

THE PROBLEMATICS OF RECOGNITION OF SAME-SEX MARRIAGES ORIGINATING FROM MEMBER STATES ACCORDING TO THE EU LEGAL REGULATION

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Received on 15 May, 2011, accepted 5 March, 2012

Abstract. *The notion of “marriage” has been growing wider during the last decade and an increasing number of member states of the European Union (EU) has made or is in the process of making it available to same-sex partners. Considering the different notions of ‘marriage’ in member states and the crucial effects of nonrecognition, the EU is addressed with the task of providing some kind of a solution. Although some legislative proposals have already been adopted or pending, the situation still largely resembles a legal ‘jungle’.*

The paper concentrates on the developments at the EU level that are related to cross-border recognition of same-sex marriages originating from within the EU. First, it analyzes the applicability of the relevant EU Regulations on jurisdiction, recognition and applicable law to same-sex marriages. Then the author focuses on the recent case practice of the CJEU to assess whether non-recognition of same-sex marriages in Lithuania may constitute discrimination under the relevant EU law. The third part of the paper is aimed at the analysis on the concept of the EU citizenship and its applicability to same-sex marriage recognition. Finally, the proposals of the European Commission on free movement of public documents and recognition of the effects of civil status records are analyzed and evaluated.

Keywords: *private international law, same-sex marriage, freedom of movement, EU citizenship, civil status documents, EU competence.*

Introduction

The notion of ‘marriage’ has been growing wider during the last decade and currently in seven European and five member states of the European Union (EU) it is made available to same-sex partners. Contracting of same-sex marriages is allowed by the legislation of the Netherlands (from 2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Iceland (2010) and Portugal (2010). Moreover, the protection of the rights of same-sex partners and their children is increasing globally and within the EU: Slovenia, Luxembourg, and Finland have declared the intent of adopting similar rules¹ and there is an ongoing discussion on legalising same-sex marriage in the United Kingdom.² Considering the different notions of ‘marriage’ in member states and the crucial effects of nonrecognition, the EU is addressed with the task of providing some kind of a solution. Notably, the EU has a competence to adopt regulations in the field of private international law, although the restriction of unanimity applies in the field of family law.³ Quite recently, both the European Commission⁴ and the European Parliament⁵ issued clear statements on mutual recognition of marriages and opened the gate for further legislation on the matters of matrimonial property rights⁶, recognition of civil status documents⁷ and recognition and enforcement of decisions on parental responsibility.⁸ However, the present situation on cross-border recognition in the EU member states can still be called a ‘legal jungle’.⁹

The principles of non-discrimination and equal treatment are now enshrined in the primary law of the EU, as reflected in the Charter of Fundamental Rights of the European Union (the Charter). The Charter has the same legal value as the European Union treaties following the entry into force of the Lisbon Treaty in 2009 and Lithuania has ratified it

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- 1 *European Union agency for Fundamental Rights. Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Comparative legal analysis.* Luxembourg: Publications Office of the European Union, 2010 update, p. 10.
 - 2 Press release of Liberal Democrats, Thu, 17 Feb 2011 [interactive]. *Featherstone: Government will look at next steps for same-sex marriage* [accessed 11-05-2011]. <<http://www.libdems.org.uk>>.
 - 3 See Art. 81 (3) Treaty of the Functioning of the European Union (TFEU).
 - 4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe’s citizens – Action Plan Implementing the Stockholm Programme. COM(2010) 171 final.
 - 5 European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)).
 - 6 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. Brussels, 16.3.2011. COM(2011) 126 final.
 - 7 Green Paper. Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010. COM(2010) 747 final.
 - 8 Communication on Action Plan Implementing the Stockholm Programme of 20 April 2010. COM(2010) 171.
 - 9 It is well evidenced by an exemplary video of the much-cited story of Kaisa and Claire, Finish and French nationals who have a registered partnership in France. Press release 16 May 2011 of ILGA Europe [interactive]. ‘Legal Jungle: same-sex families trapped between EU countries.’ [accessed 17-05-2011]. <http://www.ilga-europe.org/home/news/latest_news/legal_jungle>.

without reservations.¹⁰ According to Article 21 of the Charter, any discrimination based on grounds such as “sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation” is prohibited.¹¹ Furthermore, Article 19 of the Treaty on the Functioning of the European Union (Part II on Non-Discrimination and Citizenship of the Union) gives the EU the competence to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.¹² Although the right to marry and the right to found a family are guaranteed in accordance with the national laws governing the exercise of these rights,¹³ Article 9 is notably gender-neutral. The issue of cross-border recognition of marriages must be distinguished from the issue of granting the right to marry as such. At the same time, concepts of discrimination and citizenship play a significant role in the debate over cross-border recognition.

There is an increased unification of the rules governing conflicts of laws in family matters on the European Union level. Closer co-operation and of approximation is said to be leading to a “creation of a European international family law.”¹⁴ However, this unification so far takes place only at the level of conflict-of-laws rather than substantive family law and its major concepts, such as ‘family’ or ‘marriage.’ Article 81 (3) of the Treaty on the Functioning of the European Union (TFEU) allows adopting “measures concerning family law with cross-border implications.” Directly applicable Regulations focus on the issues of jurisdiction and the recognition and enforcement of judgments in matrimonial matters, parental responsibility (Brussels II *bis* Regulation), maintenance obligations (Brussels III Regulation), and divorce (Rome III Regulation). However, the regulations are not aimed at recognition of the status of relations. The applicability of these legal acts to same-sex marriages relate to treatment of marriages and partnerships in those countries, and these treatments vary. In other words, it is still within the margin of discretion of the hosting (forum) country to determine (on the basis of its private international law norms) whether the same-sex relation is recognized as ‘marriage’ under the relevant Regulations.

This paper aims at reviewing the developments at the EU level that are related or could be related, in the author’s opinion, to the notion of a ‘same-sex marriage’ and its cross-border recognition within the EU and in particularly, in Lithuania. It refrains from analysis of one of the crucial concepts in this field, the *ordre public* (public order) exception, and analysis of the notion of ‘marriage’ under the Lithuanian substantive law, because these studies are presented in other pending publications of the author. It also

10 Law on ratification of the Lisbon treaty of the Republic of Lithuania. *Official Gazette*. 2008, No. X-1525.

11 Charter of Fundamental Rights of the European Union. 2000/C 364/01. Done at Nice on the seventh day of December in the year two thousand.

12 Consolidated version of the Treaty on the Functioning of the European Union. C 115/47. 9.5.2008.

13 Article 9 (Right to marry and right to found a family) of the *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01).

14 Martiny, D. *Is Unification of Family Law Feasible or even Desirable?* [interactive]. Social Science Research Network [accessed 20-05-2010]. <<http://ssrn.com/abstract=1612157>>.

does not address closely related, yet more complicated topic of recognition of same-sex partnerships.

