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Would Scots Law Recognise a Dutch Same-Sex Marriage?

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The opening, in the Netherlands, of the institution of marriage to same-sex couples will sooner or later give rise to the question of whether the Scottish international private law rules relating to marriage will permit or even demand the recognition here of such unions validly entered into there. It is suggested in this article that the proper approach is not to ask whether the Scottish court will recognise the relationship as the institution of marriage as such, but whether the Scottish court will give effect to consequences flowing from the fact that the relationship has been sanctioned by the Dutch state. For many purposes the answer to that question is unavoidably yes, and it is argued that since that is so then on grounds of principle, policy, and practicality the Scottish court should give effect to such consequences as it would in relation to a Dutch opposite-sex union. There is no public policy objection to doing so.

A. INTRODUCTION

As is well known, on 1 April 2001 the Netherlands became the first country in the world to open up the institution of marriage to same-sex couples.[1] But it was by no means the first country to grant recognition to same-sex relationships, even to the extent of conferring upon them virtually all the consequences of marriage, through a system of partnership registration. That honour lay with Denmark in 1989, and the Danish precedent was followed by Sweden, Norway and Iceland, before the Netherlands followed suit in 1999. Other countries too, such as France, Belgium, Finland, Hungary, Germany, Luxembourg, the US state of Vermont and the Canadian provinces of Quebec and Nova Scotia, have since introduced legislation to permit same-sex couples to register their relationships and acquire thereby virtually all the

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1 See Dutch Civil Code, art 30(1). For comment, see K Waaldijk at *http//rulj287.leidenuniv.nl/user/cwaaldij/www/NHR/news.htm*. An interesting, and important, aspect of this apparently radical change in Dutch law was the technical ease with which it was achieved. A large number of provisions required to be reworded to make them gender-neutral and sexuality neutral, but *no* provision required its substantive content to be altered to accommodate the extension of marriage. This suggests that same-sex unions, in terms of the attributes that are important to (or controllable by) the law, cannot readily be distinguished from opposite-sex unions (capacity for child-procreation being, it should always be remembered, irrelevant to the law).

legal consequences of marriage. And in January 2003 Belgium followed the Netherlands by opening marriage itself to same-sex couples. In the Netherlands, France and Belgium, but not in the other mentioned countries, registration of partnerships is open to opposite-sex couples as well, who may use it as an *alternative to* marriage; for same-sex couples there and in the other countries registration of partnership is a *substitute for* marriage. These institutions (in themselves diverse) will inevitably create interesting and difficult questions of international private law,[2] for they have no direct analogy in the Scottish or English domestic legal systems. Equally interesting, but rather different, questions are also raised by the Dutch and Belgian opening of marriage itself to same-sex couples, for that institution does, of course, exist in this country and there have long been international private law rules to deal with foreign marriages. It is these questions, rather than those raised by partnership registration, that this article is primarily concerned with, though issues of registration will sometimes help us in determining the correct answer to particular problems raised by marriage. The question that this article hopes to answer is this: in what circumstances, if any, would Scots law recognise, or give effect to consequences flowing from, a same-sex marriage validly entered into in the Netherlands? Before addressing this question, it is necessary to remind ourselves of the conflict of laws rules that are normally applied to marriage.

B. RECOGNITION OF FOREIGN MARRIAGES: A RESUMÉ

(1) Formal validity and essential validity

Originally, a marriage that was celebrated abroad would be recognised in this country if it were considered to be valid by the *lex loci celebrationis*, or the law of the country where the marriage ceremony took place. That straightforward approach is still the favoured rule in some countries, for example many states in the United States of America,[3] and it may well be appropriate when the choice of legal systems is between different states in a single political entity. Even then, however, sophisticated exceptions and distinctions and theories require to be brought into play in order to deal with the most significant drawback of the *lex loci* approach, that is to say the ease with which individuals can thereby avoid personal incapacities simply by crossing a jurisdictional

2 For example, should registered partnerships be regarded as matters of contract (referable, therefore, to the proper law of the contract) or as matters of status (and so referable to the *lex domicilii*)? See K Norrie, "Reproductive technology, transsexualism and homosexuality: new problems for international private law" (1994) 43 ICLQ 757. For a more recent (and more thorough) examination of the issue, see J Murphy, "The recognition of same-sex families in Britain: the role of private international law" (2002) 16 Int J Law Pol & Fam 181.

3 Following the First Restatement on the Conflict of Laws (1934). The Second Restatement (1971), s 283(2), requires an exception if the marriage is not valid in the jurisdiction which has most interest in the marriage.

border.[4] The *lex loci* rule was departed from by the House of Lords in 1861, specifically to prevent this happening. In *Brook* v *Brook*[5] an English-domiciled widower wished to marry his deceased wife's sister, who was also domiciled in England, but English law at that time regarded their relationship as being within the forbidden degrees of marriage. So they travelled to Denmark (where the relationship was not within the forbidden degrees), married there, and returned to England. The House of Lords refused to recognise the marriage and, in avoiding the application of the *lex loci celebrationis,* made the distinction that remains the foundation of this aspect of conflict of laws today: while matters of form may properly be referred to the *lex loci celebrationis*,[6] the essentials of the contract of marriage, and in particular the capacity of the parties to enter into it, are referred to the *lex domicilii*, the law of the country or countries in which each party is domiciled at the time of the marriage.

Other than the sometimes (but in reality not often[7]) difficult question of determining whether a particular rule refers to formal or essential validity, this modified approach ought to have been easy to apply, and the "marriage" chapters in the conflict of laws textbooks ought to have been the shortest chapters of all. But it is not like that. For there are a number of exceptions that were created to deal with especially problematical scenarios;[8] a number of complications created by forms of marriage, particularly polygamous marriages (discussed below), that make the application of domestic rules inappropriate; a number of theories invented by commentators in attempts to make more sense of the law and to identify which state actually has a real interest in the relationship between the parties; and a number of direct statutory provisions conferring some say on the *lex loci* in determining whether marriages created within its own borders are essentially valid or not.[9]

4 See H Baade, "Marriage and divorce in American conflicts law" (1972) 72 Colum LR 329, especially at 354 et seq; W Reese, "Marriage in American conflict of laws" (1977) 26 ICLQ 952; P StJ Smart, "Interest analysis, false conflicts, and the essential validity of marriage" (1986) 14 Anglo-American LR 225; L Kramer, "Same-sex marriage, conflict of laws and the unconstitutional public policy exception" (1997) 106 Yale LJ 1965.

5 (1861) 9 HLC 193.

6 Compare *Bliersbach* v *MacEwen* 1959 SC 43, where a marriage in Scotland was valid because it followed the rules classified as formal by Scots law, with, e.g., *Cullen* v *Gossage* (1850) 12D 633, one of a number of cases where cohabitation with habit and repute was held not to constitute marriage since the cohabitation was in a foreign country where this doctrine was insufficient to create a marriage.

7 See E M Clive, *Husband and Wife*, 4th edn (1997) at 123.

8 Such as, famously, the odd English exception to the normal rule, to the effect that a domiciliary incapacity will be ignored if the other party is domiciled in England, the marriage is in England, and the incapacity is not one that exists in English law: *Sottomayor* v *De Barros (No 2)* (1879) 5 PD 94. This rule is generally thought to be peculiar to English law and not to apply in Scotland.

9 Typical is s 1(2) of the Marriage (Scotland) Act 1977, which provides that "a marriage solemnised in Scotland between persons either of whom is under the age of 16 shall be void". A foreign domiciliary capable of marrying earlier by his or her own law cannot marry in Scotland due to this statutory assertion of a role for the *lex loci* in determining a matter of capacity, normally referred to the law of the domicile.

These complications are caused, at least partly, by the fact that marriage is not only an event but also a continuing relationship with a variety of ongoing—and shifting—consequences. Marriage might have effect on taxation, property ownership, maintenance obligations, succession, remedies for domestic violence, criminal law, evidence, responsibilities for children, paternity, divorce, contractual capacity, liability for delict and many other areas. It is, frankly, implausible to expect that a single conflicts rule ("*lex loci* for formalities, *lex domicilii* for essentials", or any of the other suggested rules, such as "intended matrimonial domicile") will give a satisfactory result to all possible questions in these different areas.[10] It is tempting as an alternative approach, but ultimately not possible, to classify marriage out of existence in international private law terms by holding that each issue has its own conflict of laws rule which exists independently of marriage (e.g. spousal succession rights are a matter of succession rather than marriage, spousal inheritance tax exemptions a matter of tax law, spousal privilege in evidence a matter of procedure etc). However, there are various other issues in which the question of the existence of a marriage simply cannot be avoided and needs to be tackled before the consequences can be dealt with.

It is, nevertheless, suggested that we ought to move away from the assumption that validity of marriage is the crucial issue, for that carries an implication that a marriage is *necessarily and by definition* in existence for all purposes or for none, and therefore needs to be established (and recognised or not) from the moment the relationship between the parties is solemnised. This implication can clearly be traced to the perception of marriage as a status, but in truth marriage cannot satisfactorily be explained in terms of status alone and, in the international context, seeing marriage as a status is positively misleading. Marriage has consequences created and imposed often by the place where the parties happen to be, whatever the matrimonial domicile, ante-nuptial domicile, or place of celebration—in other words, whatever the status of the person elsewhere than the place where he or she happens to be. So, for example, a woman giving evidence in a criminal court is allowed in Scotland to refuse to answer some questions if the accused is her husband,[11] and she cannot be forced to answer them just because the law of her domicile does not grant her this evidentiary privilege, even when it accepts her status as "wife". And Scots law will grant her this privilege whenever she is married in Scottish eyes notwithstanding her "status" or its consequences in her own country.

