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What Do You Do When They Don't Say "I Do"? Cross-Border Regulation for Alternative Spousal Relationships

Sharon Shakargy

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What Do You Do When They Don't Say "I Do"? Cross-Border Regulation for Alternative Spousal Relationships

Sharon Shakargy*

ABSTRACT

Marriage is a local arrangement with international effects. Throughout the Western world, a marriage recognized as valid by the parties' home country is usually considered valid and binding in any other country. This recognition carries substantial benefits. In sharp contrast, unwed couples and some married couples, namely same-sex couples, are denied these benefits due to lack of (sufficient) inter-state and international recognition of their relationships, making their relationships unstable at best. This Article discusses the cross-border recognition of such relationships—or lack thereof—and its effects, and it suggests a way to better the situation using private law tools, thus avoiding much of the public debate on the matter.

TABLE OF CONTENTS

I.	INTRODUCTION.....	428
II.	ASRS AND THEIR IMPORTANCE	430
A.	<i>Defining ASRs: Some Alternatives for the Regulation of ASRs</i>	430
	1. "Marriage, But"	431
	2. "Marriage Like"	433
	3. "Marriage Alternative"	434
B.	<i>The Theoretical Relevance of Alternative Spousal Relationships</i>	436

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	C.	<i>The Practical Relevance of Alternative Spousal Relationships</i>	437
III.		THE PROBLEM OF ALTERNATIVE SPOUSAL RELATIONSHIPS ON THE MOVE	438
	A.	<i>What is on the Move?</i>	439
		1. Status	439
		2. Durability	441
		3. Property-Related (and Other) Rights	442
		4. Public Rights	443
	B.	<i>Cross-Border Protection of Marriage</i>	445
	C.	<i>Cross-Border Protection of ASRs</i>	445
		1. The Limited Mobility of Some ASRs: Existing Solutions	446
IV.		SUGGESTED SOLUTION	449
	A.	<i>ASRs Choice of Law Challenges</i>	449
		1. "Translation"	449
		2. Characterization	450
	B.	<i>Applicable Law of an ASR: Which is the Proper Law of That Contract?</i>	454
		1. In Cases Where there is an Actual Contract	454
		2. In Cases Where the Contract is Only Implied (at Best)	457
	C.	<i>Is Public Policy an Inevitable Barrier?</i>	458
V.		APPLICATION: THE SUGGESTED SOLUTION MEETS LOCAL POLICIES	461
	A.	<i>Countries Supporting or Not Objecting to ASRs</i>	461
	B.	<i>Countries Objecting to Particular ASRs or Aspects Thereof</i>	463
		1. Case-Specific Objections	463
		2. Group-Based Objections	466
VI.		CONCLUSION	468

I. INTRODUCTION

Imagine case 1: Odysseus married Penelope in their homeland Greece, in a marriage valid under Greek law. Later, they moved to Troy. According to the norm embodied in the conflict of laws rules regarding marriage, Troy would recognize the validity of this marriage regardless of the terms of marriage in Trojan law. That is because the ceremony is valid according to the law of the country where it was performed, and the parties are considered to have marital capacity according to the law of their home country. The choice of law rules regarding this issue, though structured for the

most part by each country independently, are similar throughout the world. Each states the same basic norm that when a couple that is eligible to marry marries in a ceremony valid in the country where the marriage is preformed, other countries should recognize this marriage as valid.¹ This would be the case even if the marriage was performed in a manner unacceptable in Trojan law or between parties unfit to marry according to that law, out of respect for Greece's autonomy and control over its people. So, wherever Odysseus may go, his marriage to Penelope remains valid.

Now imagine a few alternative stories: Max and Helena are registered as civil partners in the Netherlands. They move to Germany in order to take care of Max's sick mother. While in Germany they break up. Helena attempts to formally resolve their relationship only to find out that under German law civil partnerships are only available to same-sex couples, thus their relationship is not recognized, leaving Max free to go without any formal closure. Similarly, Arthur and Oliver, registered as civil partners in England, follow their dream and move to Greece. While in Greece, their relationship deteriorates to the point that Arthur moves out, taking all the money from the joint bank account and moving it to his own Greek bank account, leaving Oliver stranded. Oliver sues, asking that the bank be ordered to freeze the money based on it being "marital" property only to find out that their relationship, formal and valid in England, would not be recognized in Greece, which bars same-sex couples from entering civil partnerships. Lastly, Sean and Fiona are cohabiting under Irish law. While en route to vacation in New Zealand their airplane crashes in Austria. They both survive, but Fiona is badly injured. Sean tries to inform the doctors of Fiona's medical care preferences but is told that under Austrian law he is considered a stranger, as that law does not recognize their relationship, and the doctors would be deciding for Fiona until someone in her immediate family could be reached.

In all those cases, the country of destination would, at best, re-evaluate the relationship and any rights derived from it according to its domestic law. All these couples would be unable to enjoy the legal consequences of their relationships that are given to them according to the law of their country of origin. In some such cases, spouses may be fully relieved of their spousal duties and stripped of their rights by crossing a border, even though their personal law remain unchanged.

The difference between the cross-border regulation of marriages and alternative spousal relationships (ASRs) is a result of the fact

1. Except for the United States, where it is generally enough that the marriage was valid by the law having "the most significant relationship to the spouses and the marriage" or that of the place where it was performed, the law of the parties' home country is not consulted. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) [hereinafter RESTATEMENT].

that there are not—and never have been—any systematic conflicts rules regarding ASRs. Such relationships were previously unknown to law or banned by it. Now common and allowed (for the most part), those relationships remain unregulated on the international level. Many countries simply do not have any rules regarding the treatment of such relationships. Those that do, offer insufficient solutions, particularly due to the massive diversity of ASRs. This Article aims to better this situation by suggesting an appropriate cross-border regulation mechanism for such relationships in the Western world.²

This Article starts with defining ASRs and their importance. Part II of this Article sets the context of the discussion by describing three categories of ASRs, namely “marriage, but,” “marriage like,” and “marriage alternative.” The part discusses the social importance of ASRs, which justifies an effort for bettering the legal protection given to these relationships. Part III of this Article stresses the problem of ASRs in transition. It discusses the different aspects of ASRs and their current cross-border protection. This part further demonstrates the conceptual and practical problem by comparing ASRs to the paradigmatic spousal relationship, marriage, and the status-based thinking guiding its cross-border regulation. It explains why a status-solution would not be appropriate for ASRs. This Article then moves to suggesting a solution. Part IV lays out the challenges of ASR choice of law, suggesting contractual thinking as an appropriate solution for the problem. Lastly, in Part V this solution is applied to different cases of ASRs and to states with different approaches as a way to explore the scope of the proposed solution.

II. ASRS AND THEIR IMPORTANCE

A. *Defining ASRs: Some Alternatives for the Regulation of ASRs*

The twentieth century has brought with it many changes in the way families are regulated: the concept of family has gained flexibility, containing structures once excluded, such as cohabiting unwed couples and same-sex couples.³ Legal systems have tried to

2. While non-Western countries are not directly discussed here, they are not left out of the discussion completely. Some such countries show some lenience towards ASRs and so may be willing to consider the suggested solution. Others manifestly oppose such relationships, so they would have a valid public policy objection.

3. For a comprehensive discussion of these changes, see Masha Antokolskaia, *Comparative Family Law: Moving with the Times?*, in *COMPARATIVE LAW: A HANDBOOK* 241, 241–47, 253–56 (Esin Örucü & David Nelken eds., 2007) [hereinafter Antokolskaia, *Moving With Time*]; MASHA ANTOKOLSKAIA, *HARMONISATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE* 273–312 (2006) (Eur. Family Law Ser. No. 13, 2006). For a discussion on the theoretical underpinnings of these changes, see *id.* at 261–72.

address this situation by creating all sorts of regulating structures for such relationships.⁴ These structures, though created by different legal systems, each addressing its own legal issues and social needs, can all be loosely clustered into groups. For the purposes of the discussion in this Article, it is suggested to think of these relationships as each belonging to one of three general types. The first, "marriage, but," refers mainly⁵ to same-sex couples getting legally and formally married in the same manner and procedure as heterosexual couples but producing a different outcome when it comes to mobility, as the following discussion will demonstrate. The second type, "marriage-like," refers to spouses regulating their affairs through a formal legal procedure resulting in relationships similar, but not identical, to marriage, both in name and in outcomes. The third type could be described as a "marriage alternative." This type of relationship, though legally binding and sometimes entailing outcomes very similar to those of marriage, lacks the clear formal procedure for creation and dissolution that the other types have. Spouses in such relationships sometimes actively and knowingly (if not intentionally) avoid the formalities of marriage and marriage-like relationships. To better explain the different mechanisms, examples are in order.

1. "Marriage, But"

The best known "marriage, but" arrangement is that of same-sex marriage in the United States. Some states in the United States allow couples of the same sex to marry, considering the access to marriage a matter of civil rights and its denial problematic on the grounds of equality.⁶ Other states strongly oppose such marriages, considering them an abomination both to God and to the concept of marriage.⁷ These marriages, when contracted in a state allowing them, are created in the same manner as all other marriages in the

4. For a comparative survey, see generally LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenæs eds., 2001); LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES (Katharina Boele-Woelki & Angelika Fuchs eds., Eur. Family Law Ser. No. 32, 2d ed. 2012); Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949 (2007-2008).

5. Polygamy may also be included in this group, though modern approaches are much more accepting towards it. See *infra* note 125.

6. See, e.g., Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC'Y 145, 172-84 (2009) (discussing the constitutional arguments underlying the recognition of same-sex marriages).

7. For a detailed presentation of such arguments, see, for example, Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 184-208 (2000).

state and are considered as valid as any other marriage. The Federal legislation has its own stand on the recognition of marriage, both as a legislator and as a coordinating mechanism between the states. Until recently, the Federal Defense of Marriage Act (DOMA)⁸ stated that as far as the Federal government is concerned, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”⁹ So, marriage was not always simply marriage: some marriages entered into according to state legislation and valid in that state would not receive the Federal recognition and benefits given to other marriages, solely on the grounds of the parties’ sex. This clause was recently invalidated by the U.S. Supreme Court ruling in the case of Ms. Windsor,¹⁰ which stated that this clause undermines same-sex marriages by deeming them unworthy of recognition and placing them “in an unstable position of being in a second-tier marriage.”¹¹

However, DOMA has a second part, still valid to this day:

No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . ., or a right or claim arising from such relationship.¹²

According to the Full Faith and Credit Clause of the U.S. Constitution,¹³ U.S. states are expected to mutually recognize each other’s public acts, records, and judicial proceedings. Some argue that this clause requires that when a state is confronted with a finalized legal action of another state, such as a valid marriage certificate, the first state should recognize¹⁴ the action regardless of its own position on the question.¹⁵ However, it appears that recognition of marriages was never truly part of the clause.¹⁶ In any event, the part of DOMA

8. Defense of Marriage Act (DOMA), 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012)).

9. 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

10. *See generally Windsor*, 133 S. Ct. 2675.

11. *Id.* at 2694.

12. 28 U.S.C. § 1738C (2014).

13. U.S. CONST. art. IV, § 1.

14. Though it may be exempt from enforcement of a foreign action that contradicts its public policy. *See* Elisabeth Redpath, Comment, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L.J. 639, 652–55 (2013) (describing situations in which public policy may allow states to escape the Full Faith and Credit Clause).