The issue of same-sex marriage recognition has not been analyzed under the Lithuanian legal doctrine, although some relevant comments had been made by professor Vytautas Mizaras.¹⁵ There have been a few conferences and discussions (2010, 2011) where the author participated with presentations discussing some of the further-discussed cases. Some debates took place in the popular media¹⁶ but they did not analyze the issues thoroughly and focused more generally on the discussions of same-sex couples' rights in Lithuania. In addition, the last developments are very recent (e.g. judgment in *Römer v. City of Hamburg* case was adopted on 12 May 2011) and insofar have not been analyzed. These landmark cases and significant developments surely need to be addressed and may be helpful for the Lithuanian legislator, courts and competent authorities.

The objectives of the research are:

1. To analyze the issue of applicability of the relevant EU Regulations on jurisdiction, recognition and applicable law to same-sex marriages.
2. To analyze the recent case practice of the CJEU in order to establish whether the non-recognition of same-sex marriages in Lithuania may constitute discrimination under the relevant EU law.
3. To analyze the issue of cross-border same-sex marriage recognition in relation to the concept of the EU citizenship.
4. To analyze the recent proposals of the European Commission on free movement of public documents and recognition of the effects of civil status records.

The object of the research is cross-border recognition of same-sex marriage in Lithuania with the view of the developments of the EU law.

For the purposes of the research, the author uses the logical, systemic and document analysis, and comparative research methods.

The purpose and objectives of the research have determined the *structure of this paper*. First, applicability of the relevant EU Regulations on jurisdiction, recognition and applicable law to same-sex marriages is analyzed. Then the author focuses on the recent case practice of the CJEU to assess whether the non-recognition of same-sex marriages in Lithuania may constitute discrimination under the relevant EU law. Afterwards, the analysis on the concept of the EU citizenship and its applicability to same-sex marriage recognition is discussed. Finally, the proposals of the European Commission on free movement of public documents and recognition of the effects of civil status records are analyzed to evaluate whether automatic recognition or harmonization of conflict of law provisions can be advised.

15 Mizaras, V. Tarptautinės privatinės teisės vienodinimo Europos Sąjungoje rezultatai: Reglamentai Roma I ir Roma II [The results of private international law in the EU: Regulations Rome I and Rome II]. *Justitia*. 2008, 4(70).

16 Trofimovienė, L. Apie vienalytes santuokas ir jų ignoravimo pasekmes [On same-sex marriages and results of ignoring them] [interactive]. Delfi.lt of 6 December 2010 [accessed 15-12-2010]. <<http://www.delfi.lt/news/ringas/lit/trofimoviene-apie-vienalytes-santuokas-ir-ju-ignoravimo-pasekmes.d?id=39362417>>. See the included links to articles of prof. Arlauskas and prof. Mizaras.

1. Applicability of Relevant EU Regulations on Jurisdiction, Recognition and Applicable Law

Private international law operates in three closely interrelated areas of jurisdiction, applicable law and recognition and enforcement of decisions. It relates to contractual, non-contractual, and family law relations that contain international (foreign) element. In the field of family law with cross-border implications, the legal regulation of private international law is often clearly interrelated with the approaches adopted at the level of the substantive law. Even where an EU regulation should in theory apply to the matters of divorce and marriage annulment, in the absence of explanation of the notion ‘marriage’ under the Regulation, it’s applicability to same-sex marriages is not obvious.

Therefore, the first question arises whether Lithuanian courts can apply Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels-II *bis* Regulation) to same-sex marriages. No answer can be drawn from the (non-binding) Practice Guide to the Regulation,¹⁷ or the Borrás report written on the preceding Convention.¹⁸ It is sometimes claimed that Brussels-II *bis* Regulation entails ‘marriage’ in a classic sense, i.e. different-sex and not infringing the principle of monogamy. Cohabitation and partnerships, including partnerships under the Lithuanian Civil Code, would be outside the scope of the Regulation.¹⁹ Nevertheless, informal unions could be treated as marriages if this is the result under the national private international law norms. It is said that even Islamic marriage conclusively established by actions should be seen as marriage falling under Brussels-II *bis* regulation, provided that *lex loci celebrationis* so establishes.²⁰ Lithuanian private international law provisions refer to *lex loci celebrationis* as the law applicable to validity of marriages concluded abroad,²¹ thus in Lithuania same-sex marriages should in principle fall under the scope of Brussels-II *bis* Regulation.

17 Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000) [interactive]. [accessed 5 May 2011]. <http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_en.pdf>.

18 The Convention was signed in 1998 but never ratified by the member states. Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [interactive]. Official Journal of the European Communities. C 221/27 [accessed 05-05-2011]. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:221:0027:0064:EN:PDF>>.

19 Nekrošius, V. *Europos Sąjungos civilinio proceso teisė*. Pirma dalis [European Union civil procedure law. Volume one]. Vilnius: Justitia, 2009, p. 80.

20 *Ibid.*

21 Article 1.25 (4). Civil Code of the Republic of Lithuania, adopted 18 July 2000, in force since July 1, 2001. *Official Gazette*. 2000, No. 74-2262. The exception is evasion, where both spouses have a domicile in Lithuania, and *escape* its mandatory substantive conditions on contracting of marriage by contracting it abroad.

Arguments that Brussels-II *bis* does not apply to same-sex marriages may also be rejected by a number of considerations. Notably, the gender-neutral terminology of the Regulation must be stressed. Moreover, same-sex marriages are concluded in EU since 2001 in the Netherlands, thus at least indirectly these marriages had to be in mind of the legislators during the adoption. However, the Regulation does not involve *forum necessitatis* clause up to this date.²²

If Lithuanian authorities render Brussels-II *bis* inapplicable to same-sex marriage, the hypothetical question then would arise what jurisdictional (and subsequently, recognition of judgments) rules should apply. Where a relation has an EU cross-border element and is not considered as covered by the area of family law, it may, quite paradoxically, be seen as a matter of contractual or non-contractual liability. The subsequent question then arises whether Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels-I) could be applicable for determination of jurisdiction in cases related to same-sex marriage. However, this result is not likely nor desirable: it is not the purpose of Brussels-I or the national jurisdiction rules to regulate the jurisdiction in family and family-like matters. Recognized in full effect or with limited effects, without prejudice to the level of development of internal legislation, same-sex marriages must fall within the ambit of “family life” in accordance with the ECHR,²³ thus treating them as non-family would contradict international obligations of the state.