The other reason why it is unhelpful to focus on the actual validity of marriage rather than the question of whether any individual consequence thereof should follow is that, in Scots law at any rate, the consequences of marriage are almost entirely statutory and there is no necessary implication that concepts such as "married couple", "spouse", "husband", or "wife" have exactly the same meaning in every statute in

10 This point was made a quarter of a century ago by the American author, Reese, note 4 above.
11 Criminal Procedure (Scotland) Act 1995, s 264.

which they appear.[12] Rather, words in statutes have to be interpreted consistently with the policy objectives of the particular statute (bearing in mind, as always, the general rule that words are normally to be given their ordinary meanings) and, now, the requirement to be consistent with the European Convention on Human Rights. In other words, whether a "marriage" is recognised as valid or not is not the issue that should concern the court. Rather, the issue is whether for any particular statutory purpose parties come within the terms of the legislation in question. What is in practice important is not the parties' "status" but the reaction of the law in particular circumstances to the fact that the parties are in a relationship to each other of a particular kind which has been sanctified by a state. This is not a new way of seeing the international private law of marriage but rather reflects how, in practice, the UK courts have regarded another type of "marriage" which has at the same time striking similarities to and startling differences from "marriage" as understood in the domestic law of Scotland and England. Polygamous marriages provide an analogy with same-sex marriages and a precedent which, almost certainly, will be followed.[13] So it is worth spending some time reminding ourselves of the treatment polygamous marriages have received in international private law.

(2) Polygamous marriages

One of the earliest cases in which a British court was faced with a polygamous marriage, and subsequently the most influential, was that of *Hyde* v *Hyde*[14] in which Lord Penzance famously refused to extend the matrimonial remedy of divorce to a marriage that had been contracted in Utah under a system of law that apparently permitted polygamous marriages. It is important to identify properly the basis for this refusal to recognise the existence of the marriage, for it has often been misunderstood.[15] It was not based on any public policy objection to recognition. Nor was it, truly, based on the definitional argument that, whatever the nature of the relationship, it was not, because it potentially involved more than two people, a "marriage" as the law of England understood that word.[16] It is easy to misunderstand this point since Lord Penzance, in the course of his judgment, set out what is often quoted as the classic

12 So, e.g., while most statutes use the word "married" to mean "validly married" some statutes include as "married" persons whose marriage is void—see, e.g., the Children (Scotland) Act 1995, s 3(2).

13 The religious basis for the courts' original intolerance of polygamous marriages is well brought out by S Poulter in "*Hyde* v *Hyde*: a reappraisal" (1976) 25 ICLQ 475; religious opposition to recognition of the legitimacy of same-sex relationships is even more vociferous but, in the courts today, far less influential, and it ought in a multi-cultural, secular, society to be ignored.

14 (1866) LR 1 P&D 130 (henceforth *Hyde*). For a particularly lucid exposition of this case and its subsequent history, see Poulter, note 13 above.

15 Poulter, note 13 above.

16 The judge expressed "strong doubt whether the union of a man and a woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court in England, and whether persons so united could be considered 'husband' and 'wife'" (*Hyde*,

definition of marriage for the purposes of English (and Scots) law.[17] However, a definitional argument is an all or nothing argument—if the union is, by definition, not a marriage for one purpose then, by definition, it is not a marriage for any other purpose. But that is not what Lord Penzance decided, and he was careful and deliberate in the limitation of his decision to the claim before him—a claim for the matrimonial remedy of divorce. The real ratio of the decision was that that remedy was simply inappropriate to the type of relationship at issue.[18] Divorce, in other words, is in England designed to deal with monogamous unions and the court had no power to adapt that remedy to this other, alien, institution for which the domestic rules of divorce law (particularly divorce for adultery) were entirely inappropriate.[19] So the true, but limited, ratio in *Hyde* is that a marriage will not be recognised if the consequence sought cannot be applied to the relationship at issue without adaptation, which the court is unable to do.[20] Confirmation that it is this "inappropriateness of remedy" approach rather than the definitional argument that is the true ratio of *Hyde* is found in the fact that later courts have declined to define polygamous unions as not being marriage but have on the contrary granted recognition when to do so does not involve adaptation in the application of the rule or artificiality of result.[21] Thus a

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at 133). The use of particular words is irrelevant: "There is no magic in a name; and, if the relationship there existing between men and women is not the relation which in Christendom we recognise and intend by the words 'husband' and 'wife', but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer" (*Hyde*, at 134). Stirling J in *In Re Bethell* (1887) 38 Ch D 220 treated this as the ratio of *Hyde* and made it the basis of his decision there. But he was wrong to do so, as Poulter, note 13 above, shows.

17 "Marriage is the voluntary union for life of one man and one woman to the exclusion of all others" *Hyde* at 133, quoted in, e.g., F P Walton, *Husband and Wife*, 3rd edn (1951) at 1; E M Clive, *Husband and Wife*, 4th edn (1997) at 108; and by Chisholm J in *Re Kevin* [2001] Fam CA 1074 at para 7 (Family Court of Australia). The *Hyde* definition is, in fact, adopted more or less word for word in the Australian Family Law Act 1975 (Cth), s 43.

18 "It would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy" (*Hyde*, at 135).

19 See Poulter, note 13 above, at 486–488, who, while accepting this was the major reason for Lord Penzance's decision is not, in fact, convinced by it (at least not in the circumstances at issue).

20 This is also the law of Scotland. In *Muhammad* v *Suna* 1956 SC 366 Lord Walker said this (at 368): "The substance of Lord Penzance's decision was that a system of law devised for regulating, giving relief from, and dissolving a monogamous union is wholly inapplicable to a polygamous union. I cannot doubt that the same is true of Scots law. The remedies which Scots law gives in respect of adultery by either husband or wife are in my opinion applicable to monogamous unions alone and utterly incapable of being applied to a polygamous union."

21 In the words of Hughes J in *A-M* v *A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6 at para 48: "The rule [in *Hyde*] never, however, meant that a polygamous union went wholly unrecognised by English courts. Such marriages were, by contrast, recognised as valid for many purposes when valid by the law of the place where they were contracted, and provided that the *lex domicilii* of each party permitted entry into such unions. What was not permitted was the grant of matrimonial relief."

polygamous marriage was recognised for the purposes of legitimacy of children or succession,[22] for these issues did not require the adaptation of any domestic law or remedy—they were simply questions of recognising a status and of whether a particular person was entitled to succeed to another person's estate. Similarly, the rule that a subsisting marriage creates an incapacity to marry again can be applied without adaptation and so there was nothing to prevent a polygamous marriage being recognised for that purpose.[23] Recognition of polygamous marriages was granted also when other issues arose which did not require adaptation of matrimonial remedies: in *Mawji* v *R*[24] spousal exemptions from criminal liability were extended to a potentially polygamous marriage; in *Royal* v *Cudahy Packing Co*[25] an American court accepted a wrongful death claim by a surviving polygamous spouse; in *Re Sehota*[26] the word "wife" as it appeared in a succession statute was interpreted to include a spouse in a polygamous marriage; in *Nabi* v *Heaton*[27] a man was held entitled to income tax relief on the maintenance he paid to his second wife while his first marriage subsisted; and in *Onobrauche* v *Onobrauche*[28] a polygamous marriage was recognised to the extent that sexual intercourse with one of a man's wives could not found an action for divorce at the instance of another wife on the basis of adultery. In all these cases the true issue was not whether a "marriage" was to be recognised but whether the remedy sought should be granted in the circumstances that existed.

It took legislation to reverse the actual (and limited) result in *Hyde* v *Hyde*. The Matrimonial Proceedings (Polygamous Marriages) Act 1972[29] provides that the Scottish court is not precluded from entertaining proceedings for, or granting, a decree of divorce, nullity, separation, aliment, or declarator of marriage by reason only that either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person. This covers both actually and potentially polygamous marriages and entitles a spouse in either of these forms of relationship to claim, for example, not only divorce but also financial provision.[30] The practical effect is to allow the Scottish court to recognise for most purposes[31] a polygamous

22 *The Sinha Peerage Claim* (1939) 171 *Lords' Journal* 350; [1946] 1 All ER 348 (note) (in truth, the marriage here was actually monogamous and it was unclear whether, due to personal choice of religion, it was regarded as even potentially polygamous); *Bamgbose* v *Daniel* [1955] AC 107 (which did involve an actually polygamous union between a man and nine women).

23 *Baindail* v *Baindail* [1946] P 122.

24 [1957] AC 126.

25 190 NW 427 (1922).

26 [1978] 1 WLR 1506.

27 [1983] 1 WLR 626.

28 (1978) 8 Fam Law 107.

29 Section 2, as amended by the Private International Law (Miscellaneous Provisions) Act 1995.

30 *Chaudhry* v *Chaudhry* [1976] Fam 148.

