

# The New French Marriage in an International and Comparative Law Perspective

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## I. INTRODUCTION

Evolution in the composition of couples, such as the recent worldwide increase of gay and lesbian marriages, has led to substantial changes in the visage of family. One can easily say that homosexuality

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has existed throughout history.<sup>1</sup> Nevertheless, the battle for legal recognition of homosexual couples only appeared in France at the end of the twentieth century.<sup>2</sup> It is due to procrastination<sup>3</sup> that France waited until 1999 to introduce a legal status for homosexuals—a partnership called PACS—from the French *Pacte Civil de Solidarité* (civil solidarity pact).<sup>4</sup> PACS was, in other words, a kind of “marriage bis”<sup>5</sup> open to any couple, regardless of gender, to establish their common life and to administer their assets.<sup>6</sup> Although PACS rapidly evolved in the past decade toward an institution similar to marriage,<sup>7</sup> the French partnership did not adequately respond to the expectations of same-sex couples. For instance, PACS did not create reciprocal rights of inheritance between

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1. LOUIS CROMPTON, *HOMOSEXUALITY AND CIVILIZATION*, at xiii (2003).

2. On August 4, 1982, from a proposal by Robert Badinter, French Minister of Justice, the French National Assembly voted for the decriminalization of homosexuality. Loi 82-683 du 4 août 1982 abrogeant le deuxième alinéa de l'article 331 du code penal [Law 82-683 of August 4, 1982 Repealing the Second Paragraph of Article 331 of the Penal Code], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, Aug. 5, 1982, p. 2502.

3. Various attempts to create a contract of civil union have been proposed. *See, e.g.*, *Contrat d'Union Civile* in 1992 (not voted by the French Parliament); *Le Contrat d'Union Sociale* in 1995; and *Le Pacte d'Intérêt Commun* in 1998.

4. Loi 99-944 du 15 novembre 1999 relative au pacte civil de de solidarité [Law 99-944 of November 15, 1999 Relating to the Civil Solidarity Pact], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, Nov. 15, 1999, p. 16959 [hereinafter PACS].

5. *Bis* is a Latin suffix that means “again.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 221 (2002). In this context, PACS can be termed a “marriage bis” because the rights afforded to partners are similar to the rights accorded to spouses. *See* Laurence Mauger-Vielpeau, *L'Autonomie du Pacs*, *DROIT DE LA FAMILLE* para. 2 (2008), available at *Juris Classeur* (discussing the similarities and differences between marriage and PACS).

6. CODE CIVIL [C. CIV.] art. 515-1 to 515-7-1 (Fr.) (“[C]ivil covenant of solidarity is a contract entered into by two natural persons of age, of different sexes or of a same sex, to organize their common life.” (author's translation)). In French law, the term “common life” refers to an obligation for partners to share a community of living.

7. Assimilation is made in matters of rights and obligations such as mutual material and moral aid to each other; the partners and the spouses are jointly and severally liable with regard to third parties for debt incurred by one of them for the needs of everyday life. The rights of the partners bound by PACS are also extended such as benefits, income tax, and inheritance tax.

La loi n° 2006-728 du 23 juin 2006 portant réforme des successions et des libéralités a profondément modifié le régime du PACS en le rapprochant de celui du mariage. Depuis la loi n° 2007-1223 du 21 août 2007 sur le travail, l'emploi et le pouvoir d'achat, dite TEPA, l'option entre le mariage et le PACS est neutre fiscalement.

Cette tendance à l'alignement sur le régime du mariage s'est confirmée en s'étendant aux concubins vivant en « union libre », jusque-là exclus de ce rapprochement, par le biais d'une instruction administrative du 24 juillet 2007 relative à l'exonération des plus-values immobilières portant sur la résidence principale.

Suzel Castagné, *Mariage, PACS, Concubinage: Analyse Comparative*, LA SEMAINE JURIDIQUE NOTARIALE ET IMMOBILIÈRE sommaire (2008) available at *Juris Classeur*.

partners,<sup>8</sup> or the legal right to take the name of one's partner.<sup>9</sup> Internationally speaking, PACS was not always recognized in other jurisdictions; under the U.S. federal immigration law, PACSed partners did not qualify for visas.<sup>10</sup> More generally, unions other than marriages are widely unknown in the world that still gives marriage a place of honor. Therefore, the opening of marriage to homosexual couples seems the only satisfactory response to the evolving needs of society.

The heated debate over same-sex marriage in France,<sup>11</sup> which led to heightened protests of the French people on both sides of the issue,<sup>12</sup> was part of the political landscape in 2012<sup>13</sup> that carried the flavor of a half-expressed European push<sup>14</sup> and was an issue that only the French

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8. See PACS, *supra* note 4. Rights of inheritance can be passed on by a will that has been drawn up in favor of the surviving partner. *Id.*; see also Wilfried Baby, LES EFFETS PATRIMONIAUX DU PACTE CIVIL DE SOLIDARITÉ, L'INVENTION D'UNE NOUVELLE FORME DE CONJUGALITÉ 315 (2013) ("À l'inverse, le Pacs produit très peu d'effets successoraux, ce qui apparaît conforme à sa conception, celle d'un contrat qui n'engage que durant le temps que les partenaires lui accordent. L'absence de dimension temporelle dans le caryotype du Pacs explique donc un statut légal du partenaire survivant très discret, à l'exception de son volet fiscal . . . . Le couple est dès lors contraint de recourir à différents aménagements, d'ordre testamentaire ou contractuel . . . .").

9. See PACS, *supra* note 4; see also Isabelle Corpart, *Le Nom d'Usage des Époux dans Tout ses États*, DROIT DE LA FAMILLE para. 8 (2013) ("Le port du nom d'usage nécessite que les intéressés soient mariés. Ni le concubinage ni le PACS n'offrent cette possibilité.").

10. See *Foreign Affairs Manual*, U.S. DEP'T ST. vol. 9, § 40.1 N1.1 (2014), <http://www.state.gov/documents/organization/86920.pdf>.

11. Sixty-five percent of the French are in favor of same-sex marriage. *Les Catholiques et les Droits des Couples Homosexuels*, INSTITUT FRANÇAIS D'OPINION PUBLIQUE 3, 5 (2012), [http://www.ifop.fr/media/poll/1956-1-study\\_file.pdf](http://www.ifop.fr/media/poll/1956-1-study_file.pdf).

12. Steven Erlanger & Scott Sayare, *Protests Against Same-Sex Marriage Bill Intensify in France*, N.Y. TIMES (Apr. 22, 2013), <http://www.nytimes.com/2013/04/23/world/europe/in-france-opposition-to-same-sex-marriage-bill-grows.html>.

13. If the debate has not been a traditional political issue as it could be in the United States, it has become a real discussion in the last decade. François Hollande included in his election program in 2012 the opening of same-sex marriage. François Hollande, *Le Changement c'est Maintenant: Mes 60 Engagements pour la France*, PARTI SOCIALISTE 22 (2012), [http://download.parti-socialiste.fr/projet\\_presidentiel\\_2012\\_francois\\_hollande.pdf](http://download.parti-socialiste.fr/projet_presidentiel_2012_francois_hollande.pdf). By the time Hollande was elected as President of France, the French members of parliament declared that French people were in favor of a marriage reform and therefore same-sex marriage does not need a referendum. See *Mariage Pour Tous : L'UMP Tente de Déplacer le Débat sur la GPA*, LE MONDE (Jan. 30, 2013), [http://www.lemonde.fr/societe/article/2013/01/30/mariage-pour-tous-l-ump-tente-de-verrouiller-le-debat-parlementaire-avec-la-gpa\\_1825060\\_3224.html](http://www.lemonde.fr/societe/article/2013/01/30/mariage-pour-tous-l-ump-tente-de-verrouiller-le-debat-parlementaire-avec-la-gpa_1825060_3224.html).

14. See *Gas & Dubois v. France*, App. No. 25951/07 Eur. Ct. H.R., HUDOC (June 15, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572>. "It is to be hoped, therefore, that the French legislature will not merely be satisfied with the finding of no violation and will decide, if I may say so, to review this issue." *Id.* at 22 (Costa, J., concurring). Judge Spielmann called upon France "to revisit the issue by bringing the wording of Article 365 of the Civil Code into line with contemporary social reality." *Id.* at 23 (Spielmann, J., concurring).

legislature could reform.<sup>15</sup> On May 17, 2013, during a year that saw the largest number of countries legalize same-sex marriage since 2001,<sup>16</sup> France finally followed suit by inserting a new provision into the Civil Code, codified in article 143, which states, “[M]arriage is contracted by two individuals of the opposite-sex or same-sex”.<sup>17</sup> Dubbed “*mariage pour tous*”<sup>18</sup> (marriage for everyone), the republican principle of equality is the key to the French reform.<sup>19</sup> Equality in duties and rights allows for identical access to legal protections in marriage and adoption as those provided for opposite-sex couples. To perfect equality on the international level, the new bill includes language stating that marriages performed in a foreign jurisdiction satisfy the legal requirements of marriage in France.<sup>20</sup> The text also confirms France’s traditional choice-of-law rule, according to which the laws of the country where each spouse has nationality applies to the substantive validity of the marriage.<sup>21</sup> In order to be effective, the statute adopts a new conflict-of-laws rule providing that same-sex marriage would be allowed in France and that same-sex marriage occurring abroad would be recognized in France if the national law, the law in the country of the couple’s residency, or the law in the country where one of the spouses is domiciled allows for it.<sup>22</sup> Intended to bestow extensive and cosmopolitan access to same-sex marriage, the new rule suffers in reality from imperfection and does

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15. The French Constitutional Council decided “that it is not for the Constitutional Council to substitute its judgment for that of the legislator regarding the consideration of this difference of situation.” Conseil Constitutionnel [CC][Constitutional Court] decision No. 2010-92 QPC, Jan. 28, 2011, Rec. 87 para. 9 (Fr.).

16. Several countries passed a bill authorizing same-sex marriage in 2013. *Gay Marriage Around the World*, PEW RES. CENTER, <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/> (last updated Sept. 2, 2014).

17. CODE CIVIL [C. CIV.] art. 143 (Fr.) (author’s translation).

18. See *Gay Marriage, One Year On: ‘French Civilisation Did Not Crumble’*, FRANCE 24 (Apr. 23, 2014), <http://www.france24.com/en/20140423-gay-marriage-one-year-french-civilisation-did-not-crumble/>.

19. The socialists wanted to mark their prints on the text by including and reaffirming the republican character of marriage. They wanted to point out that France is a secular State and only civil marriage, as opposed to religious marriage, is celebrated in France. However, more precisely, it was also a way to stop a polemical idea that public officers could have invoked their “freedom of conscience” to avoid a same-sex marriage’s celebration as it was suggested for a moment by the President himself. *Mariage pour tous: François Hollande Invoque ‘la Liberté de Conscience’ des Maires*, LE MONDE, [http://www.lemonde.fr/societe/video/2012/11/21/mariage-pour-tous-francois-hollande-invoque-la-liberte-de-conscience-des-maires\\_1793527\\_3224.html](http://www.lemonde.fr/societe/video/2012/11/21/mariage-pour-tous-francois-hollande-invoque-la-liberte-de-conscience-des-maires_1793527_3224.html) (last updated Jan. 4, 2013).

20. CODE CIVIL [C. CIV.] art. 202-2 (Fr.).

21. *Id.* Legally speaking, there are two different conditions for a marriage to be valid: (1) the substantive validity of marriage such as requirements like age, consent, sex and (2) the formal validity such as the place of the celebration. *Id.* arts. 143-164.