The same analysis applies with determination of applicable law. The EU has so far adopted Regulations that unify conflicts-of-laws in the areas of obligations rather than family law. On the one hand, both Rome I²⁴ and Rome II²⁵ regulations do not apply to family relations and relations that have “comparable effects”. On the other hand, family law is still largely under the discretion of the member states and thus it is left for the states to determine what, by the law, they consider family and comparable relations. Where such relations are not to be considered as ‘family’ or ‘comparable’ by the state’s substantive law (e.g. presumably Lithuania), the issue of applicability of Regulations arises and might have to be determined in practice by the national courts.²⁶ As mentioned above, arising legal disputes would still have to be solved in one way or another, and if the marriages are to be adapted to “joint civil partnerships” or other type of relations under civil law, the aforementioned EU instruments might in theory be applicable for determination of the applicable law.²⁷ The author agrees with professor

22 Swennen, F. Atypical families in EU (private international) family law. In: Meeusen, J.; Pertegas, M.; Straetmans, G.; Swennen, F. (eds). *International family law for the European Union*. Intersentia, 2007, p. 396–397.

23 *Schalk and Kopf v. Austria*, App no 30141/04 (ECHR 24 June 2010), paras 94-99.

24 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 1 part 2(b).

25 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II regulation). Article 1 part 2 (b)

26 Plender, R. *European Private International Law of Obligations*. 3rd edition. Sweet & Maxwell, 2009, p. 479.

27 Notably, the law applicable to obligations rather than family relations, determined as applicable by the conflict of law norms at the EU level, paradoxically could point again to the legal system that allows same-sex marriage.

Vytautas Mizaras, who emphasizes that it is not compatible with the purposes of the relevant regulations (Rome I and Rome II) to apply them for same-sex unions. The delay of adequate regulation of family relations should not serve as the basis for such a special application of the Regulations in Lithuania.²⁸

Moreover, although the Preambles of relevant Regulations state that “family relations should be interpreted in accordance with the law of the Member States in which the court is seized,”²⁹ the Articles on the scope of the Regulations refer to *lex causae* rather than *lex fori*, i.e., “family relationships and relationships deemed by the law applicable to such relationships.”³⁰ The possible contradiction is solved by explanation that recitals actually refer to the private international law norms of *lex fori*, rather than the substantive law.³¹ This would be the most plausible explanation because in matters of marriages with foreign element, the applicable law has to be determined by the court seized and it cannot automatically apply its own law. The prohibition of *renvoi* should not prevent such explanation either. This concerns determination whether the relevant relation falls under the scope of Regulations, rather than establishing the applicable law according to conflict of law norms contained in the relevant instrument.³²

Lithuania has so far decided to refrain from participation in increased cooperation under Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) mainly because of intimidations related to same-sex marriages.³³ This reasoning can be criticized. Obviously, the failure to regulate, or abstaining from participation in simplification of legal regulation may not prevent neither same-sex marriages of foreign (and national) nationals, nor uphold the tide of a globally increasing level of protection of same-sex unions. Therefore, Lithuania’s approach “*¡No pasarán!*” to Rome III regulation should be criticized on a number of bases.

First, simply abstaining from participating in enhanced cooperation is not effective. Same-sex families of foreign nationals, as well as Lithuanian nationals abroad, are now not only factual but legal reality. Cases of divorce, succession, maintenance of same-sex spouses or their children will happen. The relevant rules on jurisdiction, applicable law, and recognition and enforcement of judgments will have to be determined by competent authorities. The legislator is thus transferring the burden of responsibility to react to the legal reality and solve complicated legal issues on the shoulders of courts, notaries, and civil registries. Legal certainty and interests of all parties involved, as well as third parties, suffer by the created legal lacuna in respect of the rights of same-sex spouses and their children. Second, the failure to participate in enhanced cooperation

28 Mizaras, V., *supra* note 15, p. 14.

29 Rome I, recital 8, Rome II, recital 10.

30 Rome I, article 1 part 2(b), Rome II, Article 1 part 2 (a).

31 Cited by prof. Mizaras, V.: Leible, S.; Lehmann, M. Die *Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht* („Rom I“). RIW, 2008, p. 528, 530.

32 Mizaras, V., *supra* note 15, p. 15.

33 Conclusion of the Legal affairs Committee of the Lithuanian Parliament on the Proposal for a Council, Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Document No. 13445/07 JUSTCIV 250, 16 January 2008.

creates a situation of fragmentation of law, where only some member states of the EU enjoy ‘higher-speed’ Europe under the unified private international law provisions. This creates Europe which is ‘divided’ rather than ‘united’ in its diversity. Third, the fears to recognize same-sex marriages are not reasonable, they are based on unfair prejudices that can no longer find basis in scientific research in the fields of psychology, sociology, or law in Europe.

More particularly, the Ministry of Justice in the debate over Rome III regulation claimed that “if the state allowed legal effects of same-sex marriages, it would infringe its obligation to take care of children and ensure their normal development.”³⁴ The reasoning is based on a presumption that same-sex (as any other) couples cannot have children prior marriage or another form of “legitimising” of their relationships. Moreover, it shows the prejudice that same-sex parenting will result in other than ‘normal’ development of a child, or same-sex marriages may somehow interrupt with parenting of other (presumably all heterosexual) families in Lithuania.

It should be reminded that the ECtHR³⁵ has rejected such prejudices in the field of law. Discrimination on the basis of sexual orientation is not acceptable in relation with child adoption and there is no reason to distrust the Lithuanian child protection authorities as incapable to choose proper parents for a particular child or to hear an opinion of a particular child. Regardless of sexual orientation of persons holding parental responsibilities, all children must be treated equally.³⁶ They should not be stripped from the protection that family law gives them or loose rights related with succession, maintenance, should not loose family or vacation home or be displaced from their parents during a medical crisis. If Lithuania considers that it is for the interests of the child to treat same-sex marriages as non-existent, it may become a haven for evasion of all duties related to such marriages.

Similar line of reasoning may apply to further EU instruments of unification that are pending and recently passed, e.g. the Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance regulation). It applies in association with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations and, where appropriate, the Hague Convention of 23 November 2007 on the international recovery of child support and other forms of family maintenance. Although *forum necessitatis* clause is provided under the Maintenance Regulation (Article 7), the outcome is still far from clear and it should not be the rule under the EU law to aid the ‘limping’ regime (under-regulation that results in ‘limping relations’) or an evading party. Similar argumentation could apply with regards to relevant proposed

34 Conclusion of the Legal affairs Committee of the Lithuanian Parliament on the Proposal for a Council, Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Document No. 13445/07 JUSTCIV 250, 16 January 2008.

35 See *Salgueiro da Silva Mouta v. Portugal*, App no 33290/96 (ECHR 21 December 1999), *E.B. v. France*, App no 43546/02 (ECHR 22 January 2008), *J. M. v. The United Kingdom*, App no 37060/06 (ECHR 28 September 2010).

36 Principles of European Family Law Regarding Parental Responsibilities, drafted by the Commission on European Family Law (2007), Principle 3.5.