31 We cannot yet say with certainty that an actually polygamous marriage would be recognised for all purposes. It is entirely unclear, e.g.,, how the court would react to an adoption petition presented by a man and one of his (several) wives. Is a man and one of his wives a "married couple" within the

marriage that is valid by the application of the normal conflict of laws rules. Or, to put it another way, marital consequences will attach to the parties in polygamous unions in much the same way as they attach to parties in monogamous unions.[32]

C. SAME-SEX MARRIAGES

The above principles are relatively well settled, yet they remain untidy and uncertain of application, as the literature and extensive case-law upon them illustrates. Yet they have to be the starting point of any discussion of the question posed by this article. Before turning to that discussion directly, it is as well to deal with one potential argument against recognition.

Public policy

It is often assumed that the most likely reaction of a court in the United Kingdom which is asked to recognise for legal purposes the existence of a same-sex marriage would be to refuse to do so on grounds of public policy.[33] Given the lack of any statutory definition of marriage in Scotland[34] it is certainly open to a Scottish court to declare that it would be contrary to public policy to recognise as marriage a state-sanctioned relationship between two persons of the same sex. But an argument on this basis is, it seems to me, unsustainable. It has long been accepted that for the domestic court to refuse to recognise a foreign marriage, validly contracted in a foreign country, there would require to be very strong grounds of policy such that the relationship can be characterised as utterly repugnant to the policy of the forum.[35] The fact that the marriage could not be contracted here or that the relationship would, indeed, amount to a criminal offence here is not nearly sufficient. Nor, patently, is it sufficient that the marriage has different rules for entry from those imposed by the forum. So public policy did not prevent recognition of a marriage that we would regard as incestuous, with the consequence of making lawful sexual intercourse which, but for the foreign marriage, would have been

terms of s 14 of the Adoption (Scotland) Act 1978? Or does the use of the word "couple" in that section imply and require monogamy?

32 See *A-M* v *A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6.

33 See, e.g., M Broberg, "The registered partnership for same sex couples in Denmark" (1996) 8 Ch and Fam LQ 149 at 154, who takes this as read.

34 Or, indeed, any common law definition—a lack which is probably explained by the absence of perceived need to define something so apparently obvious. The role of definition is filled in Scots law by the rules of validity.

35 See T Hartley, "The policy basis of the English conflict of laws of marriage" (1972) 35 MLR 571. There are, admittedly, some hints in Scottish cases that the public policy test is not so high in relation to recognition of foreign property rules (see H Patrick, "Romalpa: the international developments" 1986 SLT (News) 265 and 277), but even if that is the case there is justification in adopting a more limited role for public policy in denying recognition of foreign marriages.

unlawful.[36] Nor, perhaps more revealingly, did public policy prevent the recognition of a foreign, potentially polygamous, marriage between a twenty-six year old man and a thirteen year old (factually pre-pubescent) girl,[37] this for the purpose of avoiding the application of child protection measures, notwithstanding that, but for that recognition, the man would have faced long imprisonment.

These cases, and especially the latter, form (it must be admitted) a morally dubious base upon which to found an argument, but a far stronger reason to reject public policy objections to recognition is found in a comparison of the foreign rule or institution with the domestic law, for this helps to determine the extent to which the foreign rule or institution so offends the conscience of the court that it would be legitimate not to give effect to it. In Scotland, twenty years after the decriminalisation of (male) same-sex sexual activity,[38] the Scottish Parliament started to confer upon conjugal relationships entered into by same-sex couples legal consequences analogous to those of marriage for a variety of purposes.[39] In addition, the courts had begun, a few years earlier, to open to same-sex couples common law remedies which have long been available to opposite-sex couples[40] and to interpret statutory words and phrases like "family" and "living together as husband and wife" sufficiently broadly to include same-sex couples.[41] And in December 2002 the UK government announced plans to introduce a UK version of registered partnerships for same-sex couples.[42] It follows that for Scots law to recognise a foreign same-sex marriage would be no more than an acceptance and implementation of a rather larger range of legal consequences than that to which a same-sex couple would be subject domestically, but it is simply not true that these consequences are of a kind so novel as to be alien

36 *Cheni* v *Cheni* [1965] P 85, which involved a marriage in Egypt between an uncle and niece, valid by the Egyptian domicile of both parties.

37 *Mohamed* v *Knott* [1969] QB 1.

38 By the Criminal Justice (Scotland) Act 1980, s 80. See now the Criminal Law (Consolidation) (Scotland) Act 1995, s 13, as amended by the Sexual Offences (Amendment) Act 2000, s 1 (reducing the lawful age to sixteen years) and the Convention Rights (Compliance) (Scotland) Act 2001, s 10 (removing the prohibition on homosexual activity in the presence of more than two people).

39 See, e.g., the Adults with Incapacity (Scotland) Act 2000, s 87(2); the Housing (Scotland) Act 2001, Sch 3 para 2; the Mortgage Rights (Scotland) Act 2001, s 1(2)(c); the Agricultural Holdings (Scotland) Act 2003; and the Civil Legal Aid (Scotland) Amendment Regulations 2003, SSI 2003/49. See also the Criminal Injuries Compensation Scheme (April 2001), para 4.17.

40 See *Wayling* v *Jones* [1995] 2 FLR 1029 where proprietary estoppel was used to allow a survivor of a same-sex couple to claim a portion of the estate of his deceased partner, and *Tinsley* v *Milligan* [1993] 3 All ER 65 where a common intention constructive trust was found to exist between two lesbians, the one thereby receiving a share of the other's property at the breakdown of their relationship. These cases are, of course, English but it is implausible that the policies on the matter at issue in the two jurisdictions would be different.

41 *Fitzpatrick* v *Sterling Housing Association* [1999] 4 All ER 705; *Mendoza* v *Ghaidan* [2002] EWCA Civ 1533. See K Norrie, "We are family (sometimes): legal recognition of same-sex relationships after *Fitzpatrick*" 4 (2000) EdinLR 256, and "Extensive new rights for same-sex couples" (2003) 8 SLPQ 57.

42 Text at *http://www.pm.gov.uk/output/page985.asp*.

and repugnant to Scottish family law. It would be a mark of prejudice rather than principle were a court to hold contrary to public policy the recognition of a marriage where the relationship already had some legal consequences here in any case, and in which sexual activity was entirely legal, while at the same time it continued to hold, as in *Mohamed*, that public policy was not sufficiently pressing to deny recognition to a relationship which would have no legal consequence if entered into by UK domiciliaries and in which, if sexual activity took place, at least one of the parties would face a lengthy term of imprisonment.

A further argument against the application of public policy is that it would lead to illegitimate discrimination. A Scottish court could not recognise a foreign opposite-sex registered partnership while at the same time refusing to recognise a same-sex registered partnership from the same country, for this would be granting respect to one couple's family life, but not another's, on the basis of sexual orientation.[43] Similarly, to refuse to recognise the institution (called "marriage") governed by art 30 of the Dutch Civil Code when entered into by same-sex couples, while recognising the same institution governed by the same article when entered into by opposite-sex couples, must be equally discriminatory. So policy (avoiding illegitimate discrimination), if it has a role at all here, strongly suggests recognising rather than refusing to recognise same-sex marriages.[44]

In sum, founding upon public policy as a tactic to deny recognition to same-sex marriages which would otherwise be valid by the normal application of the rules of international private law simply does not work. The time has passed for the law or for society to regard same-sex relationships as repugnant or illegitimate or as a danger to children or as a danger to society, or as an attack on (heterosexual) marriage.[45] Opening marriage to same-sex couples is no more an attack on marriage than abolishing the status of illegitimacy was an attack on the so-called "legitimate" family.

43 A same-sex couple may be regarded in law as a "family" (*Fitzpatrick* v *Sterling Housing Association*, note 41 above; *Karner* v *Austria* (application 40016/98, admissibility decision 11 Sept 2001) so activating art 8 of the ECHR, which must be applied without discrimination (art 14) on the ground, *inter alia*, of sexual orientation (*Da Silva Mouta* v *Portugal* (2001) 31 EHRR 47).

44 Of course states may discriminate on the basis of sexual orientation if their reason for doing so can be regarded as "legitimate" as determined within its "margin of appreciation": *Frette* v *France* 26 Feb 2002, ECtHR. But the fact that the state *may* do so is neutral on the issue of whether it *will* do so: the existence of the margin of appreciation does not in itself justify discrimination. And the European Court of Human Rights has held more recently that "just like differences based on sex . . . differences based on sexual orientation require particularly serious reasons by way of justification": *L and V* v *Austria*, 9 Jan 2003, EctHR, para 45; and *SL* v *Austria*, 9 Jan 2003, EctHR, para 37.

45 Changing the terms of entry into the state-sanctioned relationship we call marriage is not in itself an attack on marriage as previously understood, otherwise Parliament has frequently attacked marriage, such as when it raised the age of marriage and every time it has loosened the forbidden degrees. Did the Supreme Court of the United States of America attack "marriage" as previously understood when it struck down various states' rules prohibiting inter-racial marriage in *Loving* v *Virginia* 388 US 1 (1967)? "Traditional" marriage is, in reality, an ever-changing, ever-evolving beast.