15. The language of the clause refers to “public acts, records, and judicial proceedings.” The public debate and some legal discussions include marriage in this list. *See* U.S. CONST. art. IV, § 1.

16. As Lea Brilmayer said, marriage is like a license, and “[a] license is just different. . . . It is not the sort of thing that is covered by the Full Faith and Credit Clause.” *Judicial Activism vs. Democracy: What are the National Implications of the*

quoted above, which is still good law (in the sense of validity), clearly excludes same-sex marriages from the Clause. Thus, states are allowed not to recognize marriages legally solemnized in other states based on the parties' sexual identities, regardless of the actual validity of the marriage according to the marital choice of law rules. So while same-sex marriages are now, following the court's decision in the Windsor case, equal to heterosexual marriages within states allowing such marriages, even when it comes to federal-law rights, they are still not really considered marriages in the interstate sphere. They are ineligible for the protection given to heterosexual marriages, and they are susceptible to questioning and reexamination. This questioning of parties' otherwise legally valid actions and clearly manifested intentions (their "*I do*") essentially replaces their marriages with a second-class, questionable relationship, in which the parties are "married, but"

2. "Marriage Like"

"Marriage like" arrangements started out as an intermediate solution for couples legally barred from marriage who sought a way to formalize their relationship, namely same-sex couples.¹⁷ These

Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Sub Comm. on the Constitution, Civil Rights, & Property Rights of the S. Comm. on the Judiciary, 108th Cong. 22–23 (2004) (statement of Professor Lea Brilmayer, Yale University School of Law), available at <http://www.access.gpo.gov/congress/senate/pdf/108hr/96924.pdf> [<http://perma.cc/W7JX-2CDH>] (archived Jan. 19, 2015). Furthermore, she argued, "[i]n fact, the Full Faith and Credit Clause has never . . . been read to force one State to recognize a marriage entered into in another State that was contrary to the local policies of the State where the marriage was thought to be enforced." *Id.* at 22; see also BRIAN H. BIX, *THE OXFORD INTRODUCTIONS TO U.S. LAW: FAMILY LAW* 47 (Dennis Patterson ed., 2013) (discussing the perceived redundancy of DOMA given that states were not constitutionally required to recognize marriages in other states under the Full Faith and Credit Clause); ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATES LINES* 114–36 (2006) [hereinafter KOPPELMAN, *DIFFERENT STATES*] (outlining the complexities of DOMA's effect on the recognition of judgments by states that do recognize same-sex marriages, and discussing DOMA's potential unconstitutionality); Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 355–57 (2005) ("There is convincing historical research showing that the Clause and its implementing statute were meant to realize the 'evidentiary' view that common law courts took towards the judgments and laws of other states." (footnote omitted)).

17. See, e.g., Antololskaia, *Moving With Time*, *supra* note 3, at 254–56 (describing the development of legislation regulating unmarried cohabitation); Ingrid Lund-Andersen, *The Nordic Countries: Same Direction – Different Speeds*, in *LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE*, *supra* note 4, at 3, 4–5 (noting that registered partnerships provided essentially the same legal effects to same-sex couples as a marriage provided to heterosexual couples). See generally Frederik Swennen & Sven Eggermont, *Same-Sex Couples in Central Europe: Hop, Step and Jump*, in *LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE*, *supra* note 4, at 19 (comparing the legal recognition offered to registered partnerships and marriages in nine European countries).

couples were offered alternatives such as civil unions, registered partnerships, and domestic partnerships. Though these arrangements all are tools of the same nature and with similar ends in mind, they are so diverse “that there are no two identical schemes” for such relationships.¹⁸ “Marriage like” relationships range from those which are very similar to marriage to those which offer very mild versions of marital commitment and outcomes. Some relationships grant only inter-spousal rights, while others also create some rights against the state;¹⁹ some create a familial relationship while others do not;²⁰ some have rigid capacity requirements while others are more lenient.²¹

Regardless of the exact terms of the relationship, on the cross-border level they are all equally vulnerable. They are not eligible for the application of choice of law rules for marriage, nor are they *systematically* regulated by any cross-border stabilizing mechanism, though some countries (namely many European ones) have specific mechanisms regulating them.²²

3. “Marriage Alternative”

While the “marriage, but” and “marriage like” arrangement are aimed—to a large extent—to simulate marriage, the “marriage alternative” arrangements sometimes serve as a conceptual substitute for marriage. The common denominator in all these relationships is the lack of formal ex-ante regulation by the state through a designated familial legal tool. Aside from that, the diversity in arrangements under this category is enormous: some arrangements are formal and others are informal, some arrangements are opted into while others are opted out of, some grant marriage-like rights in a flexible framework while some create a more durable relationship with more limited rights.

One such relationship is the Israeli Reputed Couples (*Yedu'im baTzibur*), which is a de facto relationship between people of the

18. See Boele-Woelki, *supra* note 4, at 1962. For the variety in the United States, see, for example, BIX, *supra* note 16, at 54–55.

19. For example, Danish civil partnerships are almost identical to marriage in the benefits it grants. On the other hand, the Swiss Partnerschaftsgesetz does not bestow tax or social security benefits.

20. See Swennen & Eggermont, *supra* note 17, at 27–29, 34–35 (outlining the familial rights and responsibilities of legally recognized registered partnerships in nine European countries).

21. See *id.*

22. Some countries apply the law of the place of registration, some apply marital conflicts rules, and others apply their domestic laws. None suggests proper theoretical foundation. For a comparison of such mechanisms, see Patrick Wautelet, *Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe – Divided We Stand?*, in LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, *supra* note 4, at 143, 153–58, 166–75.

same or opposite sex²³ who have been in a spousal relationship (though not necessarily a sexual one²⁴) for a certain amount of time.²⁵ Such relationships can be created unintentionally, with the parties embracing, accepting, or refraining from resisting the outcomes bestowed upon them by law. Once the parties are a reputed couple, their legal rights and duties are very similar to those of married people, both toward each other and vis-à-vis third parties and the state. It is only if they actively resist these outcomes that they are relieved of them. Such unintentional relationships (i.e., cases where it is the state that “tells” the parties they have a binding relationship because of its duration or its characteristics—such as cohabitation or the existence of a child)²⁶ exist in other countries as well.²⁷ In some of them, even active resistance of the parties to the legal relationship, expressed by contracting around it in a way showing their intent not to be in a binding relationship, cannot relieve the parties of the legal implication of the relationship.²⁸

23. See Shahar Lifshitz, *The External Rights of Cohabiting Couples in Israel*, 37 ISR. L. REV. 346, 385–89, 420 n.7 (2003) [hereinafter Lifshitz, *External Rights*]; Zvi Triger, *Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 ISR. STUD. REV. 1, 8–9 (2012).

24. CA 79/83 Attorney General v. Shukrun 39(2) PD 690 [1985] (Isr.); see also CA 4385/91 Salem v. Carmi 51(1) PD 337 [1997] (Isr.).

25. There is no clear definition of the amount (some argue that this is intentional). See Lifshitz, *External Rights*, *supra* note 23, at 387 (“Courts have adopted flexible criteria, which make it easier for couples to be considered as cohabitating couples. . . . such as setting a minimum period of time for the couple to have been living together . . .”). However, in *Amir v. Zager*, the court has found that a period of mere three months was enough to see the parties as a reputed couple. CC (TA) 3696/90 Amir v. Zager, PM 16(9) (1991) (Isr.).

26. See Rebecca Bailey-Harris, *Same-Sex Partnerships in English Family Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 4, at 605, 607 (describing three approaches for legal regulation of relationships including one approach in which a relationship becomes subject to legal regulation once certain statutorily defined requirements are met).

27. *E.g.*, *Family Law Act 1975* (Cth) s 4AA (Austl.) (laying out a system for de facto relationships in Australia where property rights are granted in all Australian states based on local legislations); Boele-Woelki, *supra* note 4, at 1959 (mentioning Portugal as a country where de facto unions are recognized for both same-sex and opposite-sex couples). For examples of common law marriages recognized in Canada, see, for example, *Family Law Act*, R.S.O. 1990, c. F.3 s. 29 (Can.). See generally Claire L’Heureux-Dubé, *Same-Sex Partnerships in Canada*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 4, at 211–13. For examples in the United States, see, for example, UTAH CODE ANN. § 30-1-4.5 (West 2014); BIX, *supra* note 16, at 33–35 (discussing common law marriages in the United States); *id.* at 51–53 (discussing long-term cohabitation).

28. For example, in Israel, parties that intended not to subject themselves to the commune property regime of reputed couples were still subjected to it if the court found they actually manifested a commune lifestyle. CA 4385/91 Salem v. Carmi 51(1) PD 337 [1997] (Isr.) (stating that parties were subjected to the commune property regime despite the fact they have repetitively discussed formalizing their relationship and decided not to do so); see also CA 52/80 Shachar v. Friedman 38(1) PD 443 [1984] (Isr.) (declaring an apartment commune property even though it was registered to the

Alongside these relationships, “marriage alternative” relationships may also be actively created by parties through more general, extra-familial tools, namely: contracts that regulate the parties’ duties and entitlements, cooping, or improvising marital and other rights into private regulation.

“Marriage alternative” relationships pose an even greater problem than that posed by the other two types of ASR. They do not qualify for application of the choice of law rules for marriage, the relationships are highly diverse, and many of them are *de facto*. They are not formally concluded through a ceremony or even a contract, though they may nonetheless require an actual legal dissolution (at least with regard to division of assets, etc.). It is therefore more complicated to know for sure whether such a relationship exists. It is also unclear whether such a semi-formal (at best) relationship is aimed at the state, let alone other states.

B. *The Theoretical Relevance of Alternative Spousal Relationships*

ASRs have flourished during the past few decades, allowing a variety of relationships—different in the level of commitment, in the rights granted through the relationship, and the sexual orientation of the spouses—to form publicly accepted and at least somewhat recognized relationships, which nonetheless fall short of the full recognition of marriage.²⁹ These relationships, originally thought of as temporary solutions,³⁰ are now expected by some to disappear: marriage is becoming increasingly flexible and allowing couples to shape their relationships more freely, marriage impediments have almost ceased to exist, and same-sex marriages are on the rise,³¹ so one might think there is no longer a need for ASRs.

However, ASRs are a valuable tool that the law had better not give up just yet. ASRs do not carry the historical and religious burden carried by marriage, which makes ASRs a valuable laboratory for spousal experiments. They allow reconsideration and re-evaluation of the imbedded preconceptions, practices, and expectations of spousal relationships, which are manifested in the marital arrangement. Other than existing as an alternative to marriage and possibly

name of one spouse only in the deliberate intention to avoid creating commune property and sharing it with the other spouse).

29. See, e.g., Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 209, 267–82 (2012) (referring to these relationships as “marriage light”).

