: “Can the link that justifies the obligation of recognition be regarded as being constituted by the sole fact that the interested party is a citizen of a Member State and all that modifies his or her personal status in one Member State should be recognized in the other States?”

65. See P. Lagarde, *prev. art.*, no. 18 and the examples cited.

66. See A. Devers, “The Distribution of Couple Statutes in Europe,” *prev. art.*

with this area's fundamental principles shall be rejected.⁶⁷ But in order for there to be an attenuated effect, the marriage must still be legally performed in terms of French regulations of private international law. Thus, this approach does not provide a solution for all the problems associated with recognition of same-sex unions.

The method of affinity with public policy doctrine appears more relevant. Under this approach, the reaction of public policy depends upon the intensity that the links of the situation in question demonstrate to the French legal order: the closer the links, the more rigorous the public policy reaction.⁶⁸ French jurisprudence has applied this "public policy of affinity" on numerous occasions, particularly in cases of children born out of wedlock⁶⁹ or repudiations made by Muslims abroad.⁷⁰ When applied to homosexual marriage, this jurisprudence would lead to the rejection of recognition in France of a marriage between two people of the same sex performed abroad, given that the situation demonstrates close links to the French legal order.

Is such reasoning incompatible with this method of recognition? Both approaches can actually complement each other.⁷¹ Recognition in fact entails some sort of regulation.⁷² Thus public policy is one of the instruments that allow a balance to be struck between free circulation and fulfillment of legal orders. It has been noted that even if its role has been highly restricted, public policy doctrine appears in most EU legal instruments.⁷³ The only situations in which it is banned are those where there is an agreement on the principles and objectives (for instance, in terms of child rearing), which is not exactly the case for same-sex marriage. The affinity of the links that the situation maintains to the country in question could thus allow the activation of the public policy exception.⁷⁴ This would be the case when one of the domestic laws in question is French law, including cases of dual citizenship.

67. *Rivière* ruling, Cass. civ., April 17, 1953, *GADIP*, *op. cit.*, no. 26.

68. For this, see not. P. Courbe, "Public Policy of Affinity," in *Meetings in honor of Paul Lagarde*, Dalloz 2005, p. 227 s.

69. Civ. 1st February 10, 1993, *Crit. rev. PIL* 1993, p. 620, note J. Foyer.

70. Civ. 1st February 17, 2004 (five rulings), *D.* 2004, p. 825, concl. F. Cavarroc, *JCP* 2004, II, 10128, note H. Fulchiron, *Rev. cit. PIL* 2004, 423, note P. Hammje, *Clunet* 2004, p. 1200, note L. Gannagé, *add.* P. Courbe, "The Rejection of Muslim Repudiations," *D.* 2004, 815.

71. See analyses of A. Devers, *prev. art.*, p. 94 s.

72. See not. P. Lagarde, "Recognition, Guide to Usage," *prev. art.* *Add.* the analyses of P. Mayer (*prev. art.*, no. 41), rationale regarding registered partnerships, and no. 46.

73. See not. A. Devers, *prev. art.*

74. See P. Mayer (*prev. art.*, no. 46), who uses the expression "of public policy doctrine on the personal status of the French."

The rejection of recognition clearly represents a disturbance in freedom of movement and residence. But not all limitations are necessarily wrong, given that they are based on objective considerations and are designated for the legitimate pursuit of a goal. This was not the case in *Grunkin-Paul*: the ECJ was not convinced by arguments that justified exclusive attachment of the family name to domestic law (the court notably rejects the argument of state stability, which in this case would not really be ensured); it had noted that German rules of conflict admitted exceptions and emphasized that German substantive law did not exclude the possibility of assigning a created last name for German children. There is some evidence, however, that the radical contradiction of the definition and meaning of a fundamental institution of family law (and not just a difference of regime) may justify the refusal of recognition, since the situation is meant to be regulated by the law of the State in question, the domestic law of either party.