The former is, of course, an attack on the legal preference currently granted to heterosexuality, just as the latter was an attack on the discrimination faced by the so-called "illegitimate" child.[46]

D. POTENTIAL AREAS OF RECOGNITION OF SAME-SEX MARRIAGES

As we have already seen, there are a variety of diverse issues within which the question of recognition of any marriage can arise. The question can also be complicated by the factual scenario, such as the marriage being contracted in their home country by foreigners who subsequently move here; or by parties domiciled here who travel abroad in order to escape one of the domestic rules of marriage law; or by parties having different domiciles; or by countries subsequently changing their laws. Many issues, however, resolve into one of either capacity, statutory interpretation, or remedy, and it is therefore proposed to explore the issues within these three broad headings. As we will see, the Scottish court is likely to find itself unable to avoid giving effect to at least some of the consequences of parties having contracted a same-sex marriage in the Netherlands; yet the end result will be muddle and inconsistency of approach if some consequences but not others are given effect to. Since, as we will see, recognition of foreign same-sex marriages is unavoidable for some issues, the only practical—and possibly the only principled—approach is to grant recognition for all purposes.

(1) Marital incapacity

There is one consequence of marriage to which it is difficult to see how the Scottish court could ever avoid giving effect, even when the marriage is contracted in the Netherlands and the parties are the same sex as each other. Marriage sometimes confers extra legal capacity on the parties thereto,[47] and sometimes imposes incapacities,[48] but it always, in monogamous marriage systems, imposes one important incapacity—the incapacity to marry again during the subsistence of the first marriage.[49] Will this consequence of a Dutch same-sex marriage be given effect to in Scotland? The matter might easily arise. If Mr A and Mr B, Dutch nationals who

46 Murphy, note 2 above, draws an interesting analogy here: he reminds us that opening the franchise to women was not an attack on the franchise itself, but on the legal preference previously granted to men.

47 It was, e.g., a rule of the common law of Scotland that a male minor who married was forisfamiliated from the curatory of his parents and he acquired thereby full contractual capacity: P Fraser, *Parent and Child*, 2nd edn (1866) at 74; A B Wilkinson and K McK Norrie, *Parent and Child*, 1st edn (1993) at 44–45. See now the Family Law (Scotland) Act 1985, s 24(1)(b).

48 See the previous Scottish rules concerning the contractual capacity of married women: Erskine, *Institute*, 1.6.22; F P Walton, *Husband and Wife*, 3rd edn (1951) at 197.

49 *Baindail* v *Baindail* [1946] P 122.

validly married each other in the Netherlands while they were domiciled there, subsequently separate, and Mr A later visits Scotland and attempts to marry here a woman, will his attempt to do so be frustrated by the continued existence of his Dutch marriage?

There are at least three arguments that necessitate an affirmative answer. First, every policy applicable to marriage law—giving effect to the reasonable expectations of the parties, preventing limping marriages, certainty, international comity—points towards holding Mr A not free to marry a woman in Scotland. Secondly, the application of the normal conflicts rule demands the same conclusion. Marital capacity, being a matter of essential rather than formal validity, is determined by the law of the domicile, and if the *lex domicilii* says Mr A is not free to marry then, absent any reason of public policy requiring the Scottish court to ignore that incapacity, the fact that he is incapable of marrying by the law of the Netherlands means that he is so incapable the world over.[50] It does not really matter whether or not his state-sanctioned relationship is regarded by Scots law as a "marriage" or not—the point is that by the law of his domicile he is incapable of marrying a woman in Scotland and so this consequence of his earlier relationship must be given effect to. Thirdly, Scottish statute requires that Mr A should not be permitted to marry in Scotland during the subsistence of his existing state-sanctioned relationship. Section 5 of the Marriage (Scotland) Act 1977 requires the district registrar to prevent the celebration in Scotland of marriages concerning which there is a legal impediment, and s 5(4) lists those impediments. Section 5(4)(b) provides that there is a legal impediment to a proposed marriage in Scotland if one or both of the parties "is already married". The word "married" here must include at least some foreign state-sanctioned relationships which would not be sanctioned by the state here (otherwise a man who had previously contracted a foreign valid polygamous marriage would not be prevented from marrying another wife in Scotland), and the only way that this provision could be held inapplicable to Mr A would be to hold that he was not "married" in the sense intended by the statute. This is the definitional point that "marriage" is limited to opposite-sex unions. Whether the definitional argument has validity or not in principle will be explored more fully shortly, but in this context it is ineffective as a weapon against Mr A's marital incapacity. For if "marriage" in s 5(4)(b) is limited to heterosexual marriage then s 5(4)(f) is activated and just as effectively prevents Mr A marrying in Scotland. This provision creates an impediment to marriage in this country if the law of a party's domicile imposes an incapacity on a ground *other than* those mentioned elsewhere in s 5(4). The ground in Dutch law is "same-sex marriage" which, *ex hypothesi,* is different from [opposite-sex] "marriage"

50 *De Thoren* v *Wall* (1876) 3R (HL) 28; *Prawdzic-Lazarska* v *Prawdzic-Lazarski* 1954 SC 98; *R* v *Brentwood Superintendent Registrar of Marriages* (1968) 2 QB 956.

as mentioned in s 5(4)(b), and therefore it falls within s 5(4)(f). In other words, if the definitional argument is good Mr A is prevented by his state-sanctioned relationship from marrying in Scotland under s 5(4)(f), and if the definitional argument is not good he is prevented by his state-sanctioned relationship from marrying in Scotland under s 5(4)(b). In either case, this important effect of his state-sanctioned relationship (and let us not quibble about what it is called) is felt in Scotland.[51] There is no avoiding this conclusion.

Section 5(4)(f) is, however, of only limited effect, namely to prevent the marriage in Scotland of someone domiciled in the Netherlands and already validly married there. That provision does not cover the situation of someone domiciled in Scotland who had previously validly married in the Netherlands a person of the same sex. This may arise either when a person with a Dutch domicile of origin changes his or her domicile to Scotland after having previously married in the Netherlands or when a Scottish domiciliary marries a Dutch person on a visit to (or while habitually resident in) the Netherlands.[52] If, having married Mr B in the Netherlands while domiciled there, our Dutch Mr A moves to Scotland and acquires a domicile here, s 5(4)(f) can no longer prevent his marrying a woman here. Yet to hold him free to marry a woman is scarcely possible, for he would then have a different spouse depending upon which country he happened to be in, since we could not expect the Netherlands to recognise for any purpose (except, perhaps, a charge of bigamy) his Scottish marriage. But the only statutory basis for holding him incapable of marrying again once he acquires a domicile in Scotland is s 5(4)(b), that is to say, that he is "already married". In this scenario, the Scottish court must face head on the question of whether or not Mr A is "married" (within the terms of the statute) for the purposes of preventing a subsequent marriage.

Those who would oppose recognition of the Dutch same-sex marriage might argue, first, that the validity of Mr A's same-sex marriage, or at the very least the incapacity created thereby, depends upon his retaining his Dutch domicile and that his change of domicile alone brought that marriage, and its consequential incapacity, to an end. But this argument is not good. Not only would it be creating a new rule of international private law without precedent[53] but it would also be creating a limping

51 Apart from anything else, the Dutch Mr A would be unable to provide the district registrar with a certificate from a competent Dutch authority to the effect that he is free to marry, this certificate being required by the Marriage (Scotland) Act 1977, s 3(1)(c) and (5).

52 Dutch marriage law requires only one of the parties to be Dutch and would hold valid a marriage between a person domiciled or habitually resident in, or national of, the Netherlands at the time of the marriage and a person domiciled in Scotland.

53 In *Ali* v *Ali* [1966] 1 All ER 664 a potentially polygamous marriage became monogamous when the parties changed their domicile to England, but there is a difference between a marriage changing its incidents and becoming invalid by a change of domicile. Every marriage changes its incidents when the parties move to a country where marriage has different effects (e.g. taxation); the point of international private law is to prevent marriages becoming invalid simply by crossing jurisdictional

marriage of a particularly problematic kind. A so-called "limping" marriage occurs when a marriage is recognised in one country but not another, or is recognised for one purpose but not another. Both forms are in fact unavoidable while different countries have different marriage laws and different conflicts laws applicable to marriage. But it would be a new and altogether bizarre form of limping marriage if a single country held for a single purpose the Dutch domiciled Mr B married to Mr A (as Scots law has to do, as explained above) while *at the same time and for the same purpose* holding the now-Scottish domiciled Mr A not married to Mr B. Marriage, being a relational state, does not exist in the abstract. No-one is simply "married"; every married person is married to someone else who must, therefore, also be married (at least for the same purpose as the first person is).

A second argument against the applicability of s 5(4)(b) would be that Mr A's Dutch same-sex marriage is simply not a "marriage" in any sense intended by the legislation.[54] The argument is that it is simply a misuse of language to include same-sex relationships, even when state-sanctioned, within the word "marriage". Marriage, by definition, is (it might be claimed) a relationship between persons of the opposite sex[55] and it can as readily be applied to a relationship between two men or two women

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borders. In *Re Sehota* [1978] 1 WLR 1506 an actually polygamous marriage validly contracted when all parties were domiciled in India did not lose its validity when all the parties acquired a domicile of choice in England.