Regulation with regards to succession.³⁷ Notably, the ECtHR recognized the right to succession of tenancy of a same-sex partner even where no marriage or partnership was internally available.³⁸ According to the ECtHR in general, although the ECHR does not include an explicit mentioning of sexual orientation, the difference in treatment based on sexual orientation requires particularly serious reasons of justification, and the margin of appreciation of states is narrow.³⁹

2. The Principle of Non-Discrimination According to the Court of Justice of the European Union

Cases of *Grant*⁴⁰ and *D. and Sweden v. Council*,⁴¹ where the CJEU secured a privileged position to heterosexual marriages and which are sometimes used to claim that CJEU upholds only “traditional” families, do not in fact exclude same-sex marriages. At that point of time, the EC law did not yet cover discrimination based on sexual orientation. The things have changed already with the entry of the force of Treaty of Amsterdam (and the insertion of Article 6a). The Lisbon treaty and entry into force of the Charter, as well as rapid development under the ECHR and in substantive legal systems of member states have changed the picture altogether. Moreover, *Grant* and *D. and Sweden v. Council* cases actually did not analyze the issue of same-sex marriages at all. These cases concerned different-sex and same-sex *partnerships*⁷ (non) equivalence to marriage. Notably, the stance of the Court since then has been reversed by the judgments in cases of *Maruko*⁴² and *Römer*⁴³ (analyzed further in more detail).

Moreover, all member states are the members of the ECHR and there is a strong interrelationship between the relevant human rights instruments. In *Schalk and Kopf v. Austria*, the ECtHR for the first time admitted that the right to marry under Article 12 is not always reserved to different-sex couples.⁴⁴ Notably, the argumentation of the ECtHR was based precisely on Article 9 of the Charter and its Commentary: “Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article

37 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM (2009) 154.

38 *Kozak v. Poland*, App No 13102/02. Decision of 2 March 2010; *Karner v. Austria*, App No 40016/98 (ECHR 24 July 2003).

39 See *L. and V. v. Austria*, App Nos 39392/98 and 39829/98 (ECHR, 9 January 2003) para 45; *S.L. v. Austria*, App No 45330/99 (ECHR 9 January 2003), para 37; *Karner v. Austria*, App No 40016/98 (ECHR 24 July 2003), para 37; *Kozak v. Poland*, App No 13102/02 (ECHR 2 March 2010), para 92.

40 Case C-249/96, *Grant v. South-West Trains* [1998] ECR I-621.

41 Case *D and Kingdom of Sweden*, Cases C-122/99 P & C-125/99 P [2001].

42 C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*. Para 73.

43 C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, Judgment of 12 May 2011.

44 *Schalk and Kopf v. Austria*, App no 30141/04 (ECHR 24 June 2010), paras 54-63.

12 is inapplicable to the applicants' complaint" (para 61). It is still for the states to say whether they want to open the doors for same-sex marriages within their jurisdiction. But it is also logical to claim that marriages that are already legally concluded abroad must be respected.

The stance of the EU is being developed in CJEU cases related to discrimination on the basis of sexual orientation. After unsuccessful cases of *Grant*⁴⁵ and *D. and Sweden v. Council*,⁴⁶ where the CJEU secured a privileged position to heterosexual marriages, a landmark decision was adopted in 2008 in *Maruko v. Vddb* which clearly overrules a former line of reasoning.⁴⁷ The case concerned registered same-sex partners and denial of survivors' benefits under a compulsory occupational pensions scheme. The Court admitted that civil status is not an EU competence *per se* but member states, when exercising their competence, must comply with EU law, and in particular with the principle of non-discrimination.⁴⁸ The Court indicated that *indirect* discrimination occurs where an apparently neutral provision, criterion or practice would put homosexuals at a particular disadvantage compared with other persons unless that practice or provision may be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The legislation establishing that after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, was found inadequate, but the Court left for the German courts to determine whether Maruko was in a "situation comparable."

In *Jürgen Römer v. City of Hamburg* (C-147/08), the Advocate General (AG) have asked the Court to decide that same-sex partners should have equal access to employment benefits as heterosexual married couples. Protection of marriage and the family as such, the AG said, cannot serve as valid justification for such discrimination.⁴⁹ It can be agreed with the simple conclusion that there are other means to protect family and marriage than discrimination of same-sex partners.

In the recently adopted judgment in the *Römer* case the Court found⁵⁰ that different treatment on the basis of sexual orientation constitutes *direct* discrimination and as such is prohibited: it is a general principle of the EU law. Nevertheless, the effect of this judgment is limited. Both *Maruko* and *Römer* could only apply to cases where: 1. partnerships are reserved to persons of same-sex, 2. Marriages are reserved to different-sex persons, and 3. Same-sex partnerships and different-sex marriages are comparable both in fact and law.

Although the Court was silent on assessing the situation where no such partnerships to same-sex partners are provided, it may be claimed that in such case (e.g. Lithuania), *indirect* discrimination could be found. Obviously, the Court limited its judgment to

45 Case C-249/96, *Grant v. South-West Trains* [1998] ECR I-621.

46 Case *D and Kingdom of Sweden*, Cases C-122/99 P & C-125/99 P [2001].

47 C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*. Para 73.

48 By analogy, the Court referred to Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 23.

49 Conclusions de l'Avocat général Nillo Jääskinen présentées le 15 juillet 2010. Affaire C-147/08 *Jürgen Römer contre Freie und Hansestadt Hamburg*. paras 109-111.

50 Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, Judgment of 12 May 2011.

factual circumstances and refrained from ruling on the issue that was not directly at stake. Moreover, regarding cross-border marriage recognition in particular, it may be claimed that failure to recognize same-sex marriages where different sex marriages are recognized, can be seen as a clear-cut case of *direct* discrimination on the basis of sexual orientation. It cannot be found compatible with the EU Charter, in particular, in consideration of its Articles 9 (the right to marry and find a family), which is gender neutral and refers to national applicable law,⁵¹ and Article 21 that establishes the principle of non-discrimination.

3. Freedom of Movement and the EU Citizenship

According to Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States⁵² (the Citizenship directive), the right to bring a ‘spouse’ is unconditional under Article 2(2)(a). The European Commission recently has shown a no-compromise stance on this issue. In April 2011, it threatened with legal action the Republic of Malta, which resists the interpretation of the Citizenship directive as granting same-sex spouses the freedom of movement.⁵³ As the Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding explained in 2010, sexual orientation is irrelevant while exercising the freedom of movement. According to the Commission, the exercise of the EU citizens’ rights has to be complied by the member states and does not require that them to provide any special rules on same-sex unions.⁵⁴ However, the issue arises whether the CJEU will find basis for ‘marriage is marriage’ interpretation under the Citizenship Directive, considering that the conservative states still rely on the public order exception to refuse recognition to same-sex spouses.⁵⁵

So far, the CJEU interpreted the Citizenship directive in a rather reserved way. Some interesting points could be drawn from cases that concern freedom of movement of Union citizens’ family members from third countries. In cases of *Metock* (then reinforced by *Sahin*⁵⁶) the Court referred to such family members as eligible to enter in order to allow the Union citizens to “lead a normal family life in the host Member

51 *Lex loci celebrationis* (the law of the celebration of marriage) is the most obvious simple solution in the member states, including Lithuania. See Article 1.25 of the Civil Code.