It will be recalled here that the ECJ has adopted a “traditional” concept of marriage⁷⁵ and the silence of Article 9 of the Charter of Fundamental Rights merely permits the opening of marriage to same-sex couples in those States that so desire. Thus far, EU legislators have been highly cautious in the matter: as Directive 2004/38/EC, dated April 29, 2004, on the right of EU citizens and their family members to move and reside freely within the boundaries of Member States adheres to a “traditional” notion of spouse, the defense of “traditional” marriage remains a legitimate objective.⁷⁶ Similarly, the EC directive from September 22, 2003 on the right to family reunification refrains from taking sides. Even if nothing is excluded for the future, in light of developments since then, throughout the EU, all these elements would limit the demand for recognition of marriages that do not maintain intimate links to the legal order of the state in question, which remains loyal to the traditional idea of marriage.⁷⁷

By taking this reasoning a bit further, one may contemplate the reaction of public policy when the marriage has been performed contrary to the domestic law of the country of one of the parties, when this law is applicable according to the rules of conflict of the State in question. Would the affinity between two public policy doctrines and the resulting double breach not justify putting an end to the recognition argument?⁷⁸ The

75. Case C-122 and C-125/99P, RTDH 2002, 663, note C. Maubernard, D. 2001, 3380, note C. Nourissat and A. Devers.

76. Dir. 2003/86/EC of September 22, 2003, on the right to family reunification, JOUE, October 3, 2003, no. L. 215, p. 12.

77. See A. Devers, *prev. art.*, p. 97.

78. Comp. P. Mayer, *prev. art.*, no. 46: “The marriage of two homosexual Italian men in the Netherlands does not, however, warrant advantage to be recognized in France” (over the marriage of two gay French men in the Netherlands): at issue is not

recognition of same-sex marriage in the EU would thus be limited to “legally” performed unions in terms of the regulations of the destination country. Assume, for instance, the case of two Swedish women married in Sweden and residing in France: their marriage would be recognized in France. A marriage between a Spanish woman and a woman with dual French-Spanish citizenship: the marriage would not be recognized. A marriage between a Dutch man and a French man: the marriage would not be recognized. A marriage between a Belgian man and an Italian man: the marriage would not be recognized. Such limitation would be all the more convenient for some countries, if they widely recognize same-sex marriage in their territory, as not regulating recognition would enable them to impose their model on other States.

But once recognition is achieved, the union produces all of its effects.

B. The Extent of Recognition

What effects can a “same-sex” marriage that was legally constituted abroad produce in France? Here, only the effects of marriage itself (personal or hereditary effects) will be addressed. Issues associated with kinship (presumption of co-maternity, availability of adoption to the couple, access to medical care for procreation, etc.) or parental authority will be omitted. In private international law, kinship, adoption, and parental authority are regulated by domestic laws. Furthermore, it has been noted that the opening of marriage to same-sex couples depends upon a separation of marriage from parentage: attempting to reconstruct this bond based on its purposes would be paradoxical.

Once recognition of marriage has been attained, it does not seem possible to limit its effects in this regard.

This could be attempted by applying the theory mentioned earlier on the attenuated effect of public policy doctrine. For instance, it is known that a polygamous union legally constituted abroad can produce certain effects in France: those that are not in excessive conflict with French public policy doctrine in terms of international issues.⁷⁹ Thus, the husband would not be able to claim rights to the obligation of common life; but if deceased, his wives would be eligible for inheritance as surviving spouses. It falls upon the judge to evaluate on a case-by-case basis, based on the effect that has been claimed. When applied to same-sex marriage, this reasoning would

the classical mechanism of public policy doctrine exception, but “a resistance opposed to the method of recognition by domestic law, whose jurisdiction reflects a subjection of the individual to the State (often referred to as incorporation based on sovereignty). Compliance with certain mandatory rules outweighs the projections of the parties. The same also applies for the method of recognition of decisions.”