22. *Id.* art. 202-1.

not provide for equal access to marriage for all. Particularly, this is due to historical international conventions that supersede the law and which the courts attempt to appease.

The difficulties for both gay and lesbian spouses occupy an even more prominent place in today's globalized world where an increasing number of couples live outside of their country of origin.<sup>23</sup> As soon as cross-border elements are present, the new definition of French marriage faces a multitude of legal challenges related to immigration, benefits, adoption, international wealth management, matrimonial property regimes, divorce, and succession. What are the surrounding practical consequences when same-sex married couples decide to move abroad, and how do we solve or anticipate all of the dormant problems? Part II of this Article will examine some of the potential issues related to same-sex marriage and conflict of laws in a comparative law perspective. Part III will then address a new approach to deal with these pragmatic matters in accordance with international and European laws and regulations, addressing the issues of immigration and benefits, patrimonial property regimes, and filiation. These suggestions to clarify or foresee the coming questions may serve individuals from countries that already have opened marriage to homosexuals, and those from countries that wish to join the international family of countries that recognize same-sex marriage.

## II. A NEW CONFLICT-OF-LAWS RULE TO CELEBRATE EQUALITY

While same-sex marriage is allowed today in twenty countries, for most countries it is not yet acknowledged, and is indeed prohibited or criminalized.<sup>24</sup> Consequently, same-sex marriage raises a problem of conflict of laws when there is a cross-border element such as a marriage performed in a foreign jurisdiction or a marriage involving a binational couple. Due to the absence of a private international law code in

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23. 232 million people are living outside their home country. Ted Thornhill, *More People Than Ever Living Outside Their Home Country: Number of Migrants Worldwide Hits 232 Million*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-2418902/More-people-living-outside-home-country-Number-migrants-worldwide-hits-232-million.html> (last updated Sept. 12, 2013).

24. *Gay Marriage Around the World*, *supra* note 16. At the time of writing, the following places recognize same-sex marriage: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg, some provinces of Mexico, the Netherlands, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, England and Wales, Uruguay, and the U.S. states of California, Connecticut, District of Columbia, Delaware, Hawaii, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. Max Fisher, *A Map of the Countries Where Homosexuality Is Criminalized*, WASH. POST (Dec. 11, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/12/11/a-map-of-the-countries-where-homosexuality-is-criminalized/>.

France,<sup>25</sup> French lawmakers have amended the Civil Code by inserting a specific chapter named “*Des conflits de Lois*” (Conflict of Laws Rules) to address the issue.<sup>26</sup>

A. *Marriage Performed in France Involving a Binational Couple or a Foreign Couple.*

By not acting to modify the law, the legislature confirmed the traditional choice-of-law rule, according to which the law of the nationality of each spouse applies to the substantive validity of marriage, considering such factors as age, consent, and gender. However, maintaining this rule would render impossible the celebration of same-sex marriage in France for foreigners whose personal law prohibits it. Consequently, to ensure the legal goal of equality between individuals, an exception has been introduced. Marriage can now be celebrated when the national law, the law of the residence, or the law of the domicile of only one of the spouses grants it.<sup>27</sup> In this manner, a foreign homosexual couple can marry in France if one spouse has a second home there or is domiciled there.<sup>28</sup> Then, for instance, a French-Egyptian couple can marry, even though Egyptian law does not recognize same sex marriage.<sup>29</sup>

The exception clause was inspired by the Belgian Civil Code,<sup>30</sup> except that Belgian law excludes the personal law in favor of the law of the habitual residence of the couple, a factor that is in accord with European legislation.<sup>31</sup> This semantic choice was highlighted by legal professionals during the hearing before the Commission of Law of the

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25. See Paul Lagarde, *Sur La Non-Codification Du Droit International Prive Français*, 25 SYRACUSE J. INT'L L. & COM. 45, 45 (1998).

26. CODE CIVIL [C. CIV.] bk. I, tit. V, ch. IV bis (Fr.).

27. *Id.*

28. *Id.* art. 74. In fact, France only requires one month of residence in the country to establish domicile. “A marriage must be celebrated in the commune where one of the spouses has his or her domicile or residence established by a continuous habitation of at least one month at the date of the public notice provided for by law.” *Id.* (author’s translation).

29. RITA J. SIMON & HOWARD ALTSTEIN, GLOBAL PERSPECTIVES ON SOCIAL ISSUES: MARRIAGE AND DIVORCE 79 (2003) (“Homosexuality is not legal in Egypt and therefore same-sex marriages are not permitted.”).

30. See Loi portant le Code de droit international privé [Code of Private International Law] of July 16, 2004, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 27, 2004, p. 57344.

31. “The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.” Regulation 650/2012, of the European Parliament and of the Council 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, recital 23, 2012 O.J. (L 201) 107, 109.

French Senate while the law was being debated before the legislature.<sup>32</sup> These professionals pointed out that conforming to the European wording would ensure stability with respect to the state, but lawmakers have insisted on extending marriage rights to couples who only own a secondary home in France—probably as a way to internationally impose their beliefs.<sup>33</sup> A risk of “nuptial tourism” in France could easily create opposition to the new conflict-of-laws rule. Nonetheless, when one spouse cannot bring back to his or her home country a marriage certificate as a souvenir because of his personal law, it is difficult to expect nuptial tourism. Therefore, there is no possibility of seeing Paris as the new Vegas of same-sex marriage. Nevertheless, lawyers and public officers should inform future spouses of the possibility that their marriage will not be recognized abroad.

#### 1. From an Illusion of Equality?

Historically, France has always been committed to matters concerning conflict of laws; it has long been a staple in French law. The new French marriage is problematic because it interferes with eleven bilateral conventions signed by France that expressly state that marriage’s substantive conditions should be determined by the national law or personal law of the spouses.<sup>34</sup> These eleven countries currently reject

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32. *Mariage pour Tous: Audition de Représentants de Professions Juridiques Devant la Commission des Lois*, PUBLIC SENAT (2013), <http://replay.publicsenat.fr/vod/audition/audition-des-representants-des-professions-juridiques/129363> (statement of Jacques Combret, Family Law Section, President, L’institut d’Études Juridiques).

33. *See id.*

34. Convention Relative à la Loi Applicable, la Compétence et l’Exequatur dans le Droit des Personnes et de la Famille [Convention Concerning the Applicable Law, Jurisdiction and Reciprocal Enforcement of Judicial Decisions in Matters of Personal Status and Family Law], Fr.-Pol., Apr. 5, 1967, 677 U.N.T.S. 235 (1969); Convention Relative au Statut des Personnes et de la Famille, et à la Coopération Judiciaire [Convention Concerning Personal and Family Status and Judicial Cooperation], Fr.-Morocco, Aug. 10, 1981, 1331 U.N.T.S. 131 (1983) [hereinafter Franco-Moroccan Convention]. France entered into an agreement on this subject with Yugoslavia in 1973. Loi 72-605 du 5 juillet 1972 autorisant l’approbation de la convention entre le Gouvernement de la République française et le Gouvernement de la République socialiste fédérative de Yougoslavie relative à la loi applicable et à la compétence en matière de droit des personnes et de la famille, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 1972, p. 7112. Kosovo, Montenegro, Bosnia-Herzegovina, Serbia, and Slovenia have since succeeded to that treaty obligation with France. Décret 2013-349 du 24 avril 2013 portant publication de l’accord sous forme d’échange de lettres entre le Gouvernement de la République française et le Gouvernement de la République du Kosovo relative à la succession en matière des traités bilatéraux conclus entre la France e l’Union de Serbie-et Monténégro, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 26, 2013; Décret 2012-621 du 2 avril 2012 portant publication de l’accord sous forme d’échange de lettres entre le Gouvernement de la République Française et le Gouvernement de Monténégro relative à la succession en matière des traités bilatéraux conclus

same-sex marriage; therefore, “marriage for everyone” does not include those nationals. No legislative solution has been possible because of the supremacy of international conventions over statutes, as per the French Constitution of 1958.<sup>35</sup>

However, the debate is not closed. The French Minister of Justice addressed the issue in an explanatory note, stating that, subject to the judge’s discretion, state prosecutors may take a flexible approach to these conventions when no express *renvoi* to the foreign personal law is set.<sup>36</sup>

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entre la France et l’Union de Serbie-et-Monténégro, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 4, 2012; Décret 2004-96 du 26 janvier 2004 portant publication de l’accord sous forme d’échange de lettres entre le Gouvernement de la République Française et le conseil des ministres de Bosnie-Herzégovine relative à la succession en matière de traités bilatéraux conclus entre la France de [sic] la République socialiste fédérative de Yougoslavie, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 31, 2004, p. 2225; Décret 2003-457 du 16 mai 2003 portant publication de l’accord sous forme d’échange de lettres entre le Gouvernement de la République française et le Conseil des ministres de Serbie-et-Monténégro relative à la succession en matière de traités bilatéraux conclus entre la France et la République socialiste fédérative de Yougoslavie, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 23, 2003, p. 8825 (Serbia-Montenegro encompassed Montenegro and Kosovo when it entered into this treaty with France. Today, all three nations are separate international entities. See *The World Factbook: Serbia*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ri.html> (last visited Nov. 10, 2014)); Décret 96-229 du 15 mars 1996 portant publication de l’accord sous forme d’échange de lettres entre le Gouvernement de la République française et le Gouvernement de la République de Slovénie relative à la succession en matière de traités conclus entre la France et la République socialiste fédérative de Yougoslavie, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 22, 1996, p. 4442. These seven conventions are signed by countries that do not allow same-sex marriage. See Fisher, *supra* note 24. The four remaining conventions with Algeria, Cambodia, Laos, and Tunisia expressly prefer personal law to national law. Échange de lettres et déclarations adoptées le 19 mars 1962 à l’issue des pourparlers d’Évian, constituent un accord, Fr.-Alg., July 3, 1962, 507 U.N.T.S. 25 [hereinafter Evian Agreement]; Décret 59-593 du 22 avril 1959 portant publication des accords entre la France et le Cambodge des 29 août et 9 septembre 1953, des accords entre la France et le Viet-nam des 16 septembre 1954 et 16 août 1955, de l’accord entre la France et la Laos du 22 octobre 1953, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 3, 1959, p. 4758 [hereinafter Décret 59-593]; Décret 58-86 du 1 février 1958 portant publication de la convention judiciaire entre la France et la Tunisie, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 2, 1958, p. 1263 [hereinafter Décret 58-86].

35. “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.” 1958 CONST. art. 55 (Fr.). The French Constitution of 1946 included the Public International Law principle of *Pacta Sunt Servanda* in its preamble. 1946 CONST. pmb. (Fr.). The preamble was then incorporated into the French Constitution of 1958 and consequently, incorporated the supremacy of international conventions over statutes into the French Constitution. See 1958 CONST. pmb. (Fr.).

36. *Dépêche du 1er août 2013 apportant des précisions à la circulaire du 21 mai 2013*, LA GARDE DES SCEAUX, MINISTRE DE LA JUSTICE (Aug. 1, 2013), [http://www.gisti.org/IMG/pdf/dp\\_459\\_c1-2013-ca\\_3-7-1.pdf](http://www.gisti.org/IMG/pdf/dp_459_c1-2013-ca_3-7-1.pdf).