52 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96.

53 Camilleri, I. Malta ‘discriminating’ against same sex couples – Commission [interactive]. *The Sunday Times, Times of Malta*. April 10, 2011 [accessed 15-05-2011]. <<http://www.timesofmalta.com/articles/view/20110410/local/malta-discriminating-against-same-sex-couples-commission>>.

54 Parliamentary question by Member of the European Parliament, Oreste Rossi [interactive]. The answer given by V. Reding on behalf of the Commission. 1 December 2010 [accessed 11-05-2011]. <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-7422&language=EN>>.

55 Chalmers, D.; Davies, G.; Monti, G. *European Union law. Text and materials*. Second edition. Cambridge: Cambridge University Press, 2010, p. 466.

56 Case C 44/24, *Deniz Sahin v. Bundesminister für Inneres*, Judgment of 21 February 2009.

State.⁵⁷ The choice of words in these judgments has been dully criticized as having hetero-normative implications⁵⁸ and similar formulations have been used since to rebut the application for same-sex marriage.⁵⁹

However, the reasoning in *Metock* can also offer some support to claim that a(ny) legal spouse is a spouse, because the Court insisted that the time or place of entering into the relationship is irrelevant.⁶⁰ Notably, the Court said that “irrespective of when and where the marriage took place”, spouse of Union citizen benefits from provisions of the Citizenship directive.⁶¹ In case of same-sex marriages, the literate interpretation drawn from *Metock* should mean that *marriage is marriage*, despite some members states’ attempts to refuse recognition or treat marriages as partnerships, thus making dependant on mutual recognition principle under Article 2 (2)(b) of the Citizenship Directive. If this line of reasoning is accepted, twofold effects are to be expected. First, same-sex spouses should also be seen as ‘spouses’ under the Directive. Second, the phenomena of ‘adaptive recognition’ (downgrade or upgrade of civil status to the internal level of protection) should not exist any longer, at least regarding same-sex marriages coming from the EU.

Finally, the issue of distributive recognition, which involves recognition of same-sex marriages of foreign nationals, but not the nationals of the host member state should be considered. Some reasoning could be drawn from the supposedly allowed ‘reverse discrimination’ within the EU. However, it should first of all apply only to purely internal situations without any trans-border element. A marriage concluded in another country, i.e. entailing the element of crossing the border, goes beyond this notion. Moreover, in its case law the CJEU had gradually abandoned the requirement to show an identifiable *physical* cross-border movement in order to rely on the EU citizen rights.⁶² In particular, the recent case of *Zambrano* should be stressed as arguably ‘reversing’ the reverse discrimination. Although this term is not clearly mentioned in the judgment, the Court in this case abandoned the restriction to rely on Article 20 of TFEU in an ‘internal situation’ only.⁶³ The Court then refined its position in *McCarthy*, where it confirmed the general rule (the prohibition of national measures that deprive own

57 Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*. Para 62.

58 Costello, C. *Metock: Free Movement and “Normal Family Life” in the Union*. *Common Market Law Review*. 2009, 46(2): 615.

59 Le Conseil Constitutionnel. Décision n° 2010-92 QPC du 28 janvier 2011. Journal officiel du 29 janvier 2011, p. 1894. “le droit de mener une vie familiale normale n’implique pas le droit de se marier pour les couples de même sexe [...] par suite, les dispositions critiquées ne portent pas atteinte au droit de mener une vie familiale normale.”

60 Costello, C., *op. cit.*, p. 615.

61 Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, para 99.

62 Case C-148/02, *Carlos Garcia Avello v. Belgium*. Judgment of the Court of 2 October 2003; Case C-135/08, *Rottmann v. Freistaat Bayern*, Judgment of 2 March 2010; Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*. Judgment of the Court (Grand Chamber) 8 March 2011.

63 Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*. Judgment of the Court (Grand Chamber) 8 March 2011. In paragraph 42 the Court states: “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”

nationals of “genuine enjoyment of the substance of the rights“ conferred by virtue of the EU citizenship) but limited its application. Dual citizenship alone was not considered sufficient: only in exceptional cases, a purely internal situation will fall under the EU law.⁶⁴ This decision can also contribute to the same-sex marriage recognition debate. The phenomena of distributive recognition where only same-sex marriages of foreign citizens are recognized can no longer stand a chance within the EU.

4. Aiming for Recognition of Civil Status Records and Determining the Way to Go

Although Brussels-II *bis* provides that “no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State,”⁶⁵ any specific rules on recognition of civil status records are so far missing. Nevertheless, the CJEU in judgments of *Konstantinidis* and *Dafeki* established the principle of free movement of civil status records.⁶⁶ The Court noted that member states have to respect foreign certificates “unless their accuracy is seriously undermined by concrete evidence related to the individual case in question.”⁶⁷ The requirement to treat the certificates as “equivalent” is based on presumption of such equivalence and is comparable with mutual trust. Recognition may be refused only under very strict conditions.

The EU priorities for developing an area of justice, freedom and security during the period 2010-14, as set out in the Stockholm Programme adopted by the European Council in December 2009,⁶⁸ call in particular for the need to “eliminate barriers to the recognition of legal acts in other Member States.”⁶⁹ In 2010, the EU Parliament confirmed its strong support of the “plans to enable the mutual recognition of the effects of civil status documents”⁷⁰ and the European Commission performed public consultations with the view of a legislative proposal on recognition of the effects of certain civil status records (e.g. in relation to marriage, adoption, names), in 2013.

Regarding free circulation of civil status documents, authentic acts and the simplification of legalisation, the EU has a few policy options to deal with these problems, as noted by the European Commission’s Green paper of 2010: 1. Assisting

64 Case C-434/09, *McCarthy v. SSHD*, Judgment of the Court (Third Chamber). 5 May 2011.

65 Article 21(2) of Brussels-II *bis*.

66 Case C-168/91, *Konstantinidis*, E.C.R., 1993, I-1191. Case C-336/94, *Dafeki*, E.C.R., 1997, I-6761.

67 Case C-336/94, *Dafeki*, E.C.R., 1997, I-6761.

68 The Stockholm Programme — An open and secure Europe serving and protecting citizens. *Official Journal of the European Union*. 2010/C 115/01.

69 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe’s citizens – Action Plan Implementing the Stockholm Programme. COM(2010) 171 final – Not published in the Official Journal.