30. This is particularly true in the same-sex context. See *infra* note 36.

31. For the change in marriage, see the sources cited *supra* note 3; same sex marriages were first legalized by the Netherlands in 2001 and have been spreading out ever since. Over the last year alone same sex marriages were legalized in five new countries (Brazil, England and Wales, France, New Zealand, and Uruguay) and many U.S. states.

supporting its stability and even development,³² ASRs also allow parties to opt out of marriage deliberately. They further allow for manifestation of the parties' preferences³³ and conveyance of messages regarding the nature of the relationship, both to their spouse and to society as a whole.³⁴

C. *The Practical Relevance of Alternative Spousal Relationships*

ASRs are of importance not only to individuals seeking to shape their lives together but also to policy-makers—regardless of their political or moral views. When considering the history of ASRs in different parts of the world, it is evident that these relationships now serve both conservatives and liberals in shaping family law. While conservative legislators use these relationships as means to bar

32. ASRs can support the stability of marriage by catering to those left out of marriage, allowing more limiting forms of marriage, creating a legal market, allowing private parties experiment, and allowing evaluation of changes before introducing them into marriage. See ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 161–75 (2009).

33. This is well demonstrated by the fact that some couples still opt for ASRs when they can marry. It is also seen in times of transition: when same-sex marriage was introduced to Norwegian law, some couples chose not to convert their relationship, showing a preference for the ASR over marriage. See Lund-Andersen, *supra* note 17, at 10. For the advantages of ASRs as a tool for choice and accurate relationships see, for example, Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS*, *supra* note 4, at 97, 100–04; Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 *TUL. L. REV.* 257, 307–11 (2013) (proposing “a singular [relationship] status with different levels” that incorporates varying degrees of commitment). For the use of ASRs as a tool for expression and signaling, see Lifshitz, *External Rights*, *supra* note 23, at 368; see also BIX, *supra* note 16, at 50; Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends—and Vice Versa*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1099, 1115 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (listing some of the benefits of “unmarried cohabitation”); Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 *WASH. & LEE L. REV.* 1565, 1594–95 (2009) [hereinafter Lifshitz, *Married Against Their Will*]; Titshaw, *supra* note 29, at 286–301 (discussing the advantages of alternative marriage options). For a critical viewpoint on ASRs as freedom, see JONATHAN HERRING, *FAMILY LAW: A VERY SHORT INTRODUCTION* 22–25 (2014) (discussing some disadvantages to ASRs and noting that ASRs sometimes mislead parties); HEATHER BROOK, *CONJUGAL RITES: MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS BEFORE THE LAW* 156–75 (2007) (arguing, based on feminist thinking, that these relationships in fact mimic marriage, and thus do not offer real freedoms and alternatives).

34. See Michael J. Trebilcock, *Marriage as a Signal*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 245, 249–54 (F. H. Buckley ed., 1999); William Bishop, *Is He Married?: Marriage as Information*, 34 *U. TORONTO L.J.* 245, 250–51, 258–59 (1984) (framing the social and economic impacts of labeling a relationship a marriage); Feinberg, *supra* note 33, at 308 (arguing that existing non-marital statuses “carry . . . marriage-related baggage” in places where the non-marital statuses were created “as political compromises to avoid same-sex marriage” (footnote omitted)); Lifshitz, *Married Against Their Will*, *supra* note 33, at 1594–95 (discussing the efficiency of marriage and cohabitation as signals).

certain individuals or couples from marriage while complying with human rights demands, liberal legislators use those very same relationships as means to extend the range of spousal options for all couples, ushering non-traditional relationships into the mainstream. A good example of such dual use of ASRs is the use of ASRs for homosexual couples. A couple of decades ago the marriage of such couples seemed impossible. With time, the growing pressure of this group was addressed by offering ASRs, which in turn normalized these couples in the legal arena. While in some conservative contexts this public recognition of a non-marital relationship was perceived to be an appropriate response to the needs of the homosexual community,³⁵ in liberal contexts this was a vehicle of revolution, making the transition into homosexual marriage a viable option and an ever-expanding reality.³⁶ In both cases, once law acknowledged these relationships, it created a new version of a spousal relationship that was appealing to both homosexual and heterosexual couples interested in an alternative to the institution of marriage.³⁷ The interest in diversifying spousal relationships suggests that ASRs are not merely a temporary tool, but a part of the general development of the legal regulation of spousal relationships. It is not only a political step on the way to marriage but also a full-fledged alternative serving a facilitative function for those looking for such arrangements and as such, is here to stay.

III. THE PROBLEM OF ALTERNATIVE SPOUSAL RELATIONSHIPS ON THE MOVE

In order to understand the extent to which the lack of cross-border regulation of ASRs is a problem, the next step is to examine the four factors of which a spousal relationship is composed and see which of them should be protected when crossing borders.

35. See Feinberg, *supra* note 33 at 262–63 (discussing this technique in the United States); Swennen & Eggermont, *supra* note 17, at 25–26 (using nine European countries to demonstrate the rationales for recognition of separate, non-marital relationships).

36. See Swennen & Eggermont, *supra* note 17, at 20–22, 30–33 (describing the evolution of recognition for same-sex marriage from recognition for same-sex partnerships). Indeed many countries had originally satisfied themselves with ASRs as means to regulate same-sex relationships but later decided to allow same-sex marriages. See generally Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 4, at 437 (discussing the history of same-sex marriage in the Netherlands).

37. For example, in Belgium, though same-sex marriages became available in 2003, tens of thousands still choose to enter *cohabitation légale*. See *Cohabitation Légale*, STATISTICS BELGIUM, http://statbel.fgov.be/fr/statistiques/chiffres/population/mariage_divorce_cohabitation/cohabitation/ (last visited Feb. 3, 2015) [<http://perma.cc/85C7-7R2N>] (archived Jan. 19, 2015).

A. What is on the Move?

1. Status

The first component of spousal relationships is commonly referred to as "status." Statuses are legal acts affiliating a person with a special class of people that are bestowed a unique bundle of rights and capacities.³⁸ Not only does the law control the content of that status (the rights and duties, capacities and incapacities), but it also dictates the terms for creating and dissolving it and its exact content, leaving no room for renegotiation or personal expression.³⁹ Status means an entitlement to a formal relation and stand toward society as a whole.⁴⁰ This means that the status would be recognized and respected regardless of state lines. Traditionally, marriage was considered a matter of status.

The cross-border regulation of this matter throughout the Western world is rather straightforward: when it comes to marriages, the common perception of this regulation is that a marriage is considered valid when it is valid according to the country of the parties' origin. To be exact, most western countries have traditionally subjected questions of capacity to each of the parties' national or domiciliary law and questions of form to the law of the place of celebration: a marriage had to comply with the requirements of two legal systems, each addressing a different question, in order to be valid.⁴¹

In traditional thinking, status was one of the core issues of marriage recognition;⁴² however, it may be that when discussing ASRs status is the least important aspect of the relationship. There is a rather wide consensus that marriage has profoundly changed over the past century to the point that it has been privatized to a great extent. As early as 1861, Maine described the transition of legal

38. See T.E. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 142–43 (13th ed. 1924); 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 684 (Robert Campbell ed., 5th ed. 1911); Carleton Kemp Allen, *Status and Capacity*, 46 L. Q. Rev. 277, 281–83, 288–89 (1930).

39. P.J. FITZGERALD, *SALMOND ON JURISPRUDENCE* 240–41 (12th ed. 1966); see Allen, *supra* note 38, at 285–86 ("The capacities and incapacities which are attached to . . . [a status] by law are entirely independent of the individual's choice").

40. R.H. GRAVESON, *STATUS IN THE COMMON LAW* 2 (1953) (asserting that a status and its effects "are a matter of sufficient social or public concern").

41. For a comparative account, see Sharon Shakargy, *Marriage by the State or Married to the State? On Choice of Law in Marriage and Divorce*, 9 J. PRIVATE INT'L L. 499, 516–19 (2013). As noted there, the United States is an exception to that Western norm. See *supra* note 1.

42. One of the main motivations of choice-of-law rules regarding marriage was to avoid the problem of "limping status." See, e.g., Kurt G. Siehr, *Domestic Relations in Europe: European Equivalents to American Evolutions*, 30 AM. J. COMP. L. 37, 56 (1982).

concepts from status to contract.⁴³ In marriage it appears that this transition has come close to a full transformation, starting as a matter closely monitored and regulated in detail by Church or state and ending up as a matter governed almost exclusively by the parties' will.⁴⁴ This privatization has produced a conceptual change in the idea of marriage so that the status aspects of it are limited, if they exist at all, and so their manifestations no longer seem important to the marriage. All the more so when it comes to ASRs that are not founded on the status tradition which marriages are based on and struggling with. ASRs are, *inter alia*, a choice-based relationship because parties can achieve many if not most rights (particularly in the inter-spousal realm) through private agreements without entering the ASR.

Furthermore, ASRs are so diverse that one cannot detect a single sweeping underlining principle in the different arrangements that could be the subject of a cross-border status. ASRs do not create classes of people, granting them unique capacities and rights in a significant amount. These relationships are too diverse to create distinct classes. The common denominator between ASRs, if there is one, is so broad that what rights and capacities it grants are also available to married parties or parties who are not in a formal relationship. People can now agree to share property or support each other financially, and modern law is usually willing to uphold such agreements even if it does not consider the parties to be family members. Children born to couples in an ASR are also equally legitimate as children born to single parents. Therefore, the cluster of rights created by ASRs is not a status one, in the sense that it is not limited to status-bearers.⁴⁵

Though the extent to which an ASR is a matter of status may be debated, the diversity of ASRs which makes them unfit for status-style international regulation is rather clear. Moreover, the attribution of status features to ASRs is the core of the public policy debate surrounding these relationships. Therefore, despite the familial nature of most ASRs and the fact that familial relations are usually protected via status in cross-border situations, it is suggested that the concept of status should not be part of the cross-border

43. See HENRY SUMNER MAINE, *ANCIENT LAW* 168–70 (John Murray ed., 13th ed. 1890).

44. This regulation included the entry and exit to and from marriage, the content of marriage, and marriage being a unique arrangement granting results unattainable without it. For a discussion of this transformation and its effect of choice of law, see Shakargy, *supra* note 41, at 506–22.

45. The only capacity aspect that can be attributed to ASR is that some spousal relationships require that one be free of any prior spousal engagements, including non-marital, in order to be allowed to form a new relationship. In that sense, an existing ASR may be said to limit one's capacity. However, not every difference in capacity is a matter of status, see Allen, *supra* note 38, at 289–90, and the limited effect ASR has on one's capacity does not suffice to make ASRs a matter of status.

regulation of ASRs. This seems to be a correct, principled approach due to the incompatibility of these relationships to the legal (as opposed to social) concept of status. More importantly, this would be the only way for a viable solution that could avoid colliding with the public policy barriers and with the practical difficulties resulting in the diversity of ASRs.

2. Durability

A second aspect that may be in need of protection when discussing spousal relationships is the durability and stability of the relationship, achieved by certain procedures attached to the dissolution of the relationship. A person recognized as married is entitled, alongside other rights and benefits, to various procedural rights, the most important one being that of dissolution. A marriage exists until a formal act of dissolution designated by law has been performed. This right is of both emotional and practical importance. In most legal systems, the right to an orderly dissolution creates an opportunity for the parties to discuss the death of their relationship, to negotiate their rights following its collapse, and to make arrangements regarding life after its end. This also promotes clarity and stability—not of the relationship itself, which may still be very easily dissolved—but of people's self-definition.⁴⁶ It enables the parties to know if and to whom they are connected and committed. Though the details of this procedural right (for example, the exact procedure required for obtaining a divorce)⁴⁷ may change between legal systems, a person may still safely assume that so long as a particular act did not take place,⁴⁸ his/her marital status remains unchanged. Cross-border protection of this procedural requirement as a condition of terminating the relationship is crucial. Without it, the disturbing reality might be that a short ride across the border could eliminate a relationship without either of the parties noticing. Western rules regarding these matters have changed with time, but the basic principle remains. The dissolution of an existing marriage is subjected to a procedure usually governed by a law connected to (at least one of) the parties in way of nationality, domicile, or habitual

46. This self-definition may stretch beyond the parties themselves: as mentioned above, this self-definition has a public, status-like side. Though the clarity of self-definition is not suggested to protect it as a matter of status, it is still worth striving for.