This is similar to the conventions with Laos,<sup>37</sup> Cambodia,<sup>38</sup> Algeria,<sup>39</sup> and Tunisia<sup>40</sup> in their treatment of personal status laws of French citizens. Indeed, if it seems inconceivable to renegotiate these agreements because it would jeopardize a number of beneficial provisions contained within the agreements,<sup>41</sup> it is always acceptable to contest decisions contained in the civil registrar<sup>42</sup> and/or through the state prosecutor by bringing the case to the courts.<sup>43</sup>

## 2. To a New French International Public Policy (*Ordre Public*) Rule

It has taken about five months after the law came into force to partially open this judicial backdoor. On October 11, 2013, the Tribunal de Grande Instance (TGI) of Chambéry ruled on the state prosecutor's decision to void marriage between same-sex French and Moroccan couples due to the violation of article 5 of the French-Moroccan treaty of 1981 and article 55 of the French Constitution.<sup>44</sup> The TGI of Chambéry held:

By modifying simultaneously the substantive law related to marriage (new article 143 of the French civil code) and the new conflict of laws applicable

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37. Décret 59-593, Lettre Annexe No. 1, art. 19 at 71 (“Pour ce qui concerne le statut personnel, les français resteront soumis à la loi française.” [“With regard to personal status laws, the French are subject to the French law.”] (author's translation)).

38. *Id.* at 41 (“[L]e statut personnel des ressortissants de l'Union française sera soumis, suivant les règles de droit international privé à leur loi nationale.” [“Personal status laws of French citizens are subject to their national law under the private international law rules.”] (author's translation)).

39. Evian Agreement, *supra* note 34, at 55 (“Le statut personnel des . . . ressortissants français sera régi par la loi française.” [“The personal status . . . of French citizens is subject to French law.”] (author's translation)).

40. Décret 58-86, art. 2, at 1267 (“En matière de statut personnel . . . les personnes de nationalité française sont régies par leur loi nationale.” [“In matter of personal status . . . French citizens are governed by French law.”] (author's translation)).

41. For instance, the Evian Agreement with Algeria is also the one that sought Algeria's independence from France. Evian Agreement, *supra* note 34, at 26.

42. HENRY DYSON, FRENCH PROPERTY AND INHERITANCE LAW: PRINCIPLES AND PRACTICE 224 (2002) (“Notice must also be taken of the fact that records kept by the *officier d'état civil* or Registrar of Births, Deaths and Marriages, of whom there is one in every commune, link together these three events so that ordinary person's *état civil* at any one time is simple to establish.”).

43. *Ministerial Written Question and Response, No. 28287*, ASSEMBLÉE NATIONALE, <http://questions.assemblee-nationale.fr/q14/14-28287QE.htm> (last visited Nov. 14, 2014).

44. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Chambéry, Oct. 11, 2013, No. 13-01631, *available at* Dalloz. “Les conditions de fond du mariage tels que l'âge matrimonial et le consentement de même que les empêchements, notamment ceux résultant des liens de parenté ou d'alliance sont régies par chacun des futurs époux par la loi de celui des deux Etats dont il a la nationalité.” [“Marriage's substantive conditions such as the age, the consent included impediments to marriage . . . are governed by each future spouse by the law of the states of which he is a national.”]. *Id.* at 3 (quoting Franco-Moroccan Convention, *supra* note 34) (author's translation).

to marriage that includes a foreign element (article 202-1 paragraph 2 of the civil code), the law of May 17th, 2013 has implicitly and necessarily modified the French international public order, so that no access to marriage discrimination based on gender justifies the removal of article 5 of the French-Moroccan convention of 10 August 1981.<sup>45</sup>

The Chambéry Court of Appeal confirmed the decision eleven days later and stated, “[W]e should ignore the application of the Convention in favor of the superior principles of the new international public order pursuant to Act of May 2013 and therefore not to recognize a superiority of the treaty on the law according to the standard hierarchy of norms.”<sup>46</sup>

Freedom to marry is a fundamental right for homosexuals and heterosexuals. However, the French-Moroccan treaty was signed at a time when France only recognized marriage between a man and a woman. Since then the law has changed, as has international public policy. A judge is justified in disregarding a bilateral treaty that results in discrimination in access to marriage based on gender or nationality if that treaty conflicts with French international public policy.

The Chambéry case was the first case related to the union between a same-sex French national and foreigner involving one of the eleven disputed bilateral conventions. This lack of jurisprudential history leaves no avenue to evaluate the long-term efficacy of the ruling in this case or to discuss the application of *jurisprudence constante*.<sup>47</sup> The decision was

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45.

En modifiant simultanément le droit matériel applicable au mariage (article 143 nouveau du code civil) et la règle de conflit de lois applicable au mariage comportant un élément d’extranéité (article 202-1 alinéa 2 du code civil) la loi du 17 mai 2013 a implicitement mais nécessairement modifié l’ordre public international français, de sorte qu’une discrimination à l’accès au mariage fondée sur *le sexe* justifie l’éviction de l’article 5 de la convention franco-marocaine du 10 aout 1981.

*Id.* at 4 (author’s translation).

46. Cour d’appel [CA] [regional court of appeal] Chambéry, 3e ch., Oct. 22, 2013, No. 13/02258, *available at* Dalloz (author’s translation).

47.

It would appear that when a harmonious line of cases has accumulated, in which a single authoritative principle consistently emerges, this phenomenon is characterized in French law as *la jurisprudence constante*. If such a consistent line of case law has built up, French courts will tend to follow it, albeit as illustration of a general principle. The single decision of a first instance court is given less weight than that of the Court of Cassation . . . .

PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD*, 70-71 (3d ed. 2007). However, the Procureur General petitioned the Court of Cassation to challenge the legality of the latter decision. The case is still pending. Jérôme Sage, *Mariage Gay Franco-Marocain: La Cour de Cassation Tranchera*, LE FIGARO (Nov. 14, 2013, 7:00 PM), <http://www.lefigaro.fr/actualite-france/2013/11/14/01016-20131114ARTFIG00680-mariage-gay-franco-marocain-la-cour-de-cassation-tranchera.php>.

rendered by a court of appeal and only concerned the Franco-Moroccan treaty of 1981, providing a public policy backdoor for French and Moroccan gay marriages.<sup>48</sup> The ten other treaties do not include an exception of this type. Should we therefore penalize the Frenchman that falls in love with a Polish person instead of a Moroccan?<sup>49</sup> Obviously, refusing the application of the new text of the law that introduces same-sex marriage to a new situation in favor of an old act is a retrograde and regressive measure. Furthermore, allowing the marriage between a homosexual French and Moroccan couple, but refusing one between a homosexual French and Polish couple creates discrimination based on nationality that the European Court of Human Rights (ECtHR) would not allow.<sup>50</sup> Discrimination is pronounced when there is a difference of treatment between people in an analogous or similar position and “differences in treatment are subject to a text of ‘reasonable and objective justification.’”<sup>51</sup> It is inconceivable that this dilemma creates a two-tiered French international public policy rule. However, until *jurisprudence constante* develops, the French should be aware of the problems they may face depending upon the nationality of the person to whom they are enamored. For example, a French citizen should verify if the law accommodates the foreign citizenship of their future spouse to ensure that the marriage can be legally performed.

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48. Article 4 of the Franco-Moroccan Convention states, “[S]i elle est manifestement incompatible avec l’ordre public.” [“If they are manifestly incompatible with public policy.”]. Franco-Moroccan Convention, *supra* note 34, art. 4 (author’s translation).

49. Poland does not recognize same-sex marriage as valid: “Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.” Tekst Konstytucji Rzeczypospolitej Polskiej Ogłoszono w Dz.U. 1997, NR 78 poz. 483, art. 18, Rozdział I [CONST.] (Pol.), *available in English at* <http://www.sejm.gov/PRAWO/KONST/ANGIELSKI/KON1.htm>.

50. “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

51. Christopher McCrudden & Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach*, EUROPEAN COMMISSION 22 (2009), <http://ec.europa.eu/social/BlobServlet?docId=4553&langId=en>.

There are several elements in this test: (1) Has the state established the justification? (2) Does the difference in treatment have a legitimate aim or aims? (3) If so, (a) is the objective sufficiently important to justify limiting a fundamental right; (b) are the measures designed to meet the objective rationally connected to it; and (c) are the means used to impair the right or freedom no more than is necessary to accomplish the objective? In applying the test of objective and reasonable justification, the ECtHR has made clear that states “enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.”

### B. *Marriages Celebrated Abroad*

A French judge may be called upon to decide if a marriage performed in another jurisdiction is valid in France. For that purpose, the judge relies on the substantive conditions and formalities to determine the validity of the union. The new article 202-2 of the Civil Code states that “marriage is valid if it has been celebrated in accordance with the formalities prescribed by the law of the state in whose territory the celebration took place.”<sup>52</sup> This is the consecration of the *locus regit actum* rule: to be valid, the marriage’s formalities must be in accordance with the law of the place of the celebration.<sup>53</sup> Compared to the U.S. *Restatement on Conflict of Laws*, which states that a marriage is valid “unless it violates the strong public policy of another state,”<sup>54</sup> French law retains a wider rule. For example, although French marriage is secular and republican, a religious marriage performed in Canada between a French person and a Canadian is valid in France if all of the Canadian formalities have been fulfilled. This is a way for France to give effect to a same-sex marriage performed abroad even if the national law of one spouse does not allow it. For instance, a Swiss couple married in Canada are considered spouses in France while they are considered registered partners in Switzerland.<sup>55</sup> The new regulation takes this a step further by adding a *forum necessitatis* provision, which welcomes non-French residents who have French citizenship to celebrate their union back in France when the country they reside in refuses to do so.<sup>56</sup>

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52. CODE CIVIL [C. CIV.] art. 202-2 (Fr.) (“Le mariage est valablement célébré s’il l’a été conformément aux formalités prévues par la loi de l’État sur le territoire duquel la célébration a eu lieu.” (author’s translation)).

53.

Whenever the formalities of a legal transaction are regarded in Anglo-American law as pertaining to the “substance” of a legal transaction, instead of relating to “procedure,” they are deemed to belong to the operative facts which go to make up the validity of the legal transaction, and are governed by the law determining the validity of the legal transaction in general. No special rules have been developed relating to “formalities” in general. Since the Middle Ages, legal transactions have on the continent been considered valid, as regards formalities, if they satisfied the law of the place where they were entered into. In more recent times this rule has been expressed by the maxim *locus regit actum*. Introduced as a matter of convenience, the maxim has retained in some countries its original optional character, at least with respect to certain transactions. In others it has become a mandatory rule.

Ernest G. Lorenzen, *The French Rules of the Conflict of Laws*, 38 YALE L.J. 165, 166 (1928).

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

55. See LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL LAW OF PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, art. 45 (Switz.) (“A marriage validly performed abroad between persons of the same sex shall be recognized in Switzerland as a registered partnership.” (author’s translation)).

56. CODE CIVIL [C. CIV.] art. 171-9 (Fr.).

The validity of a marriage is assessed on the date of the celebration.<sup>57</sup> If the marriage was performed abroad before the introduction of the French same-sex marriage provision, it would not have produced legal effects in France.<sup>58</sup> The couple would have needed to divorce before being allowed to remarry. Therefore, to avoid this ridiculous situation, it was necessary to stipulate a specific retroactive disposition validating previous same-sex marriages.<sup>59</sup> Inspired by Canadian law,<sup>60</sup> the recognition of marriages performed before the new law came into effect finally produces all of the legal consequences of marriage between spouses and between parents and children from the date of the celebration.<sup>61</sup> It also produces all of the legal consequences arising between spouses and third persons, such as creditors, from the date of the marriage record's transcription.<sup>62</sup> The new provision finally cuts off the discriminatory debate on citizenship that featured a faceoff between invalidly wed French citizens legally married in Belgium, the Netherlands, or Spain and Belgian, Dutch, or Spanish couples whose marriages were recognized in France under the attenuated effect of French public policy.<sup>63</sup>

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57. *See id.* art. 2 (Fr.) (“Legislation provides only for the future; it has no retrospective operation.” (author’s translation)).