54 Many countries have held that their own legal systems do not recognise same-sex marriage: see, e.g., *Singer* v *Hara* 522 P 2d 1187 (1974, Court of Appeals, Washington); *Layland* v *Ontario* (1993) 104 DLR (4th) 214 (Canada); *Quilter* v *Attorney-General* [1998] 1 NZLR 523 (New Zealand). But all these cases decided no more than that the respective domestic laws did not permit couples of the same sex to marry. That is a very different question from whether, if they did under another legal system, they would be regarded as "married". The right to marry protected by art 12 of the ECHR has been held by the European Court of Human Rights to refer to "traditional" (i.e. opposite-sex) marriage: *Rees* v *UK* (1986) 9 EHRR 56 at para 49; *Cossey* v *UK* (1991) 13 EHRR 622 at para 43; *Sheffield & Horsham* v *UK* (1999) 27 EHRR 163 at para 66. But again this does not address the definitional point and it is interesting to note that in both *Cossey* and *Sheffield & Horsham* the European Court saw the UK rule limiting marriage to parties of the opposite sex as an impediment to marriage (validly) laid down by the national law, and *not* as a part of the definition of the concept covered by art 12. There is (perhaps) some significance in the fact that while art 12 of the ECHR expressly refers to "men and women" having the right to marry, the equivalent article (art 9) of the Charter of Fundamental Rights of the European Union simply states that "the right to marry and the right to found a family shall be guaranteed . . .". The European Court of Human Rights assumed this change in terminology was deliberate (*Goodwin* v *UK* (2002) 35 EHRR 18 at para 100). There is little doubt that if, e.g., a Dutch public authority refused to treat same-sex marriages the same way as it treated opposite-sex marriages, that would be a breach of both Dutch law *and* an infringement of the ECHR.

55 The argument seems to be that marriage is definitionally a relationship within which the natural procreation of children might take place. But this argument suffers a flaw as obvious as it is fatal: procreation is legally irrelevant to marriage (as the House of Lords held in *Baxter* v *Baxter* [1948] AC 274 especially at 286), and marriages with infertile men or post-menopausal women are valid and unchallengeable, as are, in Scotland, marriages in which the parties have no intention of having children or no intention, indeed, of having sex. In Scots law, *consensus non concubitas facit*

as the term "heterosexual". According to this argument the relationship between two men or between two women may well have been institutionalised in some legal systems, and some of these systems may use the very word "marriage", but these facts alone do not make such relationships "marriage" in any sense understood by our law. However, a moment's reflection reveals the definitional argument to be circular: it says no more than that marriage is by definition heterosexual because that is how we define it.[56] It assumes that there is an extra-legal, naturalistic, meaning to the word which it is not open to a legislature or legal system to change. But this is not true. In fact, marriage is an artificial construct of the law and so open to redefinition by the law.[57] Marriage is an ever-evolving concept, because the law develops it. It used to be a legal institution designed to ensure that the male had control over the female, and their children, and became legal owner or administrator of all their combined property; the law (and society) now sees it as an institution based on equal partnership, companionship and choice. It used to be defined as a god-made institution which man could not terminate—until the law changed that definition and permitted divorce. The artificiality of the institution (the institution as artifice) is even more obvious in the international context where a huge variety of diverse relationships go under the name "marriage" as defined by their own societies. International private law has long been content to recognise foreign marriages even when defined differently from in domestic law.[58] So, the mere fact that Scots domestic law sees marriage as an opposite-sex relationship (or, more accurately, limits its availability to opposite-sex couples) does not in itself mean that a same-sex relationship cannot come within the term. It does. The Dutch Parliament said so.

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matrimonium: *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 10 (1990), para 827. In the transsexual case of *Goodwin* v *UK* (2002) 35 EHRR 18 the European Court of Human Rights made this abundantly clear: "Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision" (at para 98). And in the gay marriage case of *Halpern* v *Canada* (2002) 215 DLR (4th) 223, the Ontario Superior Court of Justice rejected the argument that same-sex couples could not marry because, by definition, marriage was a potentially procreative relationship: per Blair RSJ at paras 61–71 and 78, and per La Forme J at para 242. See, further, Chisholm J in *Re Kevin* [2001] Fam CA 1974 at paras 286–287, where the point is (again) made in relation to a transsexual marriage.

56 This was pointed out eloquently by A Woolley in "Excluded by definition: same-sex couples and the right to marry" (1995) 45 U Tor LJ 471.

57 In *Halpern* v *Canada* (2002) 215 DLR (4th) 223 the Ontario Superior Court rejected the argument that since the Constitution of Canada referred to "marriage" no change in the meaning of that word was possible short of constitutional amendment: per LaForme J at paras 102–106 and especially paras 122–123.

58 In *R* v *Lolley* (1812) Russ & Ry 237, 168 Eng Rep 779, a marriage made in England was held to be, by definition, indissoluble and so a man who had married a second wife after his first had divorced him in Scotland was held to be guilty of bigamy. This is the sort of consequence which follows a refusal to accept that other legal systems define marriage differently.

Since the definitional argument is not good, it follows that if Mr A was married when he lived in the Netherlands (at least to the extent of acquiring thereby an incapacity to marry again) he remains married when he moves to Scotland (at least to the extent of retaining his incapacity to marry again). Section 5(4)(b) is applicable and his existing state-sanctioned relationship prevents his marrying in Scotland. There is no avoiding this conclusion either.

The same result may well follow if one of the parties (Ms X) always was domiciled in Scotland and travelled to the Netherlands to marry a Dutch domiciliary (Ms Y) there. The question in this scenario really is whether someone domiciled in Scotland has capacity to contract a foreign same-sex marriage abroad, which would prevent her subsequently marrying someone of the opposite sex in Scotland.[59] An argument can be made that, on a close reading of the Marriage (Scotland) Act 1977, she does indeed have capacity to contract a foreign same-sex marriage (with the result that if she does so she cannot subsequently marry here). Section 5(4) lists the impediments to marriage, and if any of these exists, the Registrar General is obliged to direct the district registrar to take all reasonable steps to ensure that the marriage does not take place. Two of these impediments concern age and the forbidden degrees, and for both of these, Scottish domiciliaries are expressly barred from escaping the incapacity imposed thereby through the expedient of a trip abroad.[60] There is, in other words, expressly no jurisdictional limit to these rules and they have long been accepted[61] as imposing incapacities which Scottish domiciliaries carry with them the world over.[62] But there is no such extension in the 1977 Act to the limits of the other impediments to marriage listed in s 5(4). Had the statute intended to extend all the impediments listed in s 5(4) to Scottish domiciliaries attempting to marry abroad it could have done so. Instead, the 1977 Act chose to extend only two of the impediments beyond the jurisdictional boundaries of Scotland. Is this because the impediments other than age and forbidden degrees are intended to apply only to marriages solemnised in Scotland? While it might be argued that in 1977 there was no need to specify a rule that Scottish domiciliaries could not contract same-sex marriages abroad, since no country in the world then permitted such marriages, that argument does not work for the other impediments.[63] Just as s 5(4)(b) (an impediment exists if either party is

59 The question would not arise in Belgium since the legislation there requires that the national law of both parties should permit same-sex marriage.

60 See Marriage (Scotland) Act 1977, ss 1(1) and 2(1).

61 See Clive, *Husband and Wife*, at 74 and 127; A E Anton and P R Beaumont, *Private International Law*, 2nd edn (1990) at 438.

62 An English example concerning forbidden degrees is *Re Paine* [1940] 1 Ch 46.

63 Section 5(4)(d), e.g., creates an impediment when one of the parties is incapable of consenting to the marriage. It might be thought unnecessary to specify that this rule applies worldwide, on the basis that it is bound to be a rule in every legal system, but that is not true. Some countries allow proxy consent to be given on behalf of those who cannot consent themselves; others permit parental consent to replace the party's consent. Even English law is substantially different from Scots law in

already married) prevents a polygamous marriage in Scotland but does not prevent a Scottish domiciliary contracting a valid polygamous marriage abroad,[64] so too does s 5(4)(e) prevent a same-sex marriage in Scotland but does not in itself prevent a Scottish domiciliary contracting a valid same-sex marriage aboard. Just as there is no common law definition of "marriage" in Scots domestic law beyond the rules contained in the Marriage (Scotland) Act 1977,[65] so too, it is submitted, are there no common law rules relating to capacity to marry other than those contained in the 1977 Act. If this is so, then the Scottish Ms X in our example, having previously married Ms Y, a Dutchwoman, cannot now marry a man in Scotland, even although she is and always has been domiciled here and the (opposite-sex) marriage is planned to take place here. She is already married, at least for the purpose of s 5(4)(b), barring her from marrying again in Scotland. This conclusion is not unavoidable (as, I have suggested, the conclusions in the previous paragraphs of this section are unavoidable), but it can only be avoided by either the judicial creation of a new, non-statutory, marital incapacity for Scottish domiciliaries or the importation of a modified version of the (English, and disliked) rule in *Sottomayor* v *De Barros*.[66] Both are within the power of the Scottish court, but neither, I suggest, serves any legitimate social purpose. We have, surely, moved beyond the desire to protect lesbians from lesbianism.

(2) Statutory interpretation

It may well be that the issue just considered is really a question of statutory interpretation. It is clearly so with a number of other marital consequences (which is

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this respect, for there lack of consent does not act as an impediment to the marriage, but merely makes the marriage voidable: Matrimonial Causes Act 1973, s 12(c). So a Scottish domiciliary, incapable of consenting here, would seem to be able to contract a valid (if voidable) marriage in England. A marriage entered into (validly) abroad without a party's consent would not be recognised here due to the (this time legitimate) application of public policy.