70 European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)).

national authorities in the quest for practical solutions; 2. Automatic recognition, and 3. Recognition based on the harmonisation of conflict-of-law rules.⁷¹

The last two methods are in particular interest for this paper. It might be suggested that automatic recognition is the method with most advantages and highest level of legal certainty for the EU citizens. In some areas, e.g. the change of surname and related civil records, it should not be difficult. In other areas, including marriage, as suggested by the Commission, it may be more difficult.⁷² Nevertheless, it may be claimed that marriage certificates should not require a complicated procedure of “recognition” within the EU. The author argues that based on the principle of mutual trust, it is reasonable to expect that a marriage certificate adopted by a member state authority in one member state, should be *automatically* recognized in another member state, and any related procedure may only involve certain formalities rather than re-viewing the grounds for issuing the document in the first place.

Regarding harmonization of conflict-of-law rules, this proposal is not very far reaching, if it is read verbatim. First, a difference between *harmonisation* and unification of conflict-of-law rules can be noted and the term harmonisation is arguably not used correctly in this context.⁷³ Harmonization is not as far reaching as unification and only refers to reducing the difference between provisions, making them more similar. Only unification of conflict-of-law norms can effectively prevent a loss of matrimonial status. In situations where automatic recognition is not possible to achieve, the method of *unification* of conflict-of-law rules may be implied. However, the author considers that this is much slower method and possibly a step backwards, considering the level of the EU competence now and the level of development in all related areas. The issue of the principle of subsidiarity may still potentially arise in the areas related to family law. Nevertheless, as regards related unification of conflicts of laws, the Lithuanian legislator and legal experts have never found infringement of the principles of subsidiarity, nor proportionality.⁷⁴

Finally, some legal scholars have recently started to argue that the loss of the effects of these civil statuses can only be effectively prevented by harmonization of *substantive*

71 Green Paper. Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010. COM(2010) 747 final.

72 *Ibid.*

73 See more on differences between harmonization and unification and its incorrect uses in Boele-Woelki, K. *Unifying and harmonizing substantive law and the role of conflict of laws*. Hague Academy of International law, Martinus Nijhoff publishers, 2010, p. 32–36.

74 Subsidiarity and proportionality check on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final. Subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final [interactive]. See the full opinion of Lithuanian institutions, available at website of the Conference of Community and European Affairs Committees of Parliaments of the European Union [accessed 15-05-2011]. <<http://www.cosac.eu/en/info/earlywarning/>>.

family laws at the EU level.⁷⁵ Based on broad interpretation of Article 81, it is claimed that now “the European Union could even take measures in order to harmonize or unify substantive family law in Europe.”⁷⁶ Notably, the EU competences in this area have increased with the entry into force of the Lisbon Treaty. Article 81 (2) TFEU provides that measures in the field of judicial co-operation in civil measures may be adopted “*particularly* when necessary for the proper functioning of the internal market.” The insertion of the word ‘particularly,’ in comparison with the formerly valid formulation “*in so far* as necessary for proper functioning of the internal market” (Article 65 EC Treaty) shows that this is not anymore the only basis for adoption of measures. The EU has the power to take steps to prevent the loss of legal position of its citizens while they cross the border, plan to cross the border and are prevented from this by currently threatening legal lacunas, and seems to intend to use it.

Conclusions

Lithuanian courts should apply Brussels-II *bis* Regulation to same-sex marriages. It has been argued that even Islamic marriages may be considered as ‘marriages’ under the Regulation. Thus in accordance with the Lithuanian private international law that establishes *lex loci celebrationis* as the law applicable to validity of foreign marriages, same-sex marriages must come in under the Brussels-II *bis* Regulation. Notably, the gender-neutral terminology of the Regulation must be stressed. Same-sex marriages are concluded in EU since 2001 in the Netherlands, thus at least indirectly these marriages had to be in mind of the legislators during the subsequent adoption of the Regulation. However, the Regulation does not contain *forum necessitatis* clause up to this date, thus it may be claimed that Brussels-II *bis* should be applicable to same-sex marriages concluded abroad. The courts should refrain from contractualization of a relationship. It would be in contradiction with the aims of the Brussels I which does not include family and family-like matters. It does not comply with the ECtHR’s recent practice that recognizes same-sex couples as capable to lead ‘family life’ and notably, its acknowledgement that the right to marry under the ECHR (considering Article 9 of the Charter) is no longer reserved to different-sex couples. The same line of reasoning applies to determination of applicable law. Lithuania’s failure to participate in enhanced cooperation under Rome III regulation can be criticized as non-effective vaccine from same-sex family cases. The cases will have to be solved somehow despite the lack of a simplified regulation.

The stance of the EU is being developed in cases related to discrimination on the basis of sexual orientation. In the landmark decision *Maruko v. Vddb*⁷⁷ the CJEU

75 Dethloff, N. Arguments for unification and harmonization of family law in Europe. In: Boele-Woelki, K. (ed). *Perspectives for the unification and harmonization of family law in Europe*. Antwerp: Intersentia, 2003, p. 64.

76 Boele-Woelki, K., *supra* note 73, p. 52.

77 Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*. Para 73.

admitted that indirect discrimination occurs where an apparently neutral provision, criterion or practice would put homosexuals at a particular disadvantage compared with other persons unless that practice or provision may be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In *Jürgen Römer v. City of Hamburg*⁷⁸ the CJEU found that different treatment on the basis of sexual orientation constitutes *direct* discrimination and as such is prohibited: it is a general principle of the EU law. Nevertheless, *Maruko* and *Römer* only apply to cases where partnerships are reserved to persons of same-sex and are they comparable to marriages both in fact and law. Although the Court was silent on assessing the situation where no such partnerships to same-sex partners are provided, it may be claimed that in such case (e.g. Lithuania), *indirect* discrimination could be found. Moreover, regarding cross-border marriage recognition in particular, it may be claimed that failure to recognize same-sex marriages where different sex marriages are recognized, can be seen as a clear-cut case of *direct* discrimination on the basis of sexual orientation. It cannot be found compatible with the EU Charter, in particular, in consideration of its Articles 9 (right to marry and find a family), which is gender neutral and refers to national applicable law,⁷⁹ and Article 21 that establishes the principle of non-discrimination.

Regarding the freedom of movement within the EU and Union citizenship, reasoning in *Metock* can also offer some support to claim that *any legal spouse is a spouse*, because the Court insisted that “irrespective of when and where the marriage took place“, spouse of Union citizen benefits from provisions of the Citizenship directive.⁸⁰ In case of same-sex marriages, the literate interpretation drawn from *Metock* should mean that marriage is marriage, despite some members states’ attempts to equate them to partnerships. If this is accepted, twofold effects are to be expected. First, same-sex marriages must be recognized as marriages and same-sex spouses are obviously spouses under the Directive. Second, the phenomena of ‘adaptive recognition’ (downgrade or upgrade of civil status to the internal level of protection) should not exist any longer.