58. For example, Belgium allowed same-sex marriage before France. Consequently, it was possible for a French person or Spaniard to marry in Belgium. However, before the French law was approved, the marriage between a French person and a Spaniard in Belgium would have had no legal effect in France.

59. Conseil constitutionnel [CC][Constitutional Court] decision No. 2013-669DC, May 17, 2013 (Fr.). A specific retroactive disposition was necessary because the French Civil Code states, “Legislation provides only for the future; it has no retrospective operation.” CODE CIVIL [C. CIV.] art. 2 (Fr.) (author’s translation).

60. Canadian Civil Marriage Act, S.C. 2005, c. 33, art. 5(2) (Can.) (“A marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile.”).

61. Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 on the Opening of Marriage to Couples of the Same Sex], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 18, 2013, art. 21.

62. *Id.*

63.

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 with this area’s fundamental principles shall be rejected. 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.

Hugues Fulchiron, *National Report France*, 19 AM. U. J. GENDER SOC. POL’Y & L. 123, 144 (2011).

### III. INTERNATIONAL CONSEQUENCES OF MARRIAGE FOR EVERYONE: A SUM OF QUESTIONS

There is a clear tendency toward harmonization of law in Europe, including family law.<sup>64</sup> Nevertheless, EU law does not contain specific unified legislation or jurisprudence about the definition of marriage. For instance, EU Council Regulation No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility does not provide a definition of marriage, but only covers court decisions in matters of divorce, legal separation, or marriage annulment, and decisions on parental responsibility, including measures for the protection of the child.<sup>65</sup> The European Parliament has proclaimed being in favor of same-sex marriage several times and has requested the Member States to evolve their domestic laws,<sup>66</sup> but the states do not have the obligation to follow recommendations from the European Parliament and are not punished for their absence of decision making.<sup>67</sup> Finally, the ECtHR, when presented with the question of the right for homosexuals to marry, decided in *Schalk & Kopf v. Austria* to leave the decision up to the Member States' domestic law.<sup>68</sup> As a result, the new French legislation is not in contravention with European Community law. Rather, it is poised in the mainstream of international change.<sup>69</sup>

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64. For more developments, see Margaret Ryznar & Anna Stepien-Sporek, *A Tale of Two Federalism Systems*, 21 *CORDOZO J. INT'L & COMP. L.* 589 (2013).

65. Council Regulation (EC) 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, 2003 O.J. (L 338), arts. 2-3.

66. Resolution A3-0028/94, of the European Parliament of Feb. 8, 1994 on Equal Rights for Homosexuals and Lesbians in the EC, 1994 O.J. (C 61) 40 (requiring Member States to put an end to “the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships,” and remove “any restrictions on the rights of lesbians and homosexuals to be parents or adopt or foster children”); *Report on the Situation as Regards Fundamental Rights in the European Union*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0051+0+DOC+XML+V0//EN> (reiterating its call to “abolish all forms of discrimination—legal or de facto—which are still suffered by homosexuals, particularly as regards the right to marry and adopt children”).

67. Treaty Establishing the European Economic Community art. 189, Mar. 25, 1957, 298 U.N.T.S. 11 (“Recommendations and opinions shall have no binding force.”).

68. *Schalk & Kopf v. Austria*, App. No. 30142/04, Eur. Ct. H.R. para. 108, HUDOC (Nov. 22, 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>.

69. “We argue that there has been a radical shift in the landscape of heteronormativity in Europe, with the emergence of a new European norm of ‘homotolerance’ and the progressive normalization of same-sex sexualities: a process of ‘homonormalization.’” Sasha Roseneil et al.,

Except in those cases related to international conventions detailed in Part II, the French “marriage for everyone” agrees with international law. Although France signed the Universal Declaration of Human Rights that defined marriage as the union of a man and a woman,<sup>70</sup> the Declaration does not have the same force of law as international treaties.<sup>71</sup> There are other international conventions that refer to marriage, but these were either not ratified by France<sup>72</sup> or France has since changed its legislation, making them obsolete.<sup>73</sup> However, in practical terms, there are a multitude of legal consequences that intervene at both the international and community level related to immigration, benefits, matrimonial property regime, divorce, succession, and filiation that need to be considered.

#### A. *Immigration and Benefits*

Unlike the law of PACS that only offered the French residency card (*carte de séjour*) to same-sex partners,<sup>74</sup> same-sex marriage brings the possibility for same-sex spouses to acquire French nationality through naturalization when three conditions are met: four years of marriage, a

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*Changing Landscapes of Heteronormativity: The Regulation and Normalization of Same-Sex Sexualities in Europe*, 20 Soc. POL. 165, 165 (2013).

70. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 16 (Dec. 10, 1948) (“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”).

71. Conseil d’Etat [CE] [highest administrative court], Apr. 8, 1951, Rec. Lebon 189, 190. “The only publication in the Official Journal does not include the Universal Declaration in the number of diplomatic treaties to which the Constitution recognizes the force of law, even when it conflicts with a rule of domestic law.” *Id.* (author’s translation). The International Court of Justice confirmed that the Universal declaration does not have a legal significance binding on Member states. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 42 (May 24).

72. See, e.g., Convention sur la reconnaissance de décisions relatives au lien conjugal, Sept. 9, 1967, ICCS Convention no. 11 (on the recognition of decisions relating to the matrimonial bond).

73. See, e.g., Convention sur la légitimation par mariage, Sept. 10, 1970, ICCS Convention no. 12 (on legitimation by marriage); Ordonnance 2005-759 du 4 juillet 2005 portant réforme de la filiation [Ordonnance 2005-759 of July 4, 2005 on Filiation Reform], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2005.

74. PACS, *supra* note 4. “On October 13, 1999, France enacted the Pacte Civil de Solidarité (PACS) which is ‘a contract concluded between two physical persons who have reached the age of majority, of different or the same gender, for the purposes of organizing their life in common.’ The PACS is not meant to be the same as marriage, but for immigration purposes in procuring a residence permit for a foreign partner, a PACS is a determinative element.” Amy K.R. Zaska, Note, *Love Knows No Borders—The Same-Sex Marriage Debate and Immigration Laws*, 32 WM. MITCHELL L. REV. 625, 644 (2006).

community of living, and an adequate knowledge of French.<sup>75</sup> Immigration rights are also extended to include children who have been plenary adopted<sup>76</sup> by French same-sex married couples.<sup>77</sup> The reform should therefore substantially increase the number of naturalizations through marriage in the next four years.<sup>78</sup> In parallel, French same-sex couples are now allowed to apply for a U.S. visa since a statement from the Secretary of Homeland Security on July 1, 2013,<sup>79</sup> was issued after the United States Supreme Court ruled section 3 of the Defense of Marriage Act (DOMA) unconstitutional in *United States v. Windsor*.<sup>80</sup>

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75. CODE CIVIL [C. CIV.] art. 21-2 (Fr.); CODE CIVIL [C. CIV.] art. 21-1 (Fr.) (“As of right, marriage has no effect on nationality.” (author’s translation)).

76.

The adoption provisions in the French law are codified in part VIII of the Civil Code, entitled “Of Adoption” (Articles 343 to 370-5, last amended by Act n° 2002-304 of 4th March, 2002 and by Act n° 2003-516 of 18th June, 2003). There are two forms of adoption under the French law: plenary adoption (“*adoption plénière*,” Articles 343-59) and ordinary adoption (“*adoption simple*,” articles 360 to 370-2). The text refers to the plenary adoption, which terminates the relationship between birth parent and child (see Article 356: “Adoption confers on the child a parentage which substitutes for his original parentage: the adoptee ceases to belong to his blood family . . .”). Thus, all rights and status which the child may have had from the birth family are revoked and replaced with the rights and status granted by the adopting family (see Article 357, which states that the adoptive child bears the family name of his adoptive parents). On the contrary, according to the ordinary adoption, the adopted child becomes a member of his new family, but he keeps some legal bonds with his original family (e.g. the name of the adoptive parents is added to the adoptee’s original name—Article 363; the adoptee preserves inheritance rights within his original family—Article 364).

Maria Rosaria Marella, *Critical Family Law*, 19 AM. U. J. GENDER SOC. POL’Y & L. 721, 754 n. 100 (2011).

77. CODE CIVIL [C. CIV.] art. 20 (Fr.) (“The nationality of a child who was the subject of a plenary adoption is determined according to the distinctions set out in Articles 18 and 18-1, 19-1, 19-3 and 19-4 above.” (author’s translation)); CODE CIVIL [C. CIV.] art. 18 (Fr.) (“Is French a child one parent of whom at least is French.” (author’s translation)).

78. There were 22,382 French naturalizations in 2012, a growth of 3.3% between 2011 and 2012. *L’Accès à la Nationalité Française*, MINISTÈRE DE L’INTÉRIEUR, <http://www.immigration.interieur.gouv.fr/Info-ressources/Documentation/Tableaux-statistiques/L-acces-a-la-nationalite-francaise> (last visited Aug. 18, 2014).

79. *Secretary of Homeland Security Janet Napolitano on July 1, 2013*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/news/implementation-supreme-court-ruling-defense-marriage-act> (last visited Nov. 14, 2014) (“After last week’s decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”).

80. *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012). Before *Windsor*, U.S. federal immigration law denied couples in same-sex relationships the same rights offered opposite sex couples, even if the foreign union was legally celebrated. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).



Just like *Windsor* allows same-sex married couples to receive U.S. government benefits, Law 2013-404 of May 17, 2013 on the Opening of Marriage to Couples of the Same Sex permits same-sex spouses to access French benefits, such as spousal retirement benefits (not automatically granted by PACS), spousal survivor benefits, and the right of paternity leave or leave for adoption.<sup>81</sup> Taking a step further, and following France's support for universal decriminalization of homosexuality as expressed in United Nations forums,<sup>82</sup> the new text legally enshrines a jurisprudential principal to ensure protection for homosexual workers who refuse expatriation to a country where homosexuality is penalized.<sup>83</sup> This measure is particularly important in light of the current international situation, where the death penalty is still applicable for homosexuality in seven countries,<sup>84</sup> and criminal sanctions are possible in approximately sixty countries.<sup>85</sup> Because relocation or mobility is a significant factor in career advancement, it is thus essential that no worker be punished, dismissed, or subjected to discriminatory measures for having refused a job transfer to one of these countries.

### *B. Patrimonial Aspects of the French Same-Sex Marriage*

Same-sex married couples are free to move, however issues about their estates become complicated in a cross-border situation. Indeed, Member States' private international law and the European Community law differ to a large extent in their respective progress toward the recognition of same-sex marriage. Consequently, the new definition of marriage in France introduces a number of international patrimonial family law issues regarding matrimonial property regimes, divorce, and succession.

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81. Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 on the Opening of Marriage to Couples of the Same Sex], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 18, 2013, art. 21.

82. Address of François Hollande, President of the Republic of France, 67th Session, General Assembly of the United Nations (Sept. 25, 2012), [http://gadebate.un.org/sites/default/files/gastatements/67/FR\\_fr.pdf](http://gadebate.un.org/sites/default/files/gastatements/67/FR_fr.pdf) ("This is why France will remain at the forefront of all these struggles: for the abolition of the death penalty, for women's right to equality and dignity, for the universal decriminalization of homosexuality, which cannot be seen as a crime but—on the contrary—as the recognition of an orientation." (author's translation)).