64 This is certainly true at least so far as potentially but not actually polygamous marriages are concerned: Private International Law (Miscellaneous Provisions) Act 1995, s 7(1). The matter is far less clear for actually polygamous marriages. Lord Mackay in *Lendrum* v *Chakravarti* 1929 SLT 96 at 99 denied capacity but did not distinguish between actually and potentially polygamous marriages and in any case was speaking at a time when few, if any, incidents of polygamous unions were recognised. In 1985 the Law Commissions (Report on Private International Law, Law Com No 146, Scot Law Com No 96, 1985, at para 2.12) stated that "the only safe conclusion as to the present law of Scotland on this point is . . . that it is completely undeveloped", but while they made the recommendation relating to potentially polygamous marriages which eventually found its way into the 1995 Act, they recommended no change to the ("completely undeveloped") law on actually polygamous marriages (para 4.9). The Scottish Law Commission did make clear in its Report on Family Law (Scot Law Com No 135, 1992) (at para 8.33) that it wanted the law to state that no person domiciled in Scotland could marry a person already married. But the point is that there is presently no such statutory statement, and if one is made it will not affect the position of Scottish domiciliaries attempting to marry a person of the same sex.

65 See note 34 above.

66 See note 8 above.

unsurprising since most are, in fact, statutory). Only a few of the most important can be examined in the space available here.

(a) Intestate succession[67]

As with marital incapacity, at least parts of the law of succession will require the Scottish courts to recognise some of the consequences of a valid same-sex marriage, both by the application of the normal conflict of laws rules relating to succession and on the basis of statutory interpretation. The Scottish choice of law rule in succession is clear: succession to moveables is governed by the law of the deceased's last domicile, while succession to heritage is governed by the *lex situs*.[68] In the case of a Dutch same-sex couple, domiciled in the Netherlands and validly married to each other there, a Scottish court asked to deal with succession to moveables on the death of one of them would apply Dutch law, as the law of the deceased's last domicile. If that law identified the same-sex partner as the successor to the deceased's property (whether through marriage or registration of partnership) then the Scottish court would have to give effect to this, even when the (moveable) property was situated in Scotland. The Scottish court would also accept the succession by the surviving same-sex spouse to heritage in the Netherlands, similarly governed by Dutch law: it has no interest in denying this consequence of a same-sex marriage, nor any interest in what Dutch law called the relationship which creates the right of succession.

Succession to heritage in Scotland has the same result, though by a rather different route. It would be to Scots law as the *lex situs* that the conflicts rule directs us, wherever the deceased were domiciled at the time of his or her death. A surviving spouse in Scots law has a statutory right to inherit from an intestate before anyone else the dwelling house situated in Scotland up to a specified value, no matter where the parties are domiciled. This right arises "where a person dies intestate leaving a spouse"[69] and so the question is one of statutory interpretation: does the survivor in a same-sex marriage validly contracted in the Netherlands qualify as a "spouse" within the meaning of the Succession (Scotland) Act 1964? One might answer "no", on the basis that there is no "spouse" as Scots law understands that term (the definitional argument again), but in fact there is a prior question that must be answered: which legal system does the defining? Scots domestic law does not regard a same-sex partner

67 Testate succession is governed primarily by the intention of the deceased and interpretation of wills, rather than by choice of law rules. If one man refers in his will to another man as "my husband" or "my spouse", his intention will be given effect to irrespective of how any particular legal system happens to define these words. See *Spencer's Trustees* v *Ruggles* 1982 SLT 165 where the Inner House held that the phrase "lawful children" as it appeared in a trust deed was to be interpreted in accordance with the truster's intent (which was to exclude adopted children notwithstanding that the law regarded adopted children as "lawful" or legitimate).

68 Anton and Beaumont, *Private International Law* at 667.

69 Succession (Scotland) Act 1964, s 8(1).

as a "spouse" of the deceased,[70] but it is not Scots law, even in a question of succession to Scottish heritage, governed by a Scottish statute, that defines the word "spouse" for this purpose. The role of Scots law as the *lex situs* is to give the rule—spouses succeed—but not to define who "spouses" are. Whether a person is a spouse or not is a question of status and so is referred to the *lex domicilii.* Scots law does not demand that a person be a "spouse" according to Scottish domestic notions for this purpose, and again polygamous marriages provide both the analogy and the precedent. Such a marriage would be invalid if contracted in Scotland but if contracted abroad is nevertheless capable of bringing a person within the meaning of the word "spouse", so long as the law of the domicile so defines that person's status.[71]

This is also the case when the question is one of legitimacy, explicitly because that is a matter of status. In *Bamgbose* v *Daniel*,[72] where children were legitimate by the law of their own domicile but not by English law, they were held by the Privy Council to be entitled to succeed to property under an English statutory provision limiting succession to legitimate children. English law (the statute) applied, but the status mentioned therein was defined by the *lex domicilii* of the persons whose status was at issue, even although the word to be defined had appeared in an English statute.[73] Similarly, in *Yew* v *British Columbia*[74] the British Columbia Supreme Court held that both wives of a deceased could benefit from a marital exemption from inheritance tax contained in a Canadian statute conferring this right on "spouses", on the basis that this did not involve a requirement to recognise a relationship repugnant to its policy "but merely to recognise a status created by the foreign law".[75] And in *Re Sehota*[76] the word "wife" in an English succession statute was held to include one of the wives in an actually polygamous marriage, even although by the time of her (their) husband's death all three parties had acquired a domicile of choice in England. It was not English domestic law that defined "wife" there, and nor would it be English or Scottish domestic law that defined "spouse" in the context of a claim by the survivor of a same-sex marriage. And there is no doubt that "spouse" in the Netherlands includes such a survivor who can, therefore, claim under s 8 of the 1964 Act. There is (again) no avoiding this conclusion.

The same result (once more, unavoidably) follows in relation to succession to the free estate (heritable and moveable). Section 2(1)(e) of the 1964 Act provides that

70 If for no other reason than that there is no means (yet) whereby such a couple can receive the state's sanction in this country.

71 *Baindail* v *Baindail* [1946] P 122, per Lord Greene MR at 127; *Chaudhry* v *Chaudhry* [1976] Fam 148, per Dunn J at 152F.

72 [1955] AC 107.

73 See also *In Re Goodman's Trs* (1881) 17 Ch D 266; and *In Re Bischoffsheim* [1948] Ch 79.

74 (1924) 1 DLR 1167 (henceforth *Yew*).

75 *Yew*, at 1170.

76 [1978] 1 WLR 1506.

"where an intestate is survived by a husband or a wife, but is not survived by any prior relative,[77] the surviving spouse shall have right to the whole of the intestate estate". The word "spouse" might well be apt to describe either party to a same-sex marriage, but it has to be admitted that the words "husband" and "wife" are rather less so.[78] While some might argue that these words are, by definition, relational (i.e. that a "husband" is a male partner of a female and a "wife" is a female partner of a male)[79] it is probably better to interpret the word "husband" to mean a male partner in a valid marriage and "wife" as a female partner in a valid marriage, without any implication as to the gender of the other party to the marriage. If this is so, then again the question is: which legal system defines these words for the purposes of s 2? And again while there is an expectation that words in a Scottish statute will be interpreted according to Scots law, this is not an invariable rule, as the polygamy example once again illustrates. If the deceased and the survivor are both domiciled in the Netherlands and the law of the Netherlands would regard the survivor as a spouse then it remains an application of Scots law to confer the right of succession contained in s 2(1)(e) on the person who, according to the *lex domicilii* of the deceased, was the spouse, whatever the gender of their surviving partner.

(b) Adoption

If a same-sex married couple adopted a child in the Netherlands, as is permitted there, upon what basis could the law of Scotland refuse to recognise the existence of a parent–child relationship? The issue might arise, for example, if the family moved to Scotland and the child then sought legitim out of the estates of both adopters. It is difficult to see how (or why) Scots law could resist the claim.[80] Much more contentious would be a claim by a same-sex married couple to access the adoption legislation in this country, and their ability to do so turns on the proper interpretation of the Adoption (Scotland) Act 1978. Section 14(1A) allows "a married couple" to adopt, but also requires that "both the husband and the wife" have attained the age of twenty-one years. Clearly, then, a "married couple" for this purpose is limited, by necessary implication, to an opposite-sex couple. The rule contained in s 14(1A) could not be applied to a same-sex couple without alteration and so, following *Hyde* v *Hyde*, the statutory benefit (there of divorce, here of adoption) cannot be applied

77 I.e. issue, parents or siblings: s 2(1)(a)–(d) of the 1964 Act.

78 They are words which, many gay and lesbian people (including the present writer) believe, have heterosexist connotations and are, for that reason, avoided when describing partners.

79 J Millbank explores some of the conceptual difficulties in "Which, then, would be the 'husband' and which the 'wife'?: some thoughts on contesting the 'family' in court" (1996) 3(3) *Murdoch University Electronic Journal of Law* (at *http://www.murdoch.edu.au/elaw/issues/v3n3/millbank.html*).