Regarding distributive recognition, it should first of all apply only to purely internal situations and marriage concluded in another country, i.e. entailing the element of crossing the border, goes beyond this notion. Moreover, in the recent case of *Zambrano* should be stressed as arguably ‘reversing’ the reverse discrimination. Although this term is not clearly mentioned in the judgment, the Court in this case abandoned the restriction to rely on Article 20 of TFEU in an ‘internal situation’ only.⁸¹ Considering these developments, the phenomena of distributive recognition where only marriages of foreign citizens are recognized can no longer stand a chance within the EU.

78 Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg*. Judgment of 12 May 2011.

79 *Lex loci celebrationis* (the law of the celebration or registration of marriage) is the most obvious simple solution in the member states, including Lithuania.

80 Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, para 99.

81 Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)*. Judgment of the Court (Grand Chamber) 8 March 2011. In paragraph 42 the Court states: “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”

The EU has a few policy options to deal with free circulation of civil status documents, authentic acts and the simplification of legalisation. An automatic recognition or recognition based on the harmonisation of conflict-of-law rules has been suggested.⁸² It might be claimed that automatic recognition is the method with most advantages and highest level of legal certainty for the EU citizens. The author considers that marriage certificates should not require a complicated procedure of ‘recognition’ within the EU. The author argues that based on the principle of mutual trust, it is reasonable to expect that a marriage certificate adopted by a member state authority in one member state, should be *automatically* recognized in another member state, and any related procedure may only involve certain formalities rather than re-viewing the grounds for issuing the document in the first place. The proposal of *harmonization* of conflict-of-law rules, this proposal is criticizable. In situations where automatic recognition is not possible to achieve, the method of *unification* of conflict-of-law rules may be implied. This is the very least what the EU can do, considering that it grows the potential to take measures in order to harmonize or unify *substantive* family law in Europe.⁸³ The EU should take steps to prevent the loss of legal position of its citizens who are prevented from exercise of their rights by currently threatening legal lacunas.

References

- Boele-Woelki, K. *Unifying and harmonizing substantive law and the role of conflict of laws*. Hague Academy of International law, Martinus Nijhoff publishers, 2010.
- Camilleri, I. Malta ‘discriminating’ against same sex couples – Commission [interactive]. *The Sunday Times, Times of Malta*. April 10, 2011 [accessed 15-05-2011]. <<http://www.timesofmalta.com/articles/view/20110410/local/malta-discriminating-against-same-sex-couples-commission>>.
- Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*. [2008] ECR I-6241.
- Case C-135/08, *Rottmann v. Freistaat Bayern*, Judgment of 2 March 2010.
- Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, Judgment of 12 May 2011.
- Case C-148/02, *Carlos Garcia Avello v. Belgium*. Judgment of the Court of 2 October 2003.
- Case C-168/91, *Konstantinidis*, E.C.R., 1993, I-1191.
- Case C-249/96, *Grant v. South-West Trains* [1998] ECR I-621.
- Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, judgment of the Court (Grand Chamber) of April 1, 2008.
- Case C-310/08, *Ibrahim* [2010] ECR I-0000.
- Case C-336/94, *Dafeki*, E.C.R., 1997, I-6761.
- Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*. Judgment of the Court (Grand Chamber) 8 March 2011.
- Case C-434/09, *McCarthy v. SSHD*, Judgment of the Court (Third Chamber). 5 May 2011.
- Case C-44/24, *Deniz Sahin v. Bundesminister für Inneres*, Judgment of 21 February 2009.

82 Green Paper. Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010. COM(2010) 747 final.

83 Article 81 refers to cooperation in civil matters “having cross-border implications,” each situation within the EU may *potentially* become cross-border situation, and the requirement to show physical crossing is being abandoned.

- Case *D and Kingdom of Sweden*, Cases C-122/99 P & C-125/99 P [2001].
- Chalmers, D.; Davies, G.; Monti, G. *European Union law. Text and materials*. Second edition. Cambridge: Cambridge University Press, 2010.
- Charter of Fundamental Rights of the European Union, 7 December 2000. *Official Journal of the European Communities*. 18 December 2000 (2000/C 364/01).
- Civil Code of the Republic of Lithuania, adopted 18 July 2000, in force since July 1, 2001. *Official Gazette*. 2000, No. 74-2262.
- Communication on Action Plan Implementing the Stockholm Programme of 20 April 2010. COM(2010) 171.
- Conclusion of the Legal affairs Committee of the Lithuanian Parliament on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Document No. 13445/07 JUSTCIV 250, 16 January 2008.
- Conclusions de l'Avocat général Nillo Jääskinen présentées le 15 juillet 2010. Affaire C-147/08 Jürgen Römer contre Freie und Hansestadt Hamburg.
- Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal of the European Union*. C 83/47, 30.3.2010.
- Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community. *Official Journal of the European Union*. C 321 E/1. 29.12.2006.
- Costello, C. Metock: Free Movement and "Normal Family Life" in the Union. *Common Market Law Review*. 2009, 46(2).
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- Council Regulation No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III").
- Council Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels-II bis Regulation).
- Dethloff, N. Arguments for unification and harmonization of family law in Europe. In: Boele-Woelki, K. (ed). *Perspectives for the unification and harmonization of family law in Europe*. Antwerp: Intersentia, 2003.
- Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 ("Citizenship Directive").
- E.B. v. France*, App no 43546/02 (ECHR 22 January 2008).
- European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)).
- Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [interactive]. *Official Journal of the European Communities*. C 221/27 [accessed 05-05-2011]. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:221:0027:0064:EN:PDF>>.
- Featherstone: Government will look at next steps for same-sex marriage [interactive]. Press release of Liberal Democrats, Thu, 17 Feb 2011 [accessed 11-05-2011]. <<http://www.libdems.org.uk>>.
- Green Paper. Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records. Brussels, 14.12.2010. COM(2010) 747 final.
- J. M. v. The United Kingdom*, App no 37060/06 (ECHR 28 September 2010).