83. CODE DU TRAVAIL [C. TRAV.] art. L1132-3-2 (Fr.).

84. Fisher, *supra* note 24 (listing Iran, Mauritania, Saudi Arabia, Soudan, Yemen, Nigeria, and Somalia).

85. *Id.*

## 1. Matrimonial Property Regimes

French practitioners and judges currently refer to the Hague Convention of 14 March 1978 on the Law Applicable to Marital Property Regimes,<sup>86</sup> ratified by France, Luxemburg, and the Netherlands, to determine the matrimonial property regime of couples married in a foreign jurisdiction. This convention entered into force in France on September 1, 1992.<sup>87</sup> Therefore, marriages performed before this date are governed by traditional French public international law,<sup>88</sup> and marriages performed after this date are governed by the Hague Convention. The Hague Convention does not include any restrictions on same-sex marriages;<sup>89</sup> thus, same-sex couples' matrimonial property regime is subject to the same rules as "traditional" marriage. It is governed by the law of the common nationality of the parties, the spouses' common place of residence, or the law of the forum. Lastly, in terms of international estate planning, foreign same-sex spouses may invoke the Hague Convention to adapt their initial matrimonial regime when they purchase property in France—or in Luxemburg or the Netherlands.<sup>90</sup>

In the future, determination of marital property regimes will be subjected to the European legislation in progress. A proposal from the European Commission on March 16, 2011, suggests a single scheme: uniting the law applicable to matrimonial property regimes and granting the possibility to choose and to change the applicable law in the marriage contract.<sup>91</sup> The proposal does not expose any issue about same-sex

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86. Convention on the Law Applicable to Matrimonial Property Regimes and Convention on Celebration and Recognition of the Validity of Marriages arts. 1, 6, Mar. 14, 1978, 16 I.L.M. 14 [hereinafter Convention on Matrimonial Property].

87. *Status Table 25: Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, HCCH, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=87](http://www.hcch.net/index_en.php?act=conventions.status&cid=87) (last visited Sept. 29, 2014).

88. Derived from case law—The law of the first matrimonial domicile. Cour de cassation [Cass.] [supreme court for judicial matters] req., June 4, 1935, D.P. I 1935, 426 (Fr.).

89. Alfred E. Von Overbeck, *La Convention de la Haye sur la Loi Applicable Aux Régimes Matrimoniaux* [The Hague Convention on the Law Applicable to Matrimonial Property Regimes], in 23 ANNUAIRE SUISSE DE DROIT INTERNATIONAL [SWISS YEARBOOK ON INTERNATIONAL LAW] 105 (1977).

90. Convention on Matrimonial Property, *supra* note 86, art. 6.

91. *Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes*, COM (2011) 126 final (Mar. 16, 2011) [hereinafter *Proposal on Matrimonial Property Regimes*]; see also Ryznar & Stepien-Sporek, *supra* note 64, at 611-12 ("The European Commission's proposed regulation on this subject is that all property of the spouses should be subject to the same law, including immovable property. The choice of applicable law that can be made by spouses is limited, and the chosen law must be based on the law of the habitual residence or on the nationality of one of the spouses. If the choice is not made, there are also special rules to

marriage, but allows the use of public policy in exceptional circumstances.<sup>92</sup> While French international public policy has changed, one can easily imagine that other Member States may refuse to apply marital effects to same-sex marriage due to a different public policy approach. Consequently, the future EU regulation, as it stands, will not end the conflict of laws related to matrimonial property regimes. The draft needs to be improved so that the legal “uncertainty and discrimination regarding the property rights of international couples [are] eliminated.”<sup>93</sup>

The consequences abroad are contingent on foreign conflict-of-laws rules and the public policy of the forum. Like the Netherlands,<sup>94</sup> few states fully recognize same-sex marriage performed overseas and, subsequently, its marital effects. According to a large majority of legislation that ignores marriage or prohibits it, we will soon be faced with development of “lame” marriages: those which are valid in the country where they have been celebrated, yet are not valid in other countries, or are interpreted differently in other countries.<sup>95</sup>

This is the case with Australia.<sup>96</sup> Although the country has ratified the Hague Convention of March 14, 1978, on Celebration and

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establish applicable law. This is important because the vast majority of spouses will likely not make a choice of law regarding property matters.”).

92. *Proposal on Matrimonial Property Regimes*, *supra* note 91, recital 25 & art. 23.

93. *Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes and on the Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships*, 2011 O.J. (C 376) 87.

94. Conflict of Law Rules for Marriages Act, art. 5 (1989) (Neth.) (“A marriage that is contracted outside the Netherlands and that is valid under the law of the State where it took place or that has become valid afterwards according to the law of that State, is recognised in the Netherlands as a valid marriage.”), *translated in Act Conflict of Law Rules for Marriages*, DUTCH CIV. L., <http://www.dutchcivillaw.com/legislation/actconflictmarriage.htm> (last visited Nov. 15, 2014).

95. Mariel Revillard, *Les Unions Entre Personnes de Même Sexe*, LA SEMAINE JURIDIQUE NOTARIALE ET IMMOBILIÈRE para. 37 (2012), available at Juris Classeur.

96. Sarah K. Mazzochi, *The Great Debate: Lessons to Be Learned from an International Comparative Analysis on Same-Sex Marriage*, 16 ROGER WILLIAMS U. L. REV. 577, 591-92 (2011) (“Australia does not currently permit same-sex marriage, and the issue has been hotly debated as of late. After an amendment in 2004, the *Marriage Act 1961* has defined marriage as ‘the union between a man and a woman.’ . . . According to this bill, Australia also does not recognize same-sex marriages lawful in foreign states. Nevertheless, same-sex couples who cohabit with each other are recognized as *de facto* couples in Australia and are entitled to many of the same legal rights of cohabitating opposite-sex couples, including tax benefits, social security, health care, and employment. Australia also permits domestic partnerships in some locations such as in New South Wales, Tasmania, and Victoria. The Australian Capital Territory allows civil partnerships.”).

Recognition of Marriages,<sup>97</sup> which states that “[a] marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered such in all Contracting States,” the domestic Australian law rejects the foreign union and refuses to give marital effects to a “union solemnized in a foreign country between a man and another man; or a woman and another woman.”<sup>98</sup> Therefore, a French same-sex marriage will not be recognized in Australia, and the assets belonging to the couple will not be qualified as marital assets.

Other countries, like Germany, deny same-sex marriages as well, but do not completely reject these unions. German law applies, by analogy, a same-sex marriage performed in another jurisdiction to a civil partnership (*Eingetragene Lebenspartnerschaft*).<sup>99</sup> For example, for a French couple moving to Germany after marriage, the effects of the application of the French default community property regime (*communauté de biens réduits aux acquêts*) cannot exceed the effects of the German law on registered partnership of community of accrued gains (*Zugewinnngemeinschaft*).<sup>100</sup> However, one solution is offered by the Franco-German Matrimonial Property Regime of Accrued Gains that entered into force on May 1, 2013.<sup>101</sup> The intention is simple: it allows couples to adopt a matrimonial regime that obeys common rules of

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97. *Status Table 26: Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriage*, HCCH, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=88](http://www.hcch.net/index_en.php?act=conventions.status&cid=88) (last visited Nov. 15, 2014); *Convention on Celebration and Recognition of the Validity of Marriages*, Oct. 23, 1976, 16 I.L.M. 18.

98. *Convention on Celebration and Recognition of the Validity of Marriages* art. 9, Mar. 14, 1978, 1901 U.N.T.S. 131; *Marriage Amendment Act 2004* (Cth) 88EA (Austl.).

99. Urs Peter Gruber, *Le Mariage Homosexuel et le Droit International Privé Allemand*, in *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* para. 2 (2013), available at Dalloz (“In a first step, pursuant to the majority opinion, a homosexual marriage is governed by the law of the state in which this marriage was celebrated; however in a second step, it is held that the effects of such marriage cannot exceed those of a registered partnership concluded under German law. This way, a homosexual marriage, which was effectively concluded abroad, is somewhat downgraded and converted into a registered partnership.”).

100. EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCHE [EGBGB] [Introductory Act to the Civil Code], art. 17b(4), available at [http://www.gesetze-im-internet.de/englisch\\_bgbeg/introductory\\_act\\_to\\_the\\_civil\\_code.pdf](http://www.gesetze-im-internet.de/englisch_bgbeg/introductory_act_to_the_civil_code.pdf) (“The effects of a life partnership registered abroad shall not exceed those arising under the provisions of the German Civil Code and the Registered Partnership Act.”); Oberlandesgericht München [OCG] [Higher Regional Court of Munich] July 6, 2011, No. 31 Wx 103/111, available at <http://www.gesetze-bayern.de/jportal/portal/page/bsbayprod.psml?doc.id=KORE218482011&st=ent&showdoccase=1&paramfromHL=true> focuspoint.

101. Agreement Between the Federal Republic of Germany and the French Republic on the Optional Matrimonial Property Regime of Accrued Gains, Fr.-Ger., BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (May 1, 2013), [http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Uebersetzung\\_Abkommen\\_Wahlgueterstand.pdf?\\_\\_blob=publicationFile](http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Uebersetzung_Abkommen_Wahlgueterstand.pdf?__blob=publicationFile) [hereinafter *Common Optional Matrimonial Property Regime*].

composition, operation, and liquidation to remove legal uncertainties both between spouses and with third parties. The common property regime has the same effect whether its application is in France or in Germany and whether couples are heterosexual or homosexual.<sup>102</sup> From a wider perspective, the Franco-German regime should aim to harmonize European family law. The agreement states that other Member States, beyond just France and Germany, may adopt the common property regime later by accession.<sup>103</sup> It can be understood as the first milestone for harmonizing substantive rules, despite the fact that the agreement only involves two states. Another answer would be to develop an optional matrimonial regime to which European couples and/or registered partners could opt into without any gender distinction. The optional regime should ensure basic rights (that is to say, an equitable regime for spouses or partners) and should not be used to circumvent national public policies. In fact, an optional instrument known in every European Union (EU) Member State would obviously be useful to the free movement of couples.<sup>104</sup> A matrimonial property regime without borders would become a real “matrimonial property passport” for both same-sex and opposite-sex couples.

## 2. Divorce

In France, 46.2% of marriages end in divorce,<sup>105</sup> and there is no reason why a same-sex couple would find a better recipe for marriage

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102. Under German law, there is no difference in the laws of matrimonial property and the laws of property of registered partnership. See EGBGB, arts 15, 17b.

103. Common Optional Matrimonial Property Regime, *supra* note 101, art. 21; see also Ryznar & Stepien-Sporek, *supra* note 64, at 612 (“By agreement, Germany and France became the first countries to adopt shared substantive law through the Common Matrimonial Property Regime [COMPR] in January 2010, but other member states may accede to the agreement. The common property regime adopted in this agreement is a compromise approach. Although not a default regime, spouses may contract into this regime. The new regime is inspired by the above-mentioned community of accrued gains (*Zugewinnngemeinschaft*), which is the default regime in Germany, and, in France, is a contractual regime into which couples must contract.”). The COMPR is the first common matrimonial property regime between two different states. Furthermore, the COMPR is not exclusive to France and Germany. Other Member States can accede to the agreement. So, if other Member States accede to the Agreement, the COMPR is tracing a route towards a European harmonization of family law.

104. *Opinion of the European Economic and Social Committee on “The 28th Regime—An Alternative Allowing Less Lawmaking at Community Level,”* 2011 O.J. (C 21) 26, para. 4.3.3 (“Optional instruments may also be adopted for areas of private law other than contract law . . . . [T]he law of matrimonial property may be yet another subject for an optional instrument in the future.”).