47. The connecting factor changes when, at the time of filing for divorce, the couple has a different citizenship, domicile, or habitual residence than that which it had at the time of the marriage.

48. This action may be a court decision, or it may be one spouse saying, as is the situation in a *Talaq* divorce, or another action such as a spouse's death, which is another way for a marriage to expire. Though suggesting different levels of clarity, in all these cases a pre-determined clear event has taken place.

residence.⁴⁹ Thus, as long as the parties have not created such a connection with the country of destination, the law of that country would normally not influence their procedural entitlements. This is not the case for ASRs that have no enduring legal connections and so may be ignored as soon as the parties cross a border.

3. Property-Related (and Other) Rights

The third aspect of a relationship that is in need of cross-border protection is that of more traditional rights, mainly property rights. Whenever a border is crossed, the risk of changes to rights exists. For example, when one's country of origin and country of destination have different marital or spousal property regimes, one's rights may change when one crosses a border. Though the specifications of the right may change—and those are indeed very important—the basic understanding of the mutual dependence created by the relationship and its relation to property entitlements usually remains. Not only that, but as long as the transition is temporary, the property remains under the same legal regime, that of the parties' personal law.⁵⁰ Only when the parties make a permanent move, thus acquire a new

49. In some cases this law would be applied through jurisdiction: the forum would apply its law, but a court would only have jurisdiction if connected to the parties or one of them by virtue of nationality, domicile, or habitual residence (this is the case in Common Law). In other cases there is a direct choice of law applying forum law when the parties are so connected to the forum (e.g., France) or a mix of the two (e.g. Switzerland). Finally, in some cases the applicable law would be that chosen by the parties, but the parties may only choose a law to which they are connected in that manner (e.g., Germany, Rome III regulation). *See, e.g.*, Rome III Regulation on Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, Council Regulation 1259/2010, art. 5, 2010 O.J. (L 343) (EU) 13, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:en:PDF> [<http://perma.cc/QTP5-KUVX>] (archived Feb. 4, 2015) (providing that spouses may select “the law applicable to divorce and legal separation” as long as the selected law fits within one of four categories); RESTATEMENT, *supra* note 1, § 285 (stating that, generally, courts in the United States apply the law of the domiciliary state); *see also* Shakargy, *supra* note 41, at 516–22 (comparing choice-of-law rules in the United States, England, and the European Union). Some U.S. states are willing to discuss foreign relationships. For example, a New York court assumed jurisdiction to discuss a Vermont civil union. *See* *Dickerson v. Thompson*, 928 N.Y.S.2d 97, 99–101 (N.Y. App. Div. 2011) (finding that New York courts had jurisdiction to dissolve a civil union formed in another state); *see also* BIX, *supra* note 16, at 45 & n.63 (noting *Dickerson* and pointing out that the decision was prior to New York's recognition of same-sex marriage).

50. *See, e.g.*, EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [Introductory Act to the Civil Code], Sept. 21, 1994, BUNDESGESETZBLATT, Teil I [BGBL. I] 898, as amended, arts. 14–15 (Ger.) (giving divorcing couples in Germany a choice as to which law applies); RESTATEMENT, *supra* note 1, § 257 (defining the generally applicable law in the United States as that of the domiciliary state or the law chosen by contract); 2 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 1461, ¶ 28R-001 (Lord Collins of Mapesbury, C.G.J. Morse & David McClean eds., 15th ed. 2012) [hereinafter DICEY (15th ed.)] (indicating that, in Common Law, interests in a spouse's moveable property “are determined by the law of matrimonial domicile”).

personal law (domiciliary or national), might their property rights change.⁵¹ Other money-related rights, such as maintenance, may be regulated differently altogether. However, these issues are addressed by rules, thus the resulting rights are protectable by law. Without applying such protective mechanisms to ASRs, not only do the parties stand to lose substantial monetary rights (possibly even when they only move temporarily), but they are also harmed as their relationship may be found to be lacking in substance and durability.

4. Public Rights

A fourth aspect of relationships calling for protection in cross-border situations is that of public rights. A relationship may entail some benefits such as tax exemptions, a right to afford one's spouse immigration benefits (visa, residency, work permit), or a right to some public immunities such as a right not to testify against a spouse. In some jurisdictions some rights are only afforded to married spouses, while in others they are also available for ASRs. For example, the unmarried spouse of a U.S. citizen would not be eligible for an immigration visa,⁵² while in Denmark she would.⁵³ In other cases, the rights not only differ between various relationships, but in existence. For example, in some countries being considered a spouse

51. Different legal systems treat these changes differently. Some systems apply the law to which the parties have moved to the entire mass of property (full mutability, e.g. Switzerland). Others apply to each item the personal law the parties had at the time of acquisition (partial mutability, e.g. the United States). Lastly, some apply the personal law that the parties had at the time of the marriage to all property acquired consequently, regardless of later changes to the parties' personal law (immutability, e.g. Germany). See HAROLD MARSH, JR., *MARITAL PROPERTY IN CONFLICT OF LAWS* 104–10 (1952) (discussing the leading cases for and rationales for full mutability, partial mutability, and immutability); Robert A. Leflar, *Community Property and Conflict of Laws*, 21 CALIF. L. REV. 221, 236–38 (1933) (discussing the due process concerns of one state confiscating property that was acquired in another state).

52. Unless the spouses declare their intention to marry within ninety days of the spouse's arrival to the United States, in which case they would be issued a fiancé visa. For the general policy, see *Immigrant Visa for a Spouse or Fiancé(e) of a U.S. Citizen*, U.S. DEPT. OF STATE, <http://travel.state.gov/content/visas/english/immigrate/types/family/fiance.html> (last visited Feb. 10, 2015) [<http://perma.cc/SR5Q-WJ83>] (archived Jan. 19, 2015). For the ninety days requirement, see U.S. DEPT OF HOMELAND SEC., *Petition for Alien Fiancé(e) (Form I-129F)*, pt. 4, available at <http://www.uscis.gov/sites/default/files/files/form/i-129f.pdf> (last updated June 13, 2012) [<http://perma.cc/K872-WVH4>] (archived Jan. 19, 2015).

53. See *Spouses and Cohabiting Partners*, NEW TO DENMARK: THE OFFICIAL DANISH PORTAL FOR FOREIGNERS, https://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/spouses.htm (last updated Jan. 5, 2015) [<https://perma.cc/Y3ZV-NAF9>] (archived Jan. 19, 2015) (indicating that both spouses and cohabitating partners "can apply for a residence permit on the grounds of family reunification"). These benefits are dependent of the relationship being recognizable in Denmark.

would allow one to not testify against a spouse (e.g., California⁵⁴) but not in other countries (e.g., Australia⁵⁵).⁵⁶

These public rights are dependent not only on the relationship but also on its acceptance by the destination country. They are not a natural consequence of the interpersonal commitment and are granted by the State, incurring actual monetary or other costs on the public. When countries give such benefits to a couple who have entered foreign marriages, for example, they do so based on their own local laws regarding the benefits of marriage rather than based on what the couple may have had in the law under which the relationship was created. So a Californian spouse sued in Australia cannot expect to enjoy the spousal privileges she had at home, nor can a Danish couple rightly expect to be granted the same visa right in the United States as they had in Denmark.

Public rights may truly make a difference in a couple's life. However, they impose not on the parties in the spousal commitment but on the country hosting the couple and its community. And while a country might find it hard to justify interference in the distribution of assets or capacities between consenting parties, it may very easily explain why it should not be compelled to subject its legal rules (e.g., evidence rules) or monetary policy (e.g., tax benefits) to the wishes of the parties. Though party autonomy is a principle of growing importance, states are still allowed sovereignty over policy decisions (that are not clearly infringing on human rights, etc.).⁵⁷ Therefore, though withholding public rights might in some cases interfere in what constitutes a spousal relationship, this interference is not *prima facie* undue.

This way of thinking of spousal rights may also explain the fact that while interpersonal rights survive the transition, rights relating to the fourth claim mentioned above (rights towards the public or the state) do not. Such rights need to be acquired toward the specific state or community. They are beyond the scope of private

54. See CAL. EVID. CODE § 970 (Deering 2015).

55. See generally *Australian Crime Commission v Stoddart* [2011] HCA 47 (Austl.).

56. For an interesting discussion of this privilege vis-à-vis same-sex spouses (writing from a pre-*Windsor* point of view, therefore no longer describing the situation of married same-sex couples in the United States., but relevant to all other ASR supposes), see generally Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 *FORDHAM L. REV.* 715 (2012).

57. While one might argue that distinguishing between marriage and ASRs or indeed different types of ASRs is a forbidden discrimination which should be out of the legitimate scope of state sovereignty, such an argument is not at all obvious, among other reasons, since at least in some cases of ASR it is the spouses themselves that have chosen to enter an arrangement which is different than marriage.

international law and this Article for that matter, as they are a public matter.⁵⁸

B. *Cross-Border Protection of Marriage*

The cross-border regulation of marriage addresses all three of the central private aspects of a relationship and even the fourth, public, one. The choice of law rules governing marriage ultimately regulate the parties' status, the dissolution procedure to which they are entitled, and their bundle of actual rights both locally and internationally. Further, the cross-border strength of marriage manifested and promoted by the cross-border rules governing it extends even to the fourth claim: countries are willing, having recognized a foreign marriage as valid and binding, to treat it as their own and grant it the public benefits awarded to local marriages. An example of such willingness would be the granting of tax benefits to a couple that have entered a foreign marriage following recognition of the marriage by the forum. This regulation creates a well-rounded, stable, and therefore appealing legal outcome with clear advantages: parties opting into marriage are inoculated against sudden changes and effects of random territorial factors on their relationship. Their mutual rights and duties are clearly stipulated. This clear regulation also allows the shortcomings and limitations of the arrangement to be seen, known, and addressed or made peace with.

C. *Cross-Border Protection of ASRs*

The cross-border situation of ASRs is nothing like that of marriage. ASRs lack the cross-border protection of rights and "status" given to other relationships, as they are not systematic, as explained

58. This is despite the fact that some authors focus on such rights as one of the leading aspects when discussing the need for cross-border regulation of such relationships. See, e.g., Barry Crown, *Civil Partnership in The U.K. – Some International Problems*, 48 N.Y.L. SCH. L. REV. 697, 698–703 (2004) (demonstrating the challenges of acquiring public rights in multi-national, same-sex partnerships and proposing that same-sex couples be permitted to "register a civil partnership overseas"). Public rights, and particularly immigration rights, are the core of this discussion in the EU context, following the Union's commitment to freedom of movement. See generally Boele-Woelki, *supra* note 4, at 1968–70 (discussing recognition mechanisms as the way for Member States to cope with their duty to allow freedom of movement); Justin Borg-Barthet, *The Principled Imperative to Recognise Same-Sex Unions in the EU*, 8 J. PRIVATE INT'L L. 359 (2012) (suggesting ways to better the cross-border regulation of ASRs in the European Union based on the Union's commitment to human rights). For a better framework for addressing this issue, see generally Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421 (2012) (using constitutional arguments to suggest a recognition mechanism that appears to be possible only in federative structures or in international treaties).

above, and are thus difficult to compare with one another.⁵⁹ Some of the current regulations deny parties other benefits as well—monetary rights and durability (and, of course, public rights) are often denied. Though, in some instances, ASRs are local in the sense that they are available only to couples having a strong formal connection to the relevant country,⁶⁰ these relationships still cross borders and need protection.