- Law on ratification of the Lisbon treaty of the Republic of Lithuania. *Official Gazette*. 2008, No. 56-2123.
- Le Conseil Constitutionnel. Décision n° 2010-92 QPC du 28 janvier 2011. *Journal officiel* du 29 janvier 2011.
- Legal Jungle: same-sex families trapped between EU countries [interactive]. Press release 16 May 2011 of ILGA Europe [accessed 17-05-2011]. <http://www.ilga-europe.org/home/news/latest_news/legal_jungle>.
- Leible, S.; Lehmann, M. *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I“)*. RIW, 2008.
- Martiny, D. *Is Unification of Family Law Feasible or even Desirable?* [interactive]. Social Science Research Network [accessed 20-05-2010]. <<http://ssrn.com/abstract=1612157>>.
- Mizaras, V. Tarptautinės privatinės teisės vienodinimo Europos Sąjungoje rezultatai: Reglamentai Roma I ir Roma II [The results of private international law in the EU: Regulations Rome I and Rome II]. *Justitia*. 2008, 4(70).
- Nekrošius, V. *Europos Sąjungos civilinio proceso teisė*. Pirma dalis [European Union civil procedure law. Volume one]. Vilnius: Justitia, 2009.
- Parliamentary question by Member of the European Parliament, Oreste Rossi [interactive]. The answer given by V. Reding on behalf of the Commission. 1 December 2010 [accessed 11-05-2011]. <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-7422&language=EN>>.
- Plender, R. *European Private International Law of Obligations*. 3rd edition. Sweet & Maxwell, 2009.
- Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000) [interactive]. [accessed 05-05-2011]. <http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_en.pdf>.
- Principles of European Family Law Regarding Parental Responsibilities, drafted by the Commission on European Family Law (2007).
- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. Brussels, 16.3.2011. COM(2011) 126 final.
- Regulation (EC) No 593/2008 of the European Parliament and of the Council No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (“Rome I”).
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II regulation).
- Salgueiro da Silva Mouta v. Portugal*, App no 33290/96 (ECHR 21 December 1999).
- Schalk and Kopf v. Austria*, App no 30141/04 (ECHR 24 June 2010).
- Stockholm Programme — An open and secure Europe serving and protecting citizens. 2010/C 115/01.
- Subsidiarity and proportionality check on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final.
- Subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final.
- Swennen, F. Atypical families in EU (private international) family law. In: Meeusen, J.; Pertegas, M.; Straetmans, G.; Swennen, F. (eds). *International family law for the European Union*. Intersentia, 2007.

VALSTYBĖSE NARĖSE SUDARYTŲ TOS PAČIOS LYTIES ASMENŲ SANTUOKŲ PRIPAŽINIMO PROBLEMATIKA, ATSIŽVELGIANT Į ES TEISINĮ REGLAMENTAVIMĄ

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Santrauka. „Santuokos“ sąvoka pastarąjį dešimtmetį gerokai prasiplėtė ir šiuo metu penkiose Europos Sąjungos (ES) valstybėse narėse (Nyderlandai, Belgija, Ispanija, Švedija, Portugalija) ją gali sudaryti tos pačios lyties asmenys. Kadangi skirtinga šios sąvokos samprata valstybėse narėse sukelia daug teisinių problemų, ES ieško būdų jas išspręsti. Pabrėžtina, kad įsigaliojus Lisabonos sutarčiai, ES kompetencija imtis priemonių tarptautinės privatinės teisės srityje buvo praplėsta, nors, kiek tai susiję su šeimos teise, taikomas balsų vieningumo reikalavimas.

Šiame straipsnyje nagrinėjama tos pačios lyties santuokų reguliavimo ES teisėje problematika. Pirmoje dalyje autorė nagrinėja, ar tos pačios lyties santuokai būtų taikomi atitinkami ES reglamentai dėl jurisdikcijos, taikytinos teisės ir pripažinimo. Toliau nagrinėjama, ar tos pačios lyties asmenų santuokos nepripažinimas Lietuvoje galėtų pažeisti nediskriminavimo principą, nagrinėjama ESTT praktika. Trečioji dalis skirta analizei ES pilietybės atžvilgiu, siekiant nustatyti, ar nepripažinimas nepažeistų asmenų judėjimo laisvės. Galiausiai, paskutinėje dalyje autorė nagrinėja Europos Komisijos pasiūlymus dėl civilinio statuso dokumentų judėjimo ir įvertina ES kompetenciją harmonizuoti ir (ar) unifikuoti valstybių narių teisės nuostatas.

Straipsnyje pateikiama nuomonė, kad Tarybos reglamentas (EB) Nr. 2201/2003 dėl jurisdikcijos ir teismo sprendimų, susijusių su santuoka ir tėvų pareigomis, pripažinimo bei vykdymo, panaikinantį Reglamentą (EB) Nr. 1347/2000 (Briuselis II bis reglamentas) turėtų būti taikomas ir tos pačios lyties sutuoktiniams. Reglamente vartojama neutrali terminologija; jis priimtas tuo metu, kai tos pačios lyties santuoka ES jau buvo galima (Nyderlanduose); iki šiol Reglamente nėra forum necessitatis nuostatos, ir teigiama, kad net ir musulmoniškos santuokos galėtų patekti į šio Reglamento taikymo sritį, jei pagal *lex loci celebrationis* jos būtų teisėtos. Be to, priešingu atveju santykis būtų kontraktualizuotas, o tai prieštarautų naujausiai Europos Žmogaus Teisių Teismo praktikai, pagal kurią tos pačios lyties asmenys gali užmegzti šeiminius santykius, o 12 straipsnis (teisė į santuoką) nebėra taikomas išimtinai tik skirtingų lyčių sutuoktiniams. Panašus argumentavimas galioja ne tik jurisdikcijai, bet ir taikytinos teisės nustatymui.

Straipsnyje analizuojama Europos Sąjungos Teisingumo Teismo (ESTT) praktika, tiesiogiai susijusi su nediskriminavimu dėl seksualinės orientacijos, ar netiesiogiai pritaikytina aptariamai problematikai: *Maruko v. VdB*, *Jürgen Römer v. City of Hamburg*, *Metock*, *Zambrano* ir kt. Remiantis šiomis bylomis, argumentuojama, kad tos pačios lyties asmenų santuokos, sudarytos ES, turėtų būti pripažįstamos visose valstybėse narėse, nesudarant galimybės atvirkštinei diskriminacijai ar pakeičiant santuokos statusą (pvz., prilyginant jį partnerystei).

Galiausiai straipsnyje aptariami numatyti teisinio reglamentavimo pasiūlymai dėl civilinio statuso dokumentų laisvo judėjimo Europos Sąjungoje. Europos Komisija pabaigė viešųjų konsultacijų etapą ir teisės akto pasiūlymą planuojama pateikti 2013 m. Siūlomi keli variantai, kaip automatiškas pripažinimas ir kolizinių normų suderinimas ES lygmeniu. Siūlytina nustatyti, kad santuokos liudijimai turėtų būti automatiškai pripažinti visose ES narėse, netaikant papildomų formalumų, ir vadovaujantis abipusio pasitikėjimo principu. Kolizinių normų harmonizavimo pasiūlymas kritikuotinas kaip mažiausiai efektyvi priemonė, kurios gali imtis ES. Situacijose, kuriose neįmanoma pasiekti automatiško pripažinimo, kolizinės normos turėtų būti unifikuotos. ES palaiapsniui įgauna kompetenciją patvirtinti tokias priemones, kurios efektyviai užkirstų kelią ES piliečiams pasinaudoti savo teisėmis dėl šiuo metu egzistuojančių teisinių spragų.

Reikšminiai žodžiai: tarptautinė privatinė teisė, tos pačios lyties asmenų santuoka, laisvas asmenų judėjimas, ES pilietybė, civilinio statuso dokumentai, ES kompetencija.

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