105. *Divorce*, INSTITUT NATIONAL D’ÉTUDES DÉMOGRAPHIQUES, <http://www.ined.fr/fr/tout-savoir-population/chiffres/France/mariages-divorces-pacs/divorces> (last visited Nov. 15, 2014) (providing statistics for 2011).

longevity to reduce that statistic.<sup>106</sup> Gays and lesbians will be faced with the same marital difficulties as heterosexuals, and lawyers will soon be faced with handling their divorce. How will the new French marriage affect divorce practices, and what are the difficulties that will be encountered abroad with the modern marital pact?

First of all, French and foreign homosexual married couples can now divorce in France. The Law 2013-404 of May 17, 2013 on the Opening of Marriage to Couples of the Same Sex applies *de facto* to divorce law. Same-sex or opposite-sex couples can choose between four types of divorce: divorce by mutual consent, divorce on the basis that both spouses accept that the marriage has broken down, divorce following irretrievable impairing of the marriage tie, or divorce by fault.<sup>107</sup> Financial consequences, patrimonial consequences, and child custody are also the same. There are no discriminatory provisions, and one cannot imagine that a judge would rule differently depending on whether the couple is of the same sex or opposite sex. Scholars have pointed out that gender inequality in wages influences compensatory allowance and its allocation.<sup>108</sup> However, if the payment of a compensatory allowance is at the judge's discretion, the amount is allocated on a case-by-case basis to "compensate . . . for the disparity that the breakdown of the marriage creates in the respective ways of living."<sup>109</sup> The disparity exists in each couple, no matter its gender composition, and compensatory allowance is paid under the same conditions.

In short, French or foreign same-sex divorces do not raise any particular issues in France that opposite-sex divorces do not raise.

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106. The first same-sex divorce was pronounced in Toulouse, in the south of France, in October 2013. *Mariage Homosexuel: 4 Mois Après, un Premier Divorce Prononcé à Toulouse*, LA DEPECHE (Oct. 30, 2013), <http://www.ladepeche.fr/article/2013/10/30/1742550-mariage-homosexuel-un-premier-divorce-prononce-a-toulouse.html>.

107. CODE CIVIL [C. CIV.] art. 229 (Fr.); see also *Divorce—France*, EUR. JUD. NETWORK CIV. & COM. MATTERS (May 5, 2005), [http://ec.europa.eu/civiljustice/divorce/divorce\\_fra\\_en.htm#2](http://ec.europa.eu/civiljustice/divorce/divorce_fra_en.htm#2).

108. Sylvain Thouret, *Le Divorce Pour Tous*, DROIT DE LA FAMILLE para. 17 (2013), available at Juris Classeur; CODE CIVIL [C. CIV.] art. 270 (Fr.). This article defines "compensatory benefits" as:

One of the spouses may be compelled to pay the other a benefit intended to compensate, as far as possible, for the disparity that the breakdown of the marriage creates in the respective ways of living. This benefit shall be in the nature of a lump sum. It shall take the form of a capital the amount of which must be fixed by the judge. However, the judge may refuse to grant such a benefit where equity so demands, either taking into account the criteria set out in Article 271, or where the blame lies wholly upon the spouse who requests the advantage of this benefit, considering the particular circumstances of the breakdown.

*Id.* (author's translation).

109. CODE CIVIL [C. CIV.] art. 270 (Fr.) (author's translation).

However, how does that situation change when French couples emigrate? Do they have access to divorce in the same manner, or are they confronted by specific restrictions? This issue increases in importance with the discovery that expatriated couples are more likely to divorce than sedentary couples.<sup>110</sup> Solutions vary according to the conflict-of-laws rules of the forum. For most states, petitions for divorce by same-sex couples lawfully married in another jurisdiction call upon the judge to first determine the validity of the marriage according to the law of the forum. For example, *In re Marriage of Tara Dazy and Larissa Chism*, the judge ordered that the marriage of a lesbian couple in Canada who then moved to Indiana is null and void according to the Indiana Code prohibiting same-sex marriage.<sup>111</sup> Conversely, in 2012 Israel was the first jurisdiction to grant a same-sex divorce even though same-sex marriage is prohibited in the country.<sup>112</sup> To avoid this situation and the difficulties of divorcing, French law grants the possibility to seize French courts to divorce couples that live abroad. No French residency is required,<sup>113</sup> unlike Massachusetts<sup>114</sup> or Canada,<sup>115</sup> and court jurisdiction is not conditioned on a marriage celebrated in France, such as is required by the District of Columbia or Vermont.<sup>116</sup> The “judiciary return to France”

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110. Expatriation is a cause of divorce in one third of cases. TNS Sofres, *Expatriés, Votre Vie Nous Intéresse*, MONDISSIMO, [http://www.mondissimo.com/pdf/expatrie\\_votrevie\\_2008.pdf](http://www.mondissimo.com/pdf/expatrie_votrevie_2008.pdf) (last visited Nov. 15, 2014).

111. *In re Marriage of Tara Ranzy & Larissa Chism*, No. 49D12—0903—DR—014654 (Ind. Super. Ct., Marion County Sept. 4, 2009); *see also* IND. CODE § 31-11-1-1 (2010) (“A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.”) (declared unconstitutional by *Baskin v. Bogan*, 766F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014)).

112. Gabe Fisher, *In Precedent-setting Ruling, Court Allows Gay Couple to Untie the Knot*, TIMES ISR. (Dec. 3, 2012), <http://www.timesofisrael.com/in-precedent-setting-ruling-court-allows-gay-couple-to-untie-the-knot/#comments>.

113. CODE CIVIL [C. CIV.] art. 15 (Fr.) (“French persons may be called before a court of France for obligations contracted by them in a foreign country, even with an alien.” (author’s translation)).

114. Armin U. Kuder & Marcia Kuntz, *Legal Challenges of Divorce for Same-sex Couples*, in UNDERSTANDING THE LEGAL ISSUES SURROUNDING SAME-SEX MARRIAGE: LEADING LAWYERS ON ADAPTING TO RECENT SUPREME COURT DECISIONS IMPACTING FAMILY LAW 27, 39 (2013) (“A member of a same-sex couple who married in Massachusetts and now lives in Tennessee or Florida, or any of numerous other states that will not recognize same-sex marriages, must move to Massachusetts for one year . . . or to another recognition state for its requisite period of time before he or she can obtain a divorce.”).

115. Divorce Act, R.S.C. 1985, c. 3, art. 3 (Can.) (“(1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.”).

116. Christopher S. Krimmer, *The Gay Divorcée: When Same-Sex Marriages Dissolve in Wisconsin*, WIS. LAW. para. 9 (2012), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=85&Issue=7&ArticleID=8702> (“The second option is the District of

for divorce is only based on French citizenship.<sup>117</sup> However, it is limited by geographical boundaries and can only be used by a French person living outside of the EU. When one of the two spouses are living within the EU, the “Brussels II bis” provision takes effect under the EU Council Regulation No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility. This regulation is applicable in all EU Member States except Denmark.<sup>118</sup> Since March 1, 2005, the applicable criterion for divorce jurisdiction is the spouses’ habitual residence or the common nationality of the spouses.<sup>119</sup> For instance, a French gay couple living in Italy can seize French jurisdictions to adjudicate a divorce, while a Franco-Italian couple also living in Italy must seize Italian courts, where same-sex marriage is not recognized. Consequently, in practice, the couple cannot file a petition for divorce in Italy nor in France. The EU regulation needs to be amended to include a *forum necessitatis* provision when the courts of the Member State that has jurisdiction cannot grant a divorce for specific reasons.<sup>120</sup>

Moreover, additional difficulties are encountered with the law applicable to divorce and legal separation according to Council Regulation No. 1259/2010 of 20 December 2010.<sup>121</sup> From the time of its enactment on June 21, 2012, the Regulation Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation provides, in an unromantic manner, the possibility for spouses to choose the law applicable to their divorce, or in the absence of choice, the option to apply the law of the spouses’ habitual residence or the law

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Columbia and Vermont, which recently passed laws that allow nonresident gay or lesbian couples to divorce in their jurisdiction. . . . The couple must have been married in the District of Columbia or Vermont to be able to return to the marital jurisdiction to divorce.”).

117. CODE CIVIL [C. CIV.] art. 14 (Fr.) (“An alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he may be called before the courts of France for obligations contracted by him in a foreign country towards French persons.” (author’s translation)).

118. Council Regulation (EC) 2201/2003, *supra* note 65, art. 2.

119. *Id.* art. 3.

120. “Also, unlike recent legislative instruments such as the Maintenance Regulation or the Successions Regulation, the Regulation does not contain a *forum necessitatis*. Such jurisdiction ground was demanded by the European Parliament in its legislative resolution of 15 December 2010 on the proposal for the Rome III Regulation.” *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000*, at 8, COM (2014) 225 (Apr. 15, 2014).

121. Council Regulation 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343) 10.



of the spouses' common nationality.<sup>122</sup> The regulation aims to avoid a potential conflict of laws. Nevertheless, the text includes a backdoor for courts to decline jurisdiction on the grounds that judges do not "deem the marriage in question valid for the purposes of divorce" according to national law.<sup>123</sup> The term "marriage" should be interpreted "autonomously."<sup>124</sup> A judge should not be required to pronounce a divorce when the law of the forum does not recognize same-sex marriage. In that situation, European lawyers shall play a key role in actively promoting the determination of the law applicable to the parties.<sup>125</sup> It is thus regrettable that the modern European legislation did not plan a way out for same-sex couples, instead forcing them to return to their country of origin or to a jurisdiction that offers same-sex divorce and absorb the financial consequences of relocation. Moreover, refusing to grant divorce leaves spouses stranded in a marital life incompatible with the right to remarry that could quite be deduced from the right to marry protected by European Convention on Human Rights (ECHR).<sup>126</sup> Although for the moment there is no European definition of "marriage" as a prerequisite to divorce, it is desirable that Member States find a compromise to determine what a marriage in Europe really is.<sup>127</sup>

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122. *Id.* arts. 5, 8.

123. *Id.* art. 13.

124. Maarja Torga, *Party Autonomy in Private International Law as a Tool for Converging National Laws*, in *THE INTERACTION OF NATIONAL LEGAL SYSTEMS: CONVERGENCE OR DIVERGENCE?* 351, para. 1.1(a) (2013) ("The wording of Article 13 seems to indicate that the term 'marriage' as used in the other provisions of the Rome III Regulation should be interpreted autonomously and that such a notion could, in principle, involve non-traditional forms of marriage. Otherwise the cautious wording of Article 13 would become meaningless—if the concept of 'marriage' in the context of the Rome III Regulation would depend on the forum's own definition of 'marriage' there would be no need for the courts to resort to Article 13 of the Rome III Regulation. Of course, the exact meaning of the term 'marriage' or the term 'spouses' in the context of the Rome III Regulation would have to be resolved by the Court of Justice of the European Union.").

125. Council Regulation 1259/2010, *supra* note 121, art. 5.

126. ECHR, *supra* note 50, art. 12.

127.

However, at the moment, the conflicts-of-laws questions relating to the prerequisites of or the grounds for the invalidity of marriages have not been regulated on the international level and it is highly unlikely that the consensus on such fundamental notions could be reached any time soon in the European Community. Currently the Member States differ considerably in their treatment of non-traditional unions as marriages—at the one end of the scale are the highly conservative states such as Latvia which has felt the need to amend its Constitution in order to affirm that a marriage can only be concluded between a man and a woman. At the other end of the scale are those Member States which have taken a highly liberal stance towards same-sex marriages.

Torga, *supra* note 124, para. 1.2(c).