1. The Limited Mobility of Some ASRs: Existing Solutions

Several legislators have addressed the issue of cross-border regulation for ASRs, either for the sake of the relationship and the parties or for policy reasons. However, these local solutions are in many cases problematic. Often they downgrade the relationship, causing the parties to lose rights already attained elsewhere.⁶¹ In other cases the local mechanism upgrades the relationship, granting the parties more than they initially and intentionally received.⁶² Both upgrading and downgrading are problematic, as the following discussion will show, and are inevitable in a status-oriented world, due to the great diversity of arrangements.

a. Downgrading Mechanisms

Some countries that have addressed the issue of ASRs have done so in a manner that breaks away from traditional “as-is transference” choice of law regimes and downgrades the relationship. The clearest and best-known case is that of same-sex marriages. The substantive validity and cross-border stability of a marriage does not depend on the attitude of the creating state alone.

As mentioned, when a marriage is valid according to the relevant law (personal law for capacity and *lex loci celebrationis* for the ceremony), it is considered valid by most, if not all, Western countries. However, when it comes to same-sex marriages, some states rule that though the marriage would have been considered

59. See Martina Melcher, (*Mutual*) *Recognition of Registered Relationships Via EU Private International Law*, 9 J. PRIVATE INTL. L. 149, 150 (2013) (discussing difficulties arising from disparate ASR laws in Europe).

60. For example, those of Denmark and Finland usually demand at least one party to be habitually residing locally. See Lund-Andersen, *supra* note 17, at 6–7; Maarit Jänterä-Jareborg, *Registered Partnerships in Private International Law: The Scandinavian Approach*, in LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 137, 139, 147 (Katharina Boele-Woelki & Angelika Fuchs eds., Eur. Family Law Ser. No. 1, 2003) (noting that Denmark and Finland both had habitual residence and/or citizenship requirements for members of registered partnerships).

61. See, e.g., Civil Partnership Act, 2004, c. 33, § 213 (U.K.) (allowing the Secretary of State to recognize same-sex marriages as civil partnerships).

62. See, e.g., *Hincks v. Gallardo*, (2013) 113 O.R. 3d 654, ¶¶ 3, 29–37, 53–54, 80–85 (Can. Ont. Sup. Ct. J).

valid under the traditional choice of law rules which those states follow, the marriage will nonetheless not be recognized accordingly. One such ruling is the DOMA legislation, which singles out same-sex marriages, allowing U.S. states to deny recognition to an otherwise valid marriage due to preferences of the recognizing state. DOMA creates an ex-ante constitutional interpretation of laissez-faire, avoiding the regular case-by-case scrutiny commonly known and accepted in private international law (i.e., public policy).⁶³ This arrangement leaves the parties stranded, when it comes to their relationship and rights, and does so intentionally. However, it at least addresses the issue and gives the parties fair warning.

Another way to address the issue was adopted in Swiss legislation. Under that legislation, a same-sex couple married in a country where such a marriage is legal would be recognized in Switzerland as a couple in a civil partnership, rather than as married,⁶⁴ by virtue of a public policy exception to the regular rule applying to cross-border marriages. By recognizing the relationship as a civil partnership the law subjected the relationship to a rights regime and a dissolution procedure the couple might not have been expecting. Unlike DOMA, this mechanism gave the parties a clear and formal alternative rather than leaving them stranded. Nonetheless, it still downgraded the relationship not only by taking away one of its symbolic features (namely, the title "marriage") but also by changing the entitlements attached to it (mainly "public" rights, but sometimes also other rights). This downgrading mechanism, exists in other countries as well,⁶⁵ demonstrating the anomalies caused by the existing thinking of conflicts rules on the matter.⁶⁶

63. See *supra* note 16.

64. See LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ 1987, RS 291, art. 45(3) (Switz.).

65. See, e.g., Dieter Martiny, *Private International Law Aspects of Same-Sex Couples Under German Law*, in LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, *supra* note 4, at 189, 197–98 (describing the downgrading mechanism in Germany). This was the famous arrangement of English law. See Civil Partnership Act, 2004, c. 33, § 213 (U.K.); DICEY (15th ed.), *supra* note 50, at 951, ¶ 17-089 (stating that same-sex marriages were not permitted in England and that foreign same-sex marriages would only be recognized as civil partnerships). This law was canceled only recently following the introduction of same-sex marriages to the law of this country. See Marriage (Same Sex Couples) Act, 2013, c. 33, § 1 (U.K.).

66. The anomaly is further stressed when comparing the recognition situation to the way a transition within a state is made: when countries introduce same-sex marriages to their laws, they do not automatically transform all same sex ASRs to marriages. For an example in Norway, see Lund-Andersen, *supra* note 17, at 10.

b. Upgrading Mechanisms

In some cases, a legislator or judge may wish to help the parties by re-evaluating their relationship not as less than it was but rather as more. Such was the decision of the Ontario Superior Court of Justice in the case of *Hincks v Gallardo*,⁶⁷ which took the opposite approach to that of the U.S. legislation. While the U.S. legislation would have downgraded a Canadian same-sex marriage to be a civil partnership in some U.S. states, the judges in the *Hincks* case deemed an English civil partnership entered into by a Canadian couple to be a marriage in Canada, though the parties could have married in Canada and chose not to do so. Thus, the court upgraded the relationship, going beyond the parties' expectations and their intention to enter a non-marital relationship. The court subjected the parties, in a sense, to a different type of commitment with a weight of historical, religious, and cultural significance. Such outcomes undermine the parties' wishes and interfere with their expectations.

c. Unforeseeable "Mechanisms"

Despite their problems, both cases mentioned above have the advantage of clarity: they both permit parties to know in advance how a court in their country of destination would treat their relationship. In cases where the recognizing country has no formal recognition mechanism or a publicly declared position on the matter, the standing of the parties' relationship would depend upon an ad hoc decision by the court asked to recognize the relationship. In the absence of choice of law rules, the court would apply the law of the forum, so the outcome would depend heavily on whether or not the relationship entered into by the parties adds up—in substance and form—to a relationship known and regulated by local law. If it does not, the court would most probably either deem the relationship non-existent in the forum, or it would try to deduce some rights from the relationship based on general principles such as good faith and vested rights. This, of course, makes such cases highly susceptible to forum shopping and other distortions. Furthermore, so long as there is no precedent regarding the public policy of the forum, the court is free to

67. See *Hincks*, 113 O.R. 3d 654, ¶¶ 3, 29–37, 53–54, 80–85 (“The parties could not have married in the U.K. because that country does not permit same-sex couples to marry. Canadian law specifically holds that only equal access to marriage for civil purposes would respect same-sex couples’ right to equality without discrimination. Failing to recognize the U.K. civil partnership as a marriage would perpetuate impermissible discrimination.”). For further discussion, see Sandro Wiggerich, *Civil Partnership as Marriage: The Recognition of Foreign Same-Sex Unions Under Canadian Law*, 76 INT’L FAM. L. 42 (2014).

make up its own mind on the matter, leaving the parties ever more exposed to the ad hoc decisions and lengthy proceedings.

IV. SUGGESTED SOLUTION

The problem of cross-border ASRs is not limited to the lack of a choice of law rule. ASRs also pose some interesting conflicts issues that are more closely connected to the characteristics of these relationships. Therefore, it might be advisable to evaluate ASRs and the challenges they pose before deciding on a choice of law rule for such relationships.

A. ASRs Choice of Law Challenges

1. "Translation"

As mentioned above, ASRs are very diverse. There may be countries that have ASRs with equal or similar terms (e.g., the original relationship is a domestic partnership and the recognizing country has such relationships in its law, with proximate or similar conditions and outcomes). There might be cases where the recognizing country has in its law the same relationship for which recognition is needed, but under its law that relationship has very different outcomes (e.g., the relationship grants marriage-like rights in one country and very limited partnership rights in the other). There also may be countries that do not have the exact relationship for which recognition is sought but have other proximate relationships (e.g., the original relationship is a domestic partnership, and the law of the recognizing country does not have this relationship but does have civil partnerships or cohabitation). All these cases give rise to the question of "translation," that is, how one copies a relationship across borders.⁶⁸ Another issue is that of countries that do not have such a relationship in their law at all on principle or for other reasons.

Unlike marriage, ASRs do not enjoy a universally known and respected "brand names." They lack the long-standing tradition and

68. This translation is similar to, but not the same as, adaptation in that adaptation is mainly focused on bridging and harmonizing different rights regimes when transferring a single legal concept to a different country. See Véronique Allarousse, *A Comparative Approach to the Conflict of Characterization in Private International Law*, 23 CASE W. RES. J. INT'L L. 479, 510-11 (1991) (discussing the theory of adaptation). Translation as defined here, on the other hand, has more to do with the reinterpretation of the legal concept as a whole, which extends beyond the adaptation of rights and includes the characterization of the relationship and the bundle of rights it entails in local terms and fitting it into a system where it is sometimes very different or even unknown.

layers of meaning that marriage has. If ASRs grant any status at all,⁶⁹ that status does not convey a clear and widely respected meaning nor does it have a strong tradition to rely on. Furthermore, it is not clear that parties choose a particular ASR and not another or that they prefer an ASR to marriage, for reasons of status. It is probably more accurate to assume that in most (though not all)⁷⁰ cases, parties choose a particular scheme for the rights and benefits it provides, rather than the “status” it may create. So, it may be argued that the essence of ASRs, particularly in the case of “marriage like” and “marriage alternative” types, is the bundle of rights they provide rather than their title or any symbolic value. In the case of “marriage, but” regimes, the issue may be status, but that status is under public debate and so any attempt to support it through choice of law rules would probably be trumped by public policy arguments. Thus, insisting on addressing it in the conflicts rules regulating ASRs seems pointless.⁷¹ It is therefore suggested that the key feature in need of recognition when discussing ASRs is the rights they bestow, while the exact title of the relationship is less important.

2. Characterization

Characterization of ASRs is necessary in order to determine the way to create cross-border recognition mechanisms for ASRs (meaning, the type of conflicts rule).⁷² The recognition should be

69. Which is questionable, as discussed above, because even marriage is becoming less connected to status conceptualization. Also, these relationships do not create clear groups of people with unique sets of rights and capacities. See generally AUSTIN, *supra* note 38 (providing requirements for the creation of a status for a group of people); HOLLAND, *supra* note 38 (providing requirements for the same); Allen, *supra* note 38 (providing requirements for the same). Finally, some ASRs, such as the French *Pacte Civile de Solidarité (PaCS)*, manifestly do not involve status. See Mary Ann Glendon, *Family Law in a Time of Turbulence*, in 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY § 15 (Aleck Chloros, Max Rheinstein & Mary Ann Glendon eds., 2007); Halley, *supra* note 33, at 101–04; Swennen & Eggermont, *supra* note 17, at 33 (indicating that it is unclear whether the *PaCS* affects an individual’s civil status in France). So even if ASRs are a status-related matter, they are less of status than marriage, and they range between “less status” to “no status.”