⁷⁹ *Beneddouché* ruling, Civ. 1st January 3, 1980, *Large-scale PIL Rulings*, *op. cit.*, no. 61 and ref. *cit.*, *legitimate*.

lead to a distinction among the desired effects: those that are not in direct conflict with public policy doctrine will be produced; the others will be rejected. This position, widely accepted in doctrine,⁸⁰ has been taken up in a Ministerial Response.⁸¹ It has, however, failed to make inroads.⁸²

How, then, can the “good” and “bad” effects be sorted out in practice? The effects of marriage in terms of inheritance (is it not necessary to protect the surviving partner?) or marriage regimes (is it not equitable for the spouses to share, unless desired otherwise, the fruits of a life in partnership?⁸³) will undoubtedly be produced; the joint obligation for debts of communal life protects third parties as well as spouses (it has already been replicated in the *Pacs*). And in the case of social and tax rights: how, one may ask, has public policy doctrine been undermined considering that it is a question only of equity and solidarity? Personal obligations would remain: fidelity, care, assistance. But one cannot help but point out that it would be shocking to prohibit the only effects that give the union a personal, and not exclusively material, dimension. The theory of attenuated effect risks being a mere smokescreen masking a general reception of same-sex marriage.

Resorting to the affinity with public policy doctrine does not limit the effects of recognition either: the situation is either accepted or rejected. This applies even if the theory of recognition is applied; invoking French public policy doctrine in terms of international issues to limit the effects of recognition once it is attained seems destined to failure considering that it is uncertain what doctrine would be used as justification (civil issues? tax issues? social issues?), for rejecting certain effects;; in a space where people and goods freely circulate, where freedom, safety and predictability prevail, the act of not treating two Dutch men or women, or two Spanish men or women as spouses that are legally married in their countries in accordance with their domestic law, that reside in France or Germany, that live, work and acquire assets, separate or die there, can only constitute inequality in treatment, which is prohibited within the EU’s borders.

And the reasoning is valid, whether the effects of marriage are those that are conferred upon it by the law of the State of origin or those addressed by the law of the State where it is recognized.⁸⁴ At most, the legislature could

80. See not. M. Revillard, *Pacs, Registered Partnerships and Homosexual Marriages in PIL*, prev. art.

81. Min. Resp. no. 41533, prev.

82. See not. E. Fongaro, note under Min. Resp. no. 41533, prev. and *Review of the Effects in France of A Homosexual Union Performed Abroad*, prev. art.

83. Unless their common desire expressed in a marriage contract has determined otherwise.

84. For the debate regarding the applicable law, see P. Lagarde, prev. art., no. 20 and ref. cit.

decide that a marriage legally constituted abroad cannot produce more effects than a marriage constituted in the State of recognition.⁸⁵

Is recognition of the effects of a same-sex marriage legally constituted abroad not a means of “adapting” them to domestic law? Is it not a first step toward integration (and there will be no shortage of good reasons to argue that accepting recognition of a marriage between two foreigners and refusing recognition of two French citizens constitutes discrimination . . . based on nationality)? Contrary to what some would like to portray, the spread of the most liberal model is not a foregone conclusion:⁸⁶ it falls upon each State to define the bases of its family public policy, while respecting fundamental rights and EU law. It is especially important to guard against the abusive use of the fundamental rights, and perhaps, even further, the pure and simple transposition of Community principles conceived for issues of an entirely different nature to personal and family law: whatever the significance of the fundamental rights, there are issues that should not be treated solely in terms of the individual and his or her rights, whatever the strength of community freedoms, there are societal choices of which States must remain in control.

85. See the solution addressed by German law for registered partnerships: in light of Article 17 b EGBGB, the effects in Germany of a registered partnership from abroad are submitted to the law of the State of registration, but they cannot exceed those effects stipulated by German law.

86. See H. Fulchiron, *Does a European Family Model Exist?*, Defrénois 2005, p. 1461.