80 Indeed exactly this issue could arise nearer home since English law now permits (though Scots law does not) joint adoption by a same-sex couple: see the Adoption and Children Act 2002, ss 50 and 144(4).

to same-sex couples. On the other hand, s 15 of the 1978 Act allows a person to adopt singly so long as he or she "is not married". In its own terms s 15 does not imply that the marriage must be opposite-sex, but it would be patently ludicrous to hold that someone is not married for the purposes of s 14 yet at the same time is married for the purposes of s 15, in both cases to prevent access to adoption. "Marriage", it is submitted, must have a single meaning in the 1978 Act, and since it must mean "opposite-sex marriage" in s 14, it must mean that in s 15 also. The important point of principle is that, as before, whether a same-sex couple can access one of the consequences of marriage depends not on whether the marriage is recognised in the abstract but upon the terms of the statute laying out the consequences. This statute (doubtless to the relief of many) cannot (yet) be accessed by same-sex couples.

(c) Other statutory rights

In order properly to identify whether any particular statute does or does not include a same-sex marriage validly contracted abroad the very policy behind the statute may need to be looked at. For example, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 is admirably gender neutral in its terms. Would the "family protection" policy that drives that Act persuade the court to interpret phrases such as ". . . one spouse . . . and the other spouse . . ." as they appear in s 1 (granting occupancy rights in the "matrimonial home" to the non-entitled spouse) to include spouses of the same sex? Perhaps the answer is rather more obviously "yes" when considering the domestic violence provisions in s 4. If a Dutch same-sex married couple settled in Scotland and one of them (or any child of the family) was threatened with violence from the other and attempted to obtain an exclusion order under s 4, the policy behind the Act demands that "spouse" be interpreted in a way that provides protection whenever it is needed.[81] And if "spouse" includes a same-sex spouse in s 4, it must surely also do so in s 1.

The same process of statutory interpretation may be followed with the other statutory consequences of marriage[82]—the point being made here is that accessing these statutes depends not on "recognising marriage" in the abstract but on determining whether a particular couple are within the precise terms of the statute at issue. Same-sex couples validly married in the Netherlands will be so for many statutes.

81 Of course the Protection from Abuse (Scotland) Act 2001 allows a power of arrest to be attached to an interdict which anyone threatened with violence can obtain, but that Act did not repeal s 4, so the issue remains of who has the choice of seeking an interdict or seeking an exclusion order under s 4.

82 Such as, e.g., a claim for aliment under s 1 of the Family Law (Scotland) Act 1985; the rules relating to household goods and savings from housekeepings in ss 25 and 26 of the 1985 Act; evidentiary privilege under s 264 of the Criminal Procedure (Scotland) Act 1995; the inheritance tax exemption for transfers between spouses in s 18 of the Inheritance Tax Act 1984; or the rules on gratuitous alienations in s 34 of the Bankruptcy (Scotland) Act 1985.

(3) Matrimonial relief

In *Hyde* v *Hyde*[83] the English court, as we have seen, refused to grant a decree of divorce to a party to a potentially polygamous marriage because the forms of English divorce proceedings were considered to be wholly inappropriate to deal with the situation of a party with more than one wife. But that inappropriateness did not extend to other issues such as succession rights and marital incapacity created by a polygamous marriage, the rules concerning which would require no modification to be applied to such unions. Nor does that inappropriateness extend to Dutch same-sex marriages which, like Dutch and UK opposite-sex marriages, are monogamous. So marital relief, primarily in the form of access to the Scottish divorce court, ought to be available to a same-sex couple married in the Netherlands. There is no rule of Scottish divorce law that cannot be applied without adaptation or inappropriateness of result to same-sex couples. Even adultery does not need to be adapted. That remains a heterosexual act of a very particular nature[84] and a same-sex spouse could sue for divorce for adultery only if his or her partner performed that heterosexual act—just as an opposite-sex spouse cannot presently sue for divorce for adultery if his or her partner has performed an act of homosexual sex.[85] Indeed, within the whole of Scottish marriage law there is only one rule that simply cannot be applied to same-sex couples without substantially modifying its content,[86] and that is the (common law) rule that a marriage is voidable on the ground of incurable impotency, for impotency is defined (as adultery is) in distastefully heterosexual terms. However, I am perfectly content to deny the remedy of annulment for impotency to same-sex couples on the ground of its inappropriateness to their circumstances, for I see no injustice in doing so—rather the injustice

83 Note 14 above.

84 *MacLennan* v *MacLennan* 1958 SC 105.

85 Adultery lost any rational basis in the law once the act (penile penetration of the vagina) became the issue rather than the consequence (adulteration of the male bloodline). The ludicrous consequence described in the text is no more so than the fact that a husband who has anal or oral intercourse with a woman not his wife cannot be sued for adultery. The remedy is not to extend adultery to gay sex but to abolish penile penetration of the vagina as a particular concern of the law. Another rule some might find inappropriate is the *pater est* presumption of paternity contained in s 5(1)(a) of the Law Reform (Parent and Child) (Scotland) Act 1986. But in fact this rule is not so much inappropriate as inapplicable to same-sex marriages since it is worded in terms of a "man" being presumed father when married to a "woman". So the rule is explicitly limited to opposite-sex unions and the question of its application to same-sex unions does not arise. The paternity rule in s 28(3) of the Human Fertilisation and Embryology Act 1990 is similarly limited to opposite-sex couples: see *X, Y and* Z v *UK* (1997) 24 EHRR 143. An intriguing little question arises from the wording of s 28(2) of the 1990 Act for that talks not about a "man" being deemed father but "the other party to the marriage". This gender-neutral phrase might open the door for the female marriage partner of a woman who undergoes artificial insemination to claim to be "father". Of course she is not, in fact and in science, but then neither is any male marriage partner who becomes "father" through the application of the artificial rule in s 28.

86 And this is one more than was found in the Dutch legal system: see note 1 above.

lies in maintaining sexual potency as one of the defining characteristics of opposite-sex unions.

So, if the inappropriateness argument does not work in this context, a court wishing to deny a same-sex couple who were validly married in the Netherlands access to divorce and—importantly—financial provision on divorce will have to fall back on the definitional argument, that is to say that the state-solemnised relationship between two persons of the same sex, characterised as "marriage" by the solemnising state, is quite simply not "marriage" for the purpose of allowing the Scottish court to bring it to an end.[87] Not only is the definitional argument, as before, bad in principle, but in addition in this context the Scottish courts are likely to be debarred from deploying it. As we have seen Scots law has no option but to recognise that the relationship has, at the very least, a variety of marriage-like consequences including, crucially, the imposition of an incapacity to contract a further marriage, even in Scotland. If the Scottish court recognised (as it has to[88]) that a party domiciled in the Netherlands is incapable, because of his or her extant marriage, of marrying here, while at the same time refusing that party access to the Scottish divorce court, then the overall effect is the imposition of a marital incapacity from which a person cannot escape (at least not in Scotland). It is true that a Scottish court expressed itself content to live with that result in relation to polygamous marriages before the power to bring that form of marriage to an end was statutorily granted,[89] but today such a position is almost certainly contrary to art 12 of the European Convention on Human Rights,[90] at least if taken in conjunction with art 14. For while incapacity to (re)marry because of the unavailability of divorce is not in itself an infringement of the right to marry,[91] such unavailability would be an infringement of the non-discrimination provisions in

87 The definitional argument might have more validity with registered partnerships. These are, quite deliberately, not marriage and it is a plausible argument to say that this institution, which does not exist in Scotland, cannot be brought to an end by a Scottish divorce court. It is interesting to note that in Vermont, the Civil Union Act of 2000 (Vermont Statutes Annotated, Title 15, ss 1201) assumes that only the Vermont courts can dissolve this marriage-like institution and it requires a six-month residency in the state of Vermont before the courts there have jurisdiction. In *Rosengarten* v *Downes* (2002) 806 A 2d 170 the Appellate Division of the Superior Court of Connecticut affirmed a trial judge's finding that the Connecticut court had no jurisdiction to dissolve a civil union entered into in Vermont. Cf *D and Sweden* v *Council* Case C–122/99 P, 31 May 2001, 2001/C200/37, where it was held that a member of a Swedish registered partnership could not access EC "spousal" benefits.

88 See the discussion of s 5(4)(b) and (f) of the Marriage (Scotland) Act 1977 above.

89 In *Muhammad* v *Suna* 1956 SC 366 Lord Walker said (at 370), "It is perhaps not altogether satisfactory that a man who enters into a polygamous union while domiciled abroad should, on acquiring a domicile in this country, be unable to sue in the Court of his domicile for divorce (*Hyde's* case) and yet be regarded by the Court of his domicile as not free to marry (*Baindail's* case)", but he felt obliged on the state of the authorities to accept that position.

90 Though that provision may itself be limited to "traditional" marriages (see note 52 above), the point being made in the text is that a same-sex marriage prevents the parties thereto from entering into a traditional (i.e. opposite-sex) marriage while the earlier marriage subsists.