70. In cases where the parties chose ASRs over marriage, they were clearly not looking for the marital status. In cases where marriage was not an option it is unclear whether the ASR “status” is a choice or a last resort.

71. Note that ASRs conflicts rules would only be applied to same-sex marriages in situations when they are not considered a marriage but a “marriage, but.” A country that is willing to recognize such marriages as full-fledged marriages would apply its regular marital rules to such marriages, not ASR rules.

72. Scott Fruehwald concludes that none of the existing methodologies for cross-border recognition are suitable and opts for another arrangement, which is surprisingly similar in outcome (though not in structure) to the one discussed here. See Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 836–40 (1999) (providing a methodological discussion in the U.S. context regarding only “marriage, but” relationships). Sandrine Henneron suggests a similar outcome, but without sufficient basis to support reaching this outcome. See Sandrine Henneron, *New*

subjected to the law that will best serve both the parties in the relationship and the policies of the recognizing country, both with regards to the substantive issue at hand and to conflict of laws. The search is not for the law of this or that country but for the law connected to the case or the parties in a particular way. Identifying that law must start with characterizing the relationship. Only then will it be possible to find the choice of law category through which the governing law would be chosen, as some categories limit the possible applicable laws.

One such category is the one used in matters of personal status, including marriage and the rights resulting from it. Applying the status-protective family law choice of law concept might be desirable because of the advantages it offers, namely stability, clarity, and certainty.⁷³ Traditionally, one of the major concerns addressed by the regulation of cross-border marriages was the prevention of cases of uncertainty and "limping status," where, for example, a person is considered married under one law and single under another.⁷⁴ Choice of law rules for family matters have typically tackled this problem by using the consistent application of one's personal law to the matter,⁷⁵ regardless of the forum discussing the question, thus ignoring random influences and factors.⁷⁶ This creates a rather consistent result throughout the world, applying a single law to a particular marriage regardless of the jurisdiction.⁷⁷

At first sight, personal law seems fitting for the cross-border regulation of ASRs, since they are family or family-like relationships.

Forms of Cohabitation: Private International Law Aspects of Registered Partnerships, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 462, 469–70 (Katharina Boele-Woelki ed., Eur. Family Law Ser. No. 4, 2003). Further, Henneron completely rejects the contractual framing of the question based on grounds that are rejected here. *See id.* at 467.

73. Such an approach is discussed by Gérald Goldstein, *La cohabitation hors mariage en droit international privé*, 320 RECUEIL DES COURS 165–72 (2006) [hereinafter Goldstein]. Goldstein favors the rule of personal law on the matter based on the traditional conceptualization of status. *See id.* at 288–91; *see also* KOPPELMAN, DIFFERENT STATE, *supra* note 16, at 89–91 (providing an additional example of a status-based approach, this one rooted in "domicile").

74. *See* Siehr, *supra* note 42, at 52–53 ("In order to avoid limping family relations some European countries are now more liberal in recognizing foreign judgments than formerly.").

75. With the sole exception of the question of the validity of a marriage, which is subject to the law of the place of celebration.

76. This was also connected to the concept of a person "belonging" to a state. *See* Shakargy, *supra* note 41, at 516 ("The choice-of-law rules . . . still bind people and their marriages to particular states to which they are thought to 'belong', denying parties the ability to contract their marriage and its dissolution freely under any other law." (footnote omitted)).

77. Countries may have different connecting factors (domicile, nationality, or habitual residence). They might also interpret a situation differently, thus disagreeing on the identification of the country of nationality, domicile, or habitual residence. But personal law is still a rather clear definition, and its being used throughout the world makes it more likely that different countries would reach similar results.

The regulation may also be appealing as a symbolic statement, since it would clearly mark ASRs as family matters, even where the law is reluctant to label these relationships in this way. However, this advantage is at the same time a disadvantage because it is likely to give rise to public policy objections and since some people opt in to these relationships with the clear intention of avoiding familial ties.⁷⁸ On a more principled note, applying personal law to ASRs is inappropriate. First and foremost, it is very limiting since it forces the parties to comply with the law to which they are formally connected either by domicile, nationality, or habitual residence.⁷⁹ This personal law connection is also less appropriate in a world where marriage has changed and shifted from the realm of status to that of contracts, as described above.⁸⁰ Moreover, ASRs are used as a distinct alternative to marriage, whether due to the choice of the parties (who actively chose an ASR) or the State (which denied the couple access to marriage and offered the ASR as a substitute). ASRs are more contractual than marriage, both in form and in substance. They rely neither on a holy sacrament and religious principles nor on any collective historical narrative of spousal relationships. Instead, though they are offered by the state, they are based upon and aimed at catering to the parties' wishes and preferences. They may be described as private partnership agreements and given some public recognition, but it is still more contractual than marriage.

The status conceptualization, inherent in applying only personal law, weakens the parties' control over the relationship and strengthens that of law. The control of the law may be expressed both with regard to the existence of the relationship and with regard to its content, since the creation, the content, and the dissolution of status are controlled by law. ASRs are a choice-related tool: in some countries they coexist alongside alternatives, and parties may always choose not to formally regulate their relations at all; in many cases they may choose marriage instead of the ASR; and at least some ASRs are more a framework that is more easily tuned and changed through private accords the parties reach.⁸¹

78. See KOPPELMAN, *DIFFERENT STATE*, *supra* note 16, at 95 (pointing out that uniform recognition of ASRs would give too little weight to states' public policy-based objections).

79. See Shakargy, *supra* note 41, at 526–27 (suggesting that in today's age of globalization, increased mobility, and “multi-layered identities,” tying an individual to the laws of a single nation based on domicile or nationality is flawed).

80. As this connection is a result of status. See *id.* at 516–19, 522–23 (noting that legislation has changed in an attempt to recognize the increasingly private and contractual nature of marriage but explaining that the legislative changes have not been sufficient because the legislation still emphasizes the connection between the couple and the state).

81. Indeed, these changes also influence marriage: when co-existing with alternatives, marriage becomes an elected rather than forced institution. The growing acceptance of pre- and post-nuptial agreements promotes the parties' preferences over

As contractual relationships, rather than a status-based one, ASRs are, and should be, less concerned with public-oriented interests of the state and more focused on private virtues. Traditionally, marital relations were aimed not only at creating trustworthy unions for couples but also, and more importantly, at protecting the public interest in unions. Married couples were the only people licensed to live as couples and bear children. As such, marriage protected particular interests beyond those of the couple.⁸² The importance of this relationship was reflected in the fact they could not shape it as they saw fit, and many terms, including financial and interpersonal ones, were non-negotiable. They were considered matters of great importance to society as a whole.⁸³

When fundamental social and moral interests are involved, they may at times justly trump ordinary legal values and justify non-recognition of an otherwise valid relationship. However ASRs were created in a more relaxed legal atmosphere, and, unlike traditional marriage, they have no extraordinary regulatory inspirations. As such they only reflect general values commonly protected by law, such as the promotion of clarity, protection of justified reliance, fairness, and holding one to one's word. Under this privatized conceptualization of ASRs, it would seem less appropriate for the law to intervene in a private relationship created under another law and alter commitments and duties in it without very good cause. This would be unbecoming not only for reasons of stability and clarity but also due to comity. Moreover, invalidating the relationship and allowing a party to escape from a commitment he or she has taken on could not be done without very strong justification. Therefore, it is suggested to characterize the relationship as a contract, in a way that centers the mutual commitment of the parties and focuses on maintaining it and its content as much and as exactly as possible.⁸⁴

those of the state. However, marriage still carries historical, religious, and social meanings that limit its liberation. ASRs are free of those limitations.

82. Hence, the conceptualization of marriage as status. *See generally* Shakargy, *supra* note 41 (discussing the evolving nature of the state's interest in marriage and marriage recognition as marriage becomes increasingly privatized).

83. *See id.* at 500–10 (summarizing the history of state regulation of marriage in Europe).

84. *See* Martiny, *supra* note 65, at 195–96. Martiny offers a comprehensive analysis of the issue from a German standpoint and suggests various solutions to the different relationships. Not only does this add complexity to courts' works of recognition, but it also requires ex-ante evaluation and characterization of each and every possible ASR (which may prove difficult) for this to be a systematic solution that would allow reliance and clarity. Further, if applied to multi-country thought framework, such as that of the current discussion, the suggested solution would only work if countries around the world would agree on the characterization of each relationship, as disagreement would be a notable incentive for forum shopping as well as other undesirable outcomes such as lack of clarity and certainty.

B. Applicable Law of an ASR: Which is the Proper Law of That Contract?

1. In Cases Where there is an Actual Contract

One of the “general principles of law recognised by civilised nations”⁸⁵ is that the law considered “the proper law of the contract” should apply to cross-border contracts.⁸⁶ The proper law of the contract is, generally, that law which the parties have chosen, in an explicit or implied manner, to apply to their contract.⁸⁷ Such a choice may be stated in the contract or deduced from surrounding circumstances such as an apparent interaction of the contract with a certain law (e.g., when the parties use terms or address issues that are unique to a particular system). This choice is limited by considerations of public policy, good faith, and legality.⁸⁸ In Civil Law and in the United States,⁸⁹ the choice is also limited by the

85. RICHARD PLENDER & MICHAEL WILDERSPIN, *THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS* 131 (3d ed. 2009) (citation omitted).

86. Giesela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, in *CONFLICT OF LAWS IN A GLOBALIZED WORLD* 153, 157–58 (Eckart Gottschalk et al. eds., 2007) (indicating that party autonomy has become “a universal approach” and is rarely questioned “in both Europe and the United States” (footnote omitted)).

87. See 2 DICEY & MORRIS ON THE CONFLICT OF LAWS 1161–62, r. 180 (Lord Collins of Mapesbury ed., 11th ed. 1987) [hereinafter DICEY (11th ed.)]. The respect toward the autonomy of the parties is what makes that law so proper. See SYMEON C. SYMEONIDES, *AMERICAN PRIVATE INTERNATIONAL LAW* 197 (2008) (“It is an ancient principle that parties to a multi-state contract should be allowed to choose, within certain limits, the law that would govern their contract (party autonomy).” (footnote omitted)); MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW* 414 (2d ed. 1950, reprint. 1977) (“Just as the parties are permitted to create rights and duties between themselves as they please, and thus to ‘make law for themselves’, [sic] so it is for them to determine the law governing their contract.” (footnote omitted)).

88. At Common Law, this exception was first stated in the famous case of *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*, [1939] A.C. 277, 290 (P.C.) (appeal taken from N.S.) (Can.). See DICEY (11th ed.), *supra* note 87, at 1170 (“[W]here there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.” (footnote omitted)). This edition is the last before the Rome Convention was adopted by England and is therefore the most updated version of Common Law. This formula requiring that a choice of law be “bona fide and legal” and the absence of reasons “for avoiding the choice on the ground of public policy” has never been applied in England to strike down a choice of law, but it is still considered to be the law and was implemented in a Scottish case and several Australian cases. See *id.* at 1171–72. The proper law must also be an existing law. See *id.* at 1176–78.