### 3. Succession

While almost one half of marriages end in divorce, for the others “marriage is a fight to the death.”<sup>128</sup> Unlike the law of PACS,<sup>129</sup> which did not create reciprocal rights of inheritance between partners, the French Civil Code grants the surviving partner the classification of spouse for intestacy purposes.<sup>130</sup> These intestacy rights can be increased through a donation between spouses (inter vivos gift) or other *avantage matrimonial*.<sup>131</sup>

When a situation involves cross-border elements, the French public international law currently applies the principle of scission where the law of the deceased’s last domicile governs movables and the *lex sitae* principle governs immovables.<sup>132</sup> As of August 17, 2015, new rules will apply. France shall implement the European Regulation on Successions No. 650/2012 that provides for unity in succession law, retains the principle of one law applicable to the succession by determining the deceased’s habitual residence, and admits the *professio juris* in favor of the national law only.<sup>133</sup>

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128. HONORÉ DE BALZAC, *PHYSIOLOGIE DU MARIAGE* (Société d’Éditions Littéraires et Artistiques 1901) (1829) (“Marriage is a fight to the death, before which the wedded couple asks a blessing from heaven because it is the rashest of all undertakings to sue or eternal love, the fight at once commence and victory, that is to say liberty remains in the hands of the cleverer of the two.” (author’s translation)).

129. The law of PACS does not provide any direct rights to the surviving partner. A will is necessary. See PACS, *supra* note 4.

130.

Regarding the rights of a spouse, the laws of December 3, 2000[1] (applicable starting on July 1, 2002) and June 23, 2006 (applicable starting January 1, 2007) have created new rights in favor of the surviving spouse. Article 757 of the French Civil Code (which incorporates the relevant provisions of the new laws) states: “Where a predeceased spouse leaves children or descendants, the surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses and the ownership of the quarter in the presence of one or several children who are not born from both spouses . . . .” Further, under the new law in effect on 1st January 2007, if there are no children, but there is a surviving spouse, then the spouse is able to take all of the deceased’s estate, in preference to the deceased’s parents, as was previously the case.

Nancy E. Muenchinger, *French Law: Reforms in Real Property and Estate Law*, 59 R.I. BAR J. 23, 26 (2010).

131. “One way spouses may avoid the French forced heirship laws is to elect for the ‘Universal Community’ regime to apply to them. . . . If this regime applies, at the death of the first spouse to die, full ownership of the French property passes to the surviving spouse notwithstanding the forced heirship laws.” Theresa M.H. Marx, *A Step-by-Step Guide To Purchasing a Home in France*, 36 EST. PLAN. 24, 25-26 (2009).

132. CODE CIVIL [C. CIV.] art. 3 (Fr.) (“Immovables are governed by French law even when owned by aliens.” (author’s translation)).

133. Regulation 650/2012, *supra* note 31, arts. 21-22.

According to these rules, a foreign law can govern a succession in France whether the assets are movable or immovable.<sup>134</sup> No particular issue arises when the foreign law approves of same-sex marriage. However, the reasoning is not obvious when the foreign law ignores the union or prohibits it. How should we receive the foreign law? Should we interpret the foreign law in a strict sense and not give effect to same-sex marriage? Controversial arguments arise about the practicality and effectiveness of such proposals. Hugues Fulchiron has doubts about the usefulness of international public policy (*ordre public*) to avoid the foreign law because it is the definition of marriage that is criticized, and not its content.<sup>135</sup> Georges Khairallah considers that international public policy should intervene in case of the implementation of the proximity principle according to the situation.<sup>136</sup> Although Professor Fulchiron's remark is right, the exception of *ordre public* should be invoked to give full legal effects to homosexual surviving spouses in France. The Court of Appeal of Chambéry stated that the Law 2013-404 of May 17, 2013 on the Opening of Marriage to Couples of the Same Sex creates a new international public policy rule, and the noncelebration of a same-sex marriage in France because of a bilateral convention is clearly discriminatory.<sup>137</sup> Although the classification of the surviving spouse comes from succession law, the definition belongs *in essence* to the marriage itself. There is no surviving spouse if there is no marriage. Stating a marriage is valid while the classification of the surviving spouse is invalid constitutes an awkward and unsecured legal situation for the couple, who needs pragmatic and efficient solutions. In France, the new marriage has been created for everyone that implicitly extends to its effects. Moreover, this advocacy is supported by the EU regulation on successions that provides the possibility to exclude the foreign law applicable to succession in exceptional circumstances on the grounds of the forum's public policy.<sup>138</sup>

By contrast, can French law apply to succession when the law of the forum ignores the classification of the same-sex surviving spouse? The

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134. *Id.* art. 23.

135. Hugues Fulchiron, *Le Mariage Entre Personnes de Même Sexe en Droit International Privé au Lendemain de la Reconnaissance du "Mariage Pour Tous,"* 2013 JOURNAL DU DROIT INTERNATIONAL 1055, para. 8, at 1059, available at Juris Classeur.

136. GEORGES KHAIRALLAH & MARIELLE REVILLARD, DROIT EUROPÉEN DES SUCCESSIONS INTERNATIONALES: LE RÈGLEMENT DU 4 JUILLET 2012, at 56-57 (2013).

137. Cour d'appel [CA] [regional court of appeal] Chambéry, 3e ch., Oct. 22, 2013, No. 13/02258, available at Dalloz.

138. Regulation 650/2012, *supra* note 31, art. 35 ("The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.")

answer depends on the conflict-of-laws rules of the host country. In this way, when the foreign country's conflict-of-laws rule designates the law of the nationality, one cannot be sure that the host country will accept French recognition of the same-sex surviving spouse due to their public policy. Take the example of a French national—or Belgian, or Spaniard—who decides their national law governs their future succession according to the European *professio juris* and then moves to Italy where they live with their spouse, buy property, and die. The EU regulation on successions applies in Italy, but Italian law does not recognize same-sex marriage. Therefore, there is no guarantee that the surviving spouse will be protected in Italy. The same is also true with cases involving Romania because Romanian law expressly rejects same-sex marriage performed in other jurisdictions.<sup>139</sup> The choice of law applicable to succession is thus important because it may raise contradictions with the goals being pursued. Hence, same-sex couples need an attorney's advice on a case-by-case basis before migrating anywhere, and it is up to the lawyers to carefully advise them on the potential effect of the applicable law according to the EU regulation on successions.

### C. Filiation

In a second phase, France followed the general European tendency to grant access to a fictitious filiation for same-sex couples—namely adoption—and to close off to them nonadoptive filiation like assisted medical procreation (AMP) and surrogacy.<sup>140</sup> In several northern European countries like Denmark, the Netherlands, Sweden, and Iceland, adoption is fully disconnected from marriage.<sup>141</sup> Since the new bill came into force, the possibility for same-sex couples to marry provided, *de facto*,<sup>142</sup> the possibility to jointly adopt a child, while only individual adoption is available for PACSed partners.<sup>143</sup> Adoption is now accessible

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139. Cod civil [C. civ.] art. 277 (Rom.) (“Marriages between persons of the same-sex be concluded in Romania or abroad or foreign citizens are not recognized in Romania.” (author's translation)).

140. Loi 2004-800 du 6 août 2004 relative à la bioéthique [Law 2004-800 of Aug. 6, 2004 Relating to Bioethics], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2004.

141. See *Sweden Legalises Gay Adoption*, BBC NEWS (June 6, 2002), <http://news.bbc.co.uk/2/hi/europe/2028938.stm>.

142. CODE CIVIL [C. CIV.] art. 6-1 (Fr.) (“Marriage and adoptive filiation has the same effect, rights and obligations recognized by the laws, excluding those covered by Title VII of Book I of this Code, the spouses or parents are of different sexes or the same sex.” (author's translation)).

143. See CODE CIVIL [C. CIV.] art. 343-1 (Fr.) (“Adoption may be also petitioned by a person over twenty-eight years of age. Where the adopter is married and not judicially separated,

and is based on the same conditions as those applied to heterosexual married couples without any distinction of rights and procedures and is in the sole interest of the child to legally secure the child's relationship with both adults who participate daily in the child's education.<sup>144</sup> Nevertheless, there is a factual limit in the context of international adoption because few children's countries of origin allow joint adoption to same-sex couples; only Brazil, Mexico, some U.S. states, and South Africa offer the opportunity, thus limiting cases and the equal chance to adopt.<sup>145</sup>

The possibility to adopt the spouse's child is offered as well.<sup>146</sup> This type of adoption is controversial because it may cause a serious dilemma with the validity of the process, which often deals with children fraudulently conceived by AMP, which is still forbidden in France for same-sex couples.<sup>147</sup> The process is well known for lesbian couples who travel to Belgium<sup>148</sup> or Spain,<sup>149</sup> where they may freely access AMP regardless of their status or sexual orientation.<sup>150</sup> These couples subvert

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his or her spouse's consent is required unless this spouse is unable to express his or her intention." (author's translation)).

144. CODE CIVIL [C. CIV.] art. 353-1 (Fr.) ("In case of adoption of a ward of State, of a child entrusted to a body authorized for adoption, or of an alien child who is not the child of the adopter's spouse, the court shall verify before making an adoption order that the petitioner or petitioners gained an authorization to adopt or were dispensed with it. Where an authorization was refused or was not issued within the statutory period, the court may make an adoption order if it considers that the petitioners have the capacity to receive the child and that the adoption is consonant with his welfare." (author's translation)).

145. *Mariage Homosexuel et Adoption: Les Pays Qui Ont Dit "Oui,"* LA LIBRE (May 18, 2013), <http://www.lalibre.be/actu/international/mariage-homosexuel-et-adoption-les-pays-qui-ont-dit-oui-51b8fcc4e4b0de6db9ca8970>; Agnes Leclair, *Les Adoptions Internationales Fermées aux Homosexuels*, LE FIGARO (Sept. 11, 2012), <http://www.lefigaro.fr/actualite-france/2012/09/11/01016-20120911ARTFIG00448-les-adoptions-internationales-fermees-aux-homosexuels.php>.

146. CODE CIVIL [C. CIV.] art. 345-1 (Fr.) ("Plenary adoption of the spouse's child is allowed: 1) Where the child has a lawfully established parentage only with regard to that spouse; 1bis) When the child was the subject of a full adoption by one spouse and has no affiliation established only with respect; 2) Where the parent other than the spouse has been totally deprived of parental authority; 3) Where the parent other than the spouse is dead and has left no ascendant of the first degree or where the latter obviously took no further interest in the child." (author's translation)).

147. Loi 2004-800 du 6 août 2004 relative à la bioéthique [Law 2004-800 of Aug. 6, 2004 Relative to Bioethics], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2004.

148. Loi relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes [Law on Assisted Reproduction and Destination Supernumerary Embryos and Gametes] of July 6, 2007, MONITEUR BELGE [M.B.] [OFFICIAL GAZETTE OF BELGIUM], July 17, 2007, 38575 (Belg.).

149. Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida [Law 14/2006 of May 26, 2006, on Human Assisted Reproduction] (B.O.E. 2006, 9292) (Spain).

150. See also Virginie Rozee Gomez & Elise de La Rochebrochard, *Cross-Border Reproductive Care Among French Patients: Experiences in Greece, Spain and Belgium*, 28 HUM.

the primary purpose of the law because adoption of the spouse's child is done with the purpose of reconstituting the family.