91 *Johnston* v *Ireland* (1986) 9 EHRR 203.

art 14 if it were imposed only on foreign domiciliaries or were based on sexual orientation. The fact that there may be an option for a Dutch domiciliary seeking to escape a same-sex marriage (being to go to the Dutch court for divorce there) does not answer the point if that would put him or her to expense over and above that required of other persons habitually resident in Scotland. And in any case the Dutch courts may have lost jurisdiction, e.g. if the spouses had moved to Scotland.[92]

There is, curiously, another route open to the party to a same-sex marriage seeking to escape its hold and seeking, also, financial provision on its termination. That is to seek a declarator of nullity, on the ground that, being between parties of the same sex, the marriage was incompetent in the first place. Of course, it could be argued that a declarator of nullity is not available since the marriage was, *ex hypothesi*, valid in the Netherlands,[93] but those seeking to deny same-sex couples access to a court to terminate their relationship cannot have it both ways. The Dutch marriage is either valid or invalid and it is unsustainable nonsense to argue that the marriage is valid for the purposes of preventing a declarator of nullity but at the same time invalid for the purposes of preventing a decree of divorce. It should be noted here that a decree of nullity was granted in *Corbett* v *Corbett*[94] after the respondent, April Ashley (a male to female transsexual) was found to be, in law, a man. The "marriage" in that case was, therefore, between two men but Ormrod J held nevertheless that he had no jurisdiction to refuse to grant the decree.[95] And notice this: if an action for nullity

92 And what if there *is* a Dutch divorce? That would need to be recognised in Scotland under the terms of s 46 of the Family Law Act 1986 if, as in our example, either party to the marriage remained habitually resident in, domiciled in, or a national of the country in which the divorce was obtained, and Scots law would not only have to enforce its terms but also to permit an application by one of the parties for an order for financial provision following the foreign divorce: s 28(1) of the Matrimonial and Family Proceedings Act 1984 so provides in cases "where parties to a marriage have been divorced in an overseas country".

93 Just as, in *Cheni* v *Cheni* [1965] P 85, a decree of nullity, sought on the basis that the parties (validly married abroad) were within the forbidden degrees as set down by English law, was refused because the marriage was valid according to the applicable law.

94 [1971] P 83.

95 It is to be admitted that the question at issue in the text is rather different since the English legislation (now the Matrimonial Causes Act 1973, s 11(c)) explicitly declared a marriage between persons of the same sex to be void (unlike the 1977 Act in Scotland which merely makes it a ground upon which the district registrar must take steps to prevent the marriage taking place). Polygamous marriages (again) provide a better analogy. In *Risk* v *Risk* [1951] P 50 an English woman who had married polygamously in Egypt was held not entitled to a decree of nullity even when she was also not entitled to a divorce because both divorce and nullity were remedies which, following *Hyde*, could not be granted. But this is a misapplication of *Hyde* since it ignores the fact that there is nothing inappropriate in granting decree of nullity in respect of something that looks like, but is not, marriage—that indeed is the very point of nullity and was what justified the decree in *Corbett*. Any other approach leads to ludicrous results, as illustrated by *Sowa* v *Sowa* [1961] P 70 in which a polygamously married man defended an action for divorce on the ground that he could not be regarded as married, and at the same time defended an action of affiliation on the ground that the

is available then this would have the important effect of making claims for financial readjustment at the end of the relationship competent, for s 17(1) of the Family Law (Scotland) Act 1985 provides that the rules for financial provision on divorce shall apply to actions for declarator of nullity of marriage as they apply to actions for divorce.[96] Adopting this route might be politically unsound within the movement for gay and lesbian equality,[97] but, I conceive, legally competent. It cannot be argued that there is nothing to nullify,[98] for the marriage has a variety of inescapable consequences, as shown above. Declarators of nullity and consequent financial provision thereupon are not available when there is nothing remotely marriage-like for the law to declare null (e.g. the relationship between a man and his bank). Yet they are available if the relationship had been solemnised as, and looks like, marriage but is invalid because of the existence of one of the impediments, such as that the parties were within the forbidden degrees, or one or both was already married, or one or both was under sixteen, or did not give valid consent, or was subject to a domiciliary incapacity. These are all grounds listed in s 5(4) as impediments to marriage in Scotland. The one I have not mentioned is that both parties are of the same sex.[99] If that is an impediment of the same nature as the others (and there is no indication in the statute that it is to be treated any differently) then, by a pleasing paradox, its denial of marriage between parties of the same sex opens the way to a declarator of nullity, which itself opens the way for members of same-sex couples to claim financial provision under s 8 of the Family Law (Scotland) Act 1985 at the termination of their relationship. Parties to opposite-sex relationships who are required to wait for two or five years before they can claim financial provision on

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woman trying to divorce him was not a "single woman" as then required for title to raise an action for affiliation. Both defences succeeded, in a decision that is palpably wrong, for the action for affiliation was characterised as a "matrimonial remedy". (Oddly, the judges referred to the man as "husband" throughout.)

96 The same rule is found in English law: Matrimonial Causes Act 1973, ss 21–24. In *Rampal* v *Rampal* [2001] EWCA Civ 989 the Court of Appeal held that there was no universal rule preventing financial provision being awarded to a party to a bigamous marriage, even when both parties knew that, for that reason, the marriage was void (though it might be appropriate to do so in the circumstances of individual cases).

97 Since gay men and lesbians are subject to the same life and relationship difficulties as the heterosexual majority, one cannot really blame an individual within the minority community for seeking legal redress in a manner that protects his or her individual interests but does the political cause of equality no good.

98 Interestingly, in the costs case that followed *Corbett* v *Corbett* (*Corbett* v *Corbett (No 2)* [1971] P 110) Ormrod J held that April Ashley had to be regarded, for legal purposes including Corbett's obligation of maintenance, as "wife" until the decree of nullity became absolute. This is acceptance that there was a legal consequence of the relationship which had to be given effect to. The relationship (a void marriage) was not nothing and if April Ashley's relationship was in this peculiar category it is difficult to see how a true same-sex marriage could be regarded in any other light.

99 1977 Act, s 5(4)(e).

divorce may well wonder why the law benefits same-sex couples by giving them immediate access to that valuable right. They should claim discrimination.

E. CONCLUSION

In summary, the question of whether the Scottish court should or would recognise a Dutch same-sex marriage is, given the dual nature of marriage as an event and a relationship, better reformulated into the question of whether, for particular statutory purposes, the existence of the relationship has consequences which Scots law will give effect to. We ought not to get bogged down in the overtly political or religious question of whether giving effect to statutory purposes amounts to recognising (i.e. the Scottish court giving its imprimatur to) same-sex marriage. Freeing the question from the politics (as we can do by accepting that there is no relevant public policy consideration) makes it easier to answer, by turning it into a mundane issue of statutory interpretation. This is the private lawyer's answer to the question posed in the title.

But I have political views too, and here is the political answer. Let us suppose that the Scottish court is determined to refuse to recognise a Dutch same-sex marriage except to the extent that it is forced to give effect to some of the consequences thereof. What would be the result? Parties would at the same time be not married and yet not free to marry, not able to seek divorce but able to claim financial provision on divorce, incapable of marrying abroad but capable of conferring the status of "spouse" on a partner, able to succeed to moveable but not to heritable property, be a parent to a partner's children but neither a father nor a mother. What sound objective would be furthered by courts insisting on these results? Who benefits?

It is unlikely that the Netherlands and Belgium will remain the only countries in the world permitting same-sex marriage;[100] even if they do for the short-term future, it is inconceivable that all parties to such marriages will remain all their lives in these countries. Courts outwith the Netherlands and Belgium will have to face the sorts of issues discussed above. These courts have a choice. They could, on the one hand, resist recognition as long as possible. But since for some purposes at least recognition is unavoidable the result will be that individuals will suffer, as polygamously married people did, for ten, twenty or forty years, of being married and at the same time not being married, of being incapable of marrying again and at the same time incapable of escaping their existing union, of being married to different people, depending upon the country they happen to be in. Nobody benefits if the courts take this course,

100 At the time of publication the Attorney General of Canada is appealing a decision of the Ontario Superior Court that the Canadian limitation of marriage to opposite-sex couples was an unconstitutional infringement of the Canadian Charter of Fundamental Rights and Freedoms: see *Halpern v Canada* (2002) 215 DLR (4th) 223.

not even opposite-sex couples.[101] On the other hand, the courts can choose to accept the inevitable. There is no question but that more and more countries are giving ever-greater recognition to same-sex relationships, nor that (western) society is increasingly accepting the need to avoid discrimination on the basis of sexual orientation. I have no doubt that fifty years from now statute will require the Scottish court to recognise foreign same-sex marriages,[102] just as it did for polygamous marriages, so in the long run all that is achieved by resisting recognition now (for those purposes other than where recognition cannot be avoided) is to impose upon gay men and women deleterious and unjustifiable complications in the legal regulation of their family lives. There is nothing to prevent the Scottish courts from now giving effect, for virtually all purposes, to foreign same-sex marriages and there are many persuasive (in my view) arguments of both policy and principle to suggest that they should. The challenge is there for our judges: to show temerity and animus, or to show common sense and compassion. The example of polygamous marriages teaches us two important lessons: (i) resistance is ultimately futile; and (ii) marriage as understood in domestic law survives the acceptance, upon which all international private law is based, that other countries do things differently.

101 Confusion would reign, e.g., if an opposite-sex couple tried to marry when one of them had previously contracted a same-sex marriage.

102 I make no prediction as to whether such marriages will be permitted in this country. That is another issue and not the point of this article.