89. See RESTATEMENT, *supra* note 1, § 187. Under § 187, the contract must include a foreign element, and the choice must be reasonable. See *id.* cmt. f. The contractual classification allows flexible links between the parties and the law: creating a contract in a country and through its registry and through its procedure (or staying in a country long enough to create a cohabitation under its law) should suffice to link the *lex loci contractus* to the case and allow its application.

requirement that the contract have some link to the chosen law.⁹⁰ In the absence of choice by the parties, the proper law of the contract is that which is most closely connected to the contract.⁹¹

What is the proper law of an ASR? The law the parties have chosen or the law most connected to the relationship may be one of many choices, but the special circumstances of the ASR make it easier to detect the most relevant law. ASRs are contractual mechanisms made by law. In many, if not most, cases, parties enter these relationships without exercising their contractual freedom to stipulate any terms of their own.⁹² By doing—or rather *not* doing—so, they enter into the arrangements made by the specific legal system as is. They are influenced to a great extent by the decisions made by the legislators of that arrangement, and they are practically accepting these decisions as their own. This forms a special connection between the contract and the law under which it is created.

Once again, one may be inclined to apply personal law as the proper law of this relationship, but this inclination must be resisted. Previously, it was argued that ASRs should be characterized as contractual and not status-based familial relations. Personal law should not be seen as the proper law of the contract for similar reasons: once the relationship has no real and justifiable status implications by its nature,⁹³ the law of the country to which the parties “belong”, as such, has no special relevance.⁹⁴ In cases where parties contract an ASR in a foreign country, it is exactly this personal law that they are trying to evade, and this evasion should not be impeded without proper cause, such as public policy.⁹⁵

90. See Rühl, *supra* note 86, at 161 (suggesting that any grounds the parties have for their choice of law would suffice); Bernd von Hoffmann, *Assessment of the E.E.C. Convention from a German Point of View*, in CONTRACT CONFLICTS—THE E.E.C. CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY 221, 222 (P.M. North ed. 1982) (“There is no German case law in which a choice of law made by the parties has been set aside; however, there is considerable authority in German legal writing that requires some kind of reasonable interest for the choice of law.”).

91. See DICEY (11th ed.), *supra* note 87, at 1161–62.

92. As a matter of principle, the parties are free to create a contract governed by the law of their choice, and courts would uphold that choice of law if it complies with regular contractual choice of law rules. However, if they wish to receive any public benefits under the law of the *lex loci contractus*, they should probably avoid this path.

93. Unlike status, personal law is not a law-made, strictly regulated concept that creates classes of people with unique sets of rights and capacities. See, e.g., GRAVESON, *supra* note 40, at 2 (defining status and pointing out that status and its effects are “matter[s] of sufficient social or public concern”).

94. Goldstein, *supra* note 73, at 58–59 mentions a similar idea, based on Mayer’s work, using not a contractual basis but rather the conflict of authorities theory.

95. The fact that the home country of the parties does not have the particular ASR in its law, or indeed does not offer ASRs at all, does not necessarily mean that the relationship would raise public policy concerns.

In fact, it appears that the law most relevant to the relationship is not the personal law of the parties but the local law of the relationship, that is, the law under which the relationship was created and entered into. By opting into a specific ASR in a certain country and under a given law, the parties demonstrate a preference for that country and its laws, though not necessarily a connection to them. The parties opt into a predetermined set of rights and duties, set by the law governing their relationship in the time and place of creation. It is this commitment in that exact degree which the parties choose for themselves. The relationship itself, being formulized by a law and bureaucratic procedure of a particular country, is closely connected to that country. Further, some countries make their ASRs available only to people with a clear formal connection to the country, thus reaffirming the link of the parties to the local law.⁹⁶ Therefore, the law of the country where the ASR was entered into is the law which best describes the parties' expectations, wishes, and to some extent—their affiliations.⁹⁷ Thus, it is the most proper law to be applied to this contract.⁹⁸ As long as the parties have not stated otherwise, it is to be assumed that they have not intended to subject their commitment to geographic boundaries and have it exist only in the place of creation. Therefore, the law under which the ASR was entered into should govern any discussion of this relationship anywhere in the world.

96. For example, Finland, like Denmark, requires partners seeking to enter a registered partnership to be closely tied to Finland. See Lund-Andersen, *supra* note 17, at 6–7. France only allowed foreigners to enter its same-sex marriage scheme following a court decision. See Circulaire du 29 mai 2013 de présentation de la loi ouvrant le mariage aux couples de personnes de même sexe (dispositions du Code civil) NOR: JUSC1312445C, http://www.textes.justice.gouv.fr/art_pix/JUSC1312445C.pdf.

97. For a similar position based on different grounds, see Janeen M. Carruthers, *Scots Rules of Private International Law Concerning Homosexual Couples*, 10.3 ELECTRONIC J. COMP. L. 1, 7 (2006) (articulating the Scottish rules for recognizing foreign domestic partnerships as civil partnerships). For a discussion of de-facto cohabitation where the “proper law of cohabitation” is clearly designated as the applicable law, see *id.* at 15–16; see also Melcher, *supra* note 59, at 161–62 (discussing the place of registration as the most appropriate criteria for establishing cross-border continuity of a registered relationship).

98. See similarly, in a treaty context, Convention sur la reconnaissance des partenariats enregistrés, International Commission on Civil Status, Sept. 4, 2007, ICCS Convention no. 32 art. 3, <http://ciec1.org/Conventions/Conv32Ang.pdf> [<http://perma.cc/ZB75-35P2>] (archived Feb. 17, 2015) (signed by Spain and Portugal only, see ICCS Conventions: State of Signatures, Ratifications and Accessions as at 15 June 2014, <http://ciec1.org/SignatRatifConv.pdf> [<http://perma.cc/3ECG-GTZA>] (archived Feb. 17, 2015)). Note that the stability and clarity of this mechanism entails rejection of *renvoi*, which would be in accordance with the tendency manifested in Article 15 of the EC Convention on the Law Applicable to Contractual Obligations (Rome 1980) and some national arrangements. See Erwin Spiro, *The Proper Law of the Contract and Renvoi: Further Comments on the Amin Rasheed Shipping Case*, 33 INT'L & COMP. L.Q. 199, 199–200 (1984).

2. In Cases Where the Contract is Only Implied (at Best)

"Marriage alternative" ASRs are sometimes not contracted in a formal manner, even though they enjoy the protection of the law as an implied contract. These relationships are a pure product of the law, as often times the parties do not even consciously act toward creating the relationship or even acknowledge its creation. Such is the Israeli Reputed Couples arrangement which creates a marriage-like set of rights with the parties doing no more than merely having a relationship.⁹⁹ When considering such relationships, it is obvious that the law creating the relationship should be the law governing it elsewhere, as this law would be the basis for the parties' possible reliance on the relationship, thus making its application justifiable.

Alongside this informal relationship-creating process, parties may also create contracts and agree on the terms of their relationships. Parties might see it fit to address choice of law considerations, though this is not very likely. When the parties have consciously consented to be in a relationship according to a given law, there should be no problem (except for, maybe, public policy which will be discussed below) to grant them rights based on that law and on their contract under that law. However, these rights would be to include only inter-spousal ones, as rights against the state would only be created by the procedure designated and recognized by the country bestowing the rights. The situation would be the same in cases where the parties did not actively create a contract but had an implied accord regarding the relationship. Naturally, in most cases of conflicts between the parties, this alleged consensus would be disputed, but courts are used to dealing with such disputes.

The proper law, once identified, applies also to the creation of the contract. Therefore, it would also be used to decide if there is a contract at all. When searching for the proper law of the contact, the court will assess the connection between the relationship and different laws. These connections include those the parties argue for, alongside other links revealed in the facts of the case. When weighing these connections, the nationality, domicile, or habitual affiliations of the parties may regain relevance and play a role, since it may be assumed that the parties' actions correspond with the law(s) with which they are most familiar. Factual circumstances, such as whether the previous behavior of the parties demonstrated reliance on a specific law (and on the said relationship), may also be considered. The result will be that the existence of the relationship would be deemed under the law put forth by the parties or by

99. The parties are only required to have family life and a shared household for an undefined period of time. *See, e.g.*, CA 621/69 Nassis v. Juster 24 SC 617, 619 [1970] (Isr.); *see also* Lifshitz, *External Rights*, *supra* note 23, at 346, 387 (regarding the indeterminate amount of time required).

another, more fitting, law. Naturally, this procedure is long, complicated, costly, and more than all—unstable and uncertain, but such are the perils of informal and implied relationships. When comparing it to the alternatives, this procedure at least has the benefit of affording the relationship some cross-border protection.

Whether the parties have an actual contract or not, applying the law under which the relationship was created has the benefit of circumventing the “translation” question. That is due to the fact that recognition under this mechanism does not immerse the relationship in the *lex fori* or any other law that is foreign to the original relationship but rather preserves it subjected to the original *lex contractus*. So when considering recognition, a court does not have to sort out ways to fit the relationship into the local legal structures but is able to recognize, regulate, and maintain it under the law in which the relationship is known and accurately defined. Consequently, this mechanism not only solves the issue of translation between different systems that use the same title (e.g., “domestic partnership,” “civil union,” etc.) for relationships which are actually different, but it also addresses the difficulty arising in courtiers where such relationships simply do not exist. Applying the original law of the relationship practically deems the law of the recognizing country irrelevant and allows diverse outcomes, that is various foreign ASRs and their specifications, to coexist.

C. Is Public Policy an Inevitable Barrier?

Another benefit of the contractual framing of the issue has to do with public policy objections. The basic premise is that a state’s legitimacy to criticize a foreign action, by refusing to recognize it, is limited to extreme cases.¹⁰⁰ A country may invoke public policy objections and withhold recognition from a foreign relationship that is manifestly opposed to the fundamental norms of the forum.¹⁰¹

100. See DICEY (15th ed.), *supra* note 50, at 1871, ¶¶ 32–182; KOPPELMAN, DIFFERENT STATES, *supra* note 16, at 22 (“[C]ourts should not refuse to entertain a foreign cause of action unless application of the foreign law ‘would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.’” (quoting *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (1918))); Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the *Conflict of Laws*, 56 COLUM. L. REV. 969, 970 (1956) (noting that, under the Restatement (Second) of the Conflict of Laws, small differences in the laws of two states is not sufficient for one state to reject the other state’s law on public policy grounds). Koppelman views the rationale for the public policy exception as particularly repugnant “because it extends to transactions with which the forum has no connection other than the accident of being the place of the trial.” KOPPELMAN, DIFFERENT STATES, *supra* note 16, at 25 (footnote omitted).

101. See *supra* note 100; see also *Bernkrant v. Fowler*, 360 P.2d 906, 909 (Cal. 1961) (“[T]he California statute of frauds, in the absence of a plain legislative direction to the contrary, could not reasonably be interpreted as applying to the contract [made in Nevada] even though [the deceased] subsequently moved to California and died

However, countries are expected to not object to foreign actions just because they are different than the local actions and laws.¹⁰² This appears to be particularly true for systems that have already allowed deviation from traditional marriage and introduced some alternative relationship in their law and so should not insist on the terms of this deviation. That is to say that a country that has already broken away from the traditional status-based marriage has less of a justifiable objection to ASRs, since it has already loosened its grip on spousal relationships.¹⁰³ When addressing ASRs as a public status-like relationship, they may easily trigger such fundamental objections.¹⁰⁴ Applying a contractual mechanism to ASRs expropriates the discussion, to a great extent, from the public sphere. There may still be public policy objections in the private contractual sphere, but private matters are less offensive to public policy in most cases.