1. Wouldn't It Be Better If France Opened AMP and Other Medical Procreation to Same-Sex Couples?

AMP is governed in France by Bioethics Act No. 2004-800 of August 6, 2004, which intended to relieve a state of infertility, the pathological nature of which has been diagnosed medically.<sup>151</sup> The technique is only accessible to heterosexual couples; singles and homosexuals are excluded.<sup>152</sup> Standing apart from Belgium and Spain, the new French law did not cover this legal issue. The former French Prime Minister Jean-Marc Ayrault, after consulting the National Consultative Ethics Committee for Health and Life Sciences,<sup>153</sup> decided to postpone the concern of AMP until the next legislative session.<sup>154</sup> It is clear that permitting access to AMP to same-sex couples avoids a long and expensive procedure in a foreign country or an adoption process. However, before introducing this opportunity, this Article suggests that French filiation law needs a complete review. The French Civil Code continues to provide a patriarchal attachment to family, expressed in both the marriage and filiation chapters, while some articles have not been modified since codification in 1804.<sup>155</sup> There is still a link between marriage and procreation. The husband's paternity presumption<sup>156</sup> in

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REPROD. 3103, 3103 (2013) ("French patients seeking CBRC are same-sex couples, single women who are not eligible for assisted reproduction technologies (ARTs) in France and heterosexual couples seeking oocyte donation due to extremely limited access to this technique in France, while their choice of Greece as a destination is influenced by financial issues.").

151. Loi 2004-800.

152. Code de la santé publique [C.S.P.] art. L2141-2 (Fr.).

153. It is interesting to note here that the National Consultative Ethics Committee for Health and Life Sciences' members have been recently modified and include now some persons close to the President of Republic or its political party. This may imply a positive report of the committee in the next months. Laetitia Claveul & Gaelle Dupont, *Renouvellement en Profondeur du Comité d'éthique*, LE MONDE (Sept. 21, 2013) [http://www.lemonde.fr/societe/article/2013/09/21/nominations-sous-haute-surveillance-au-comite-d-ethique\\_3482200\\_3224.html](http://www.lemonde.fr/societe/article/2013/09/21/nominations-sous-haute-surveillance-au-comite-d-ethique_3482200_3224.html).

154. Alexandre Boudet, *PMA: Le Gouvernement Reporte (Encore) le Débat sur la Procréation Assistée*, HUFFINGTON POST (Sept. 10, 2013), [http://www.huffingtonpost.fr/2013/09/10/pma-gouvernement-report-debat-procreation-assistee\\_n\\_3898904.html](http://www.huffingtonpost.fr/2013/09/10/pma-gouvernement-report-debat-procreation-assistee_n_3898904.html).

155. CODE CIVIL [C. CIV.] art. 213 (Fr.) ("Spouses are responsible together for the material and moral guidance of the family. They shall provide for the education of the children and shall prepare their future." (author's translation)).

156. *See, e.g., id.* art. 312 ("A child conceived in wedlock has the husband as his father." (author's translation)); Conseil constitutionnel [CC] [constitutional court] decision No. 2013-669DC, May 17, 2013, para. 40 (Fr.) ("[T]he provisions of this Article prevent two maternal filiations or two paternal filiations from being established in relation to the same child; that accordingly, in particular, filiation may not be established within a same-sex couple through the presumption under Article 312 of the Civil Code.").

force needs to be altered to draw a filiation concept in line with modern society. When one out of every two children is born out of wedlock, one notices that marriage is not needed to procreate and to raise children, nor are children correlated to marriage. French law can learn from Spanish law, which introduced in 2006 the possibility of creating a double link of maternity filiation with two women for children born from AMP.<sup>157</sup> This is certainly a new definition of filiation far different from the biological definition. The concept of family has evolved in recent years and legislation needs to comply with reality; this is the role that the representatives of the people should undertake.

## 2. A Step Further: Surrogacy?

French law has prohibited surrogacy since the Court of Cassation's decision in 1991 was confirmed by the Bioethics Act of 1994.<sup>158</sup> Article 16-7 of the French Civil Code states that “[a]ll agreements relating to procreation or gestation on account of a third party are void.”<sup>159</sup> The Penal Code outlines correctional penalties for the incitement to abandon a child or for taking part in any agreement for reproductive or gestational surrogacy.<sup>160</sup> The law does not stop biologically infertile adults who want to have children because they can turn to foreign surrogacy.<sup>161</sup> The method becomes an immigration issue when parents and children travel back to France. In practice, judges heard an increase of cases from plaintiffs who sought transcription on the French civil status registers for these children born abroad from surrogacy.<sup>162</sup> The last decade brought a convoluted jurisprudence. For instance, in 2011, the Court of Cassation

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157. These children have no access to information on their origin. Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida [Law 14/2006 of May 26, 2006, on Human Assisted Reproduction] (B.O.E. 2006, 9292) (Spain).

158. Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 31, 1991, No. 90-20105 (Fr.); Loi 2004-800 du 6 août 2004 relative à la bioéthique [Law 2004-800 of Aug. 6, 2004 Relating to Bioethics], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2004.

159. CODE CIVIL [C. CIV.] art.16-7 (Fr.) (author's translation).

160. CODE PÉNAL [C. PÉN.] art. 227-12 (Fr.) (“The incitement of the parents or one of them to abandon a born or unborn child, made either for pecuniary gain, or by gifts, promises, threats or abuse of authority, is punished by six months’ imprisonment and a fine of 7,500€.” (author's translation)).

161. Directorate General for Internal Policies, *A Comparative Study on the Regime of Surrogacy in EU Member States*, EUR. PARLIAMENT 21 (2013), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI\\_ET\(2013\)474403\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf) (“In France, 200 children were born to surrogate mothers who resided outside of the country. There has been a steady increase in these cases: 120 in 2007, 125 in 2008, 150 in 2009, and 170 in 2010.”).

162. See e.g., *Etat Civil des Enfants Nés à l'étranger de Mères Porteuses: Taubira Réfléchi*, LE POINT (Jan. 16, 2013), [http://www.lepoint.fr/politique/etat-civil-des-enfants-nes-a-l-etranger-de-meres-porteuses-taubira-reflechit-16-01-2013-1615710\\_20.php](http://www.lepoint.fr/politique/etat-civil-des-enfants-nes-a-l-etranger-de-meres-porteuses-taubira-reflechit-16-01-2013-1615710_20.php).

refused to give French nationality to a child born from surrogacy,<sup>163</sup> while the Court of Appeal of Rennes pronounced an opposite decision in 2012.<sup>164</sup> A circular of the Minister of Justice on January 25, 2013 adjusted the conditions to provide French nationality for children born from surrogacy.<sup>165</sup> The Chancery Office has pressed French prosecutors and court clerks to enforce granting French nationality for such cases.<sup>166</sup> The legal document has been produced during the heated same-sex marriage debate and has strongly put forward the idea of introducing surrogacy in France.<sup>167</sup> More recently, on June 26, 2014, in the cases of *Mennesson v. France* and *Lebassee v. France*, the ECtHR ordered France to recognize children from surrogate mothers, a set of decisions that finally ended the convoluted French jurisprudence.<sup>168</sup>

### 3. So, Are We Facing Change in French Law?

During parliamentary debate, Members of Parliament (MPs) argued that guaranteeing AMP to female couples without granting the same access to male couples creates discriminatory access to artificial procreation based on gender.<sup>169</sup> When one remembers that same-sex marriage was discussed around the notion of equality, the argument for allowing nondiscriminatory surrogacy takes on its full meaning. However, between ethics and need, the French President François Hollande has disapproved of the introduction of a surrogacy bill during his current five-year term, an act that may lead to a legal backdoor in the future.

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163. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 6, 2011, No. 09-66486 (Fr.).

164. Cour d'appel [CA] [regional court of appeal] Rennes, 6e ch. A, Feb. 21, 2012, No. 11-02758 (Fr.).

165. *Circulaire du 25 janvier 2013 relative à la délivrance des certificats de nationalité française—convention de mère porteuse—Etat civil étranger*, BULLETIN OFFICIEL DU MINISTÈRE DE LA JUSTICE (Jan. 25, 2013), [http://www.textes.justice.gouv.fr/art\\_pix/JUSC1301528C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSC1301528C.pdf).

166. *Id.*

167. *Id.*

168. *Mennesson v. France*, App. No. 65192/11 Eur. Ct. H.R., HUDOC (Sept. 26, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145389>; *Lebassee v. France*, App. No. 65941/11 Eur. Ct. H.R., HUDOC (Sept. 26, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145180>; see also Press Release, European Court of Human Rights, Totally Prohibiting the Establishment of a Relationship Between a Father and His Biological Children Born Following Surrogacy Arrangements Abroad Was in Breach of the Convention, EUR. CT. H.R. 185 (June 26, 2014), <http://hudoc.echr.coe.int/webservices/content/pdf/003-4804617-5854908>.

169. See, e.g., Philippe Le Ray, Assemblée Nationale XIVe Legislature, Session ordinaire de 2012-2013, Compte rendu intégral, première séance du vendredi 1er février 2013.



The issue also occurs in other EU Member States. Can we expect an evolution in domestic law by implementing European legislation? On July 8, 2013, French and other European lawyers suggested a report about the booming practice of surrogacy in Europe.<sup>170</sup> Even though surrogacy operates well for infertile couples to give birth, the document illustrates that a majority of European domestic law denies its legality.<sup>171</sup> In 1985, only the United Kingdom legalized surrogacy designed as noncommercial, altruistic, and ethical.<sup>172</sup> The technique is clearly forbidden in Germany, Spain, and Italy; while Belgium, Greece, Ireland, and the Netherlands do not come down hard on this issue.<sup>173</sup> According to the report, it seems impossible today to progress towards a common European legislation because degrees of acceptance are disparate in Europe.<sup>174</sup> Considerations about harmonization of rules of jurisdiction, parental civil status issues, and certainty as to the legal parenthood of the child and free movement of the child inside the EU are encouraged.<sup>175</sup> At least, between the fervor of harmonization and the reluctance to lose a national identity, it is surely a positive first step.

#### IV. CONCLUSION

France took time to create a “marriage for everyone.” It is clearly in the name of equality between individuals that marriage has been opened to homosexual couples. Nevertheless, the principle of equality is not an

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170. Directorate General for Internal Policies, *supra* note 161, at 14.

171. *Id.* at 15-16, 277.

172. *Id.* at 58.

173. *Id.* at 15-16.

174. *Id.* at 197-98.

175. *Id.* at 191-92

5. If an EU level response to the legal issues arising from cross-border surrogacy is thought desirable, consideration ought to be given to the need to draft harmonised rules of jurisdiction to cater for contractual issues, enforcement issues, regulatory issues, parental civil status issues, and child civil status issues, as set out in Section III.
6. If an EU level response to the legal issues arising from cross-border surrogacy is thought desirable, the question of what law governs various legal issues arising in connection with surrogacy would be of pivotal importance. Attention would require to be paid to the need, or not, for harmonised choice of law rules concerning the contractual aspects of cross-border surrogacy and the civil status implications thereof, as set out in Section IV.  
.....
8. Whatever the nature of a putative EU regime, it is suggested that one of the principal aims which it should seek to deliver is certainty as to the legal parenthood of the child, and the child's entitlement to leave the state of origin, and to enter and reside permanently in the receiving state.

*Id.*

absolute right because it suffers from difficulties in an international context that French law cannot alone prevent. It is now obvious to note that European law also suffers from a lack of uniform provisions in this matter. Although the EU Member States hold disparate views related to marriage, a European definition of marriage would be a welcome step towards the European movement of harmonization. The principle of equality is even less absolute regarding filiation: homosexual married couples still experience discrimination related to AMP and surrogacy. Here again, France is lagging behind in evolving its legislation, and we can only hope for European legislation to drive matters forward. It is time for French law to regain its *lettres de noblesse*; shall the law be the same for all, or shall it not?<sup>176</sup>

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176. Déclaration des Droits de l'Homme et du Citoyen du 26 août 1789 [Declaration of Human and Civic Rights of 26 Aug. 1789] art. 6.