Characterizing ASRs as contractual is preferable not only from a theoretical point of view. Once relationships are defined as private contractual matters rather than public status-related matters, they are considered to be of less importance and influence, and therefore, less interest to the public,¹⁰⁵ though the public may still be interested in contracts. Yet, its interest in them is less entwined in their each and every aspect. In this regard, contracts are different from matters of status, where the public intervention is extensive.¹⁰⁶ This shifts the main focus of the relationship from the public to the personal by

here. The basic policy of upholding the expectations of the parties by enforcing contracts valid under the only law apparently applicable would preclude an interpretation of our statute of frauds that would make it apply to and thus invalidate the contract because [the deceased] moved to California and died here." (citation omitted)).

102. See generally *supra* note 100. Furthermore, a local action is not expected to take foreign laws into account. See, e.g., *Bernkrant*, 360 P.2d at 909–10 ("Protection of rights growing out of valid contracts precludes interpreting the general language of the statute of frauds to destroy such rights whether the possible applicability of the statute arises from the movement of one or more of the parties across state lines or subsequent enactment of the statute.").

103. That is to say that if a country has allowed any ASRs at all, it should be open to ASRs that are different in details. When the difference is only in details, there is an expectation that the country only object when it has a particularly good reason to do so. See *Goldstein*, *supra* note 73, at 48–49.

104. Though this argument seems rather intuitive, some have doubted it. See, e.g., Martina Melcher, *Private International Law and Registered Relationships: An EU Perspective*, 20 EUR. REV. PRIVATE L. 1075, 1084 ("[I]t is not obvious in how far the application of foreign substantive provisions on registered relationships in cross-border cases poses a genuine and sufficiently serious threat to that domestic concept.").

105. Though contractual matters are not necessarily un-interesting to those engaged in public policy debates. Contracts of slavery or for prostitution or for abuse of children would of course be a matter for public policy. See *infra* note 125.

106. For example, it is hard to see how a particular division of assets between ex-spouses would be seriously defined as a matter of public policy. *But see infra* note 115. However, when marriage was a pure matter of status, the public intervention was not limited to preventing grave breaches on indispensable norms. The whole notion of status is a creation of law, as opposed to the contractual creation of the parties' free will.

defining it as a private contract rather than a state-governed status.¹⁰⁷ Focusing on the outcomes of the relationship and not on the relationship itself (thus, seeing ASRs as a contract regulating a bundle of monetary and other rights rather than as creating a “brand name” relationship of which right are resulting) takes ASRs even further out of the reach of public policy.¹⁰⁸ Public policy is relative: a country is likely to conceptualize some relationships as a threat to its morals and norms, but it may be less prone to feel threatened when it is not asked to give the relationship any public recognition besides that given by its courts when upholding the interpersonal obligations derived from that relationship.¹⁰⁹ The possible loss of some symbolic declaratory value of the relationship caused by this characterization is, of course, a cost. The loss of some public benefits such as taxation and immigration benefits (the first and fourth claims in the analysis suggested above) is also a cost, due to the fact that only the country where the relationship was created is party to the contract and could be obligated by it. However, this cost is more bearable than a complete disregard of the relationship.

This is not to say that public policy has nothing to do with contract-based ASRs but that it is easier to avoid a head-on collision when using contractual formulation. Though privatizing a relationship makes it less of a public affair, it does not mean that the public may have no objections whatsoever or that countries may not object to legal outcomes just because they are contractually construed. For example, a U.S. state that legislated a “mini-DOMA” barring same-sex relationships from any protection, thus manifesting a strong public policy objection to such relationships,¹¹⁰ would still be unwilling to recognize a same-sex marriage and would have all the necessary legal grounds to deny any recognition and protection of the

107. An argument was made that “if a . . . right is one that the parties could have contracted” for, then the recognizing country has no coherent public policy argument to justify withholding that benefit. See Andrew Koppelman, *Recognition and Enforcement of Same-Sex Marriage Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2158 (2005) [hereinafter Koppelman, *Interstate Recognition*]. However, this argument, satisfying the parties with a “could have” implied contract, has been justly criticized because “in the absence of a contract, the parties are relying upon the state to create their rights, and it is the state’s prerogative whether to do so.” Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2212 (2005).

108. Being legal effects of a foreign matter. See Goldstein, *supra* note 73, at 48.

109. As a matter of relative public policy, courts would not support an evading party, thus they would uphold the relationship in the context of the case at hand, though in a different constellation of the same case, the court might not have recognized the relationship. See Hans Verheul, *Public Policy and Relativity*, 26 NETH. INT’L L. REV. 109, 110–11 (1979) (discussing the case of the administration of a deceased Nigerian’s estate amongst his nine wives under English law, despite English law’s disavowal of the institution of polygamous marriage).

110. See Silberman, *supra* note 107, at 2210.

relationship.¹¹¹ Such objections, though not to be taken lightly, are more limited as the claim made in a privatized relationship and in recognition of rights only is more modest. That is particularly true since most states would be willing to allow some spousal rights between such couples through non-marital relationships. Only in states that deny all spousal benefits resulting from such relationships would public policy overcome the privatization of the relationship.¹¹²

Even so, the contractual formulation would benefit people in cases where the issue is not public policy but lack of legislation. That is, cases of courts in countries which do not object to ASRs as such but simply do not have them—in general or, what is more likely, a certain kind of them in particular—in their laws.

V. APPLICATION: THE SUGGESTED SOLUTION MEETS LOCAL POLICIES

By and large, countries may be divided into two groups: those who support ASRs or do not object to them and those who oppose particular ASRs or ASRs in general. While the challenge posed by the first group of countries is mainly a technical one—how the relationships will be recognized—the second group poses a more value-oriented question: what, if at all, could be recognized and under what terms. The following applies the proposed solution to both types of countries.

A. Countries Supporting or Not Objecting to ASRs

As mentioned, there are several types of ASRs: “marriage, but,” “marriage-like,” and “marriage alternative.” These three groups include various arrangements, such as “domestic partnerships,” “civil

111. See, e.g., *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 552 (Mich. 2008) (finding that article 1, § 25 of Michigan's constitution was valid and prevented the provision of health benefits to same-sex domestic partners by public employers).

112. In some cases, even such express objections may not suffice as justification for withholding recognition of such relationships based on public policy. Some lower federal courts have recently started questioning this assumption, ruling that the enactment of such provisions does not create a prevailing public policy barring the creation or recognition of such relationships, based on (sometimes very narrow) constitutional reasoning. See, e.g., *Bourke v. Beshear*, 996 F. Supp. 2d 542, 549–57 (W.D. Ky. 2014), *rev'd*, *Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, *Bourke v. Beshear*, 2015 U.S. Lexis 620, 83 U.S.L.W. 3608 (Jan. 16, 2015); *Deboer v. Snyder*, 973 F. Supp. 2d 757, 768–75 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 2015 U.S. Lexis 624, 83 U.S.L.W. 3608 (Jan. 16, 2015); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1196–1216 (D. Utah 2013), *aff'd*, No. 13-4178, 2014 WL 2868044 (10th Cir. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 977–98 (S.D. Ohio 2013), *rev'd*, *Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted* 2015 U.S. LEXIS 618, 83 U.S.L.W. 3607 (Jan. 16, 2015); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 767–72 (M.D. Tenn. 2014), *rev'd*, *Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

unions,” “cohabitations,” and other country-specific mechanisms offered by different laws around the world. It is assumed that all countries suggesting such mechanisms in their laws do not, in principle, object to ASRs. However, it is granted that they may not see eye to eye with regard to the terms of the relationships or to the kinds of ASRs to which they are open. When describing the problem caused by the lack of conflicts rules for ASRs, one of the most difficult problems was identified as the problem of “translation.” Assume that a couple in a Dutch civil union moves from the Netherlands to France. Both these countries have civil unions in their laws. However, in the Dutch relationship the couple had familial relations, while the French *Pacte Civil de Solidarité* (“PaCS”) is clearly designated to evade the creation of such relations,¹¹³ resulting in a relationship that is manifestly and intentionally different from marriage.¹¹⁴ Using the seemingly fitting marital rules in such a case would entail a translation of the Dutch relationship to the French norms, thus losing the familial component of the relationship together with other benefits attached to that relationship, particularly with regard to rights following its dissolution.¹¹⁵ On the other hand, under the suggested solution the French court would not have to align the relationship with the norms of the French ASR, as the relationship would still be the Dutch one upon which the parties agreed, with every benefit and disadvantage it previously had. French courts would afford them any relief needed to sustain the relationship as long as it does not offend French public policy.

The same would be the case had this Dutch relationship “visited” Portugal. Portugal does not address civil unions in its laws; however, it does regulate a similar arrangement, a domestic partnership. Translating the Dutch relationship into Portuguese norms would be a mighty challenge, the outcome of which is not at all clear. But under the suggested mechanism, it does not matter that Portugal does not have civil unions in its law. All Portugal is asked to do is uphold a *foreign* relationship through contractual rules, not to immerse this relationship into Portuguese legal norms. In other words, Portugal would not recognize a relationship but rather enforce a contract.

113. See Daniel Borrillo, *The “Pacte Civil de Solidarité” in France: Midway between Marriage and Cohabitation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW, *supra* note 4, at 475, 475–76, 481–87; see also *supra* note 69 (providing examples of downgrading mechanisms).

114. See Swennen & Eggermont, *supra* note 17, at 30–33 (suggesting that the French PaCS was designed to provide “some legal protection for same-sex couples, without ‘endangering’ marriage” (footnote omitted)).

115. See *id.* at 30, 36 (noting the differences in dissolving a registered partnership in the Netherlands and France). ASRs also vary in more mundane aspects: some relationships include a spousal property regime, support duties, and inheritance rights while others do not. In such cases, the translation of the foreign relationship to different local norms would fundamentally change the relationship and commitments.

In both of these examples, the contractual characterization of the relationship does not grant it all-inclusive international protection. Any country may object to the recognition and execution of a contract within its territory or by its courts based on public policy arguments. So, if the relationship in question is, for some reason, in clear contradiction to the forum's norms, the forum may withhold recognition. This may be the case if the recognized relationship were the Brazilian *União Estável*, which can be devised as a multi-lateral relationship,¹¹⁶ as opposed to the common bilateral perception of such relationships. In a case where a trio seeks recognition of their relationship in another country, that country may think that this relationship, under its terms in the country of origin, is not acceptable and rule accordingly. This does not, in any way, differ from the regular contractual rule, nor does it put ASRs or even this particular ASR in an unusual risk. On the contrary, if anything, the contractual understanding of ASRs gives this relationship a better chance for recognition and execution (as a contract and not a "relationship") throughout the world.

B. Countries Objecting to Particular ASRs or Aspects Thereof

1. Case-Specific Objections

Some ASRs are different from others not simply in detail, but in principle. Such is the case of the Belgian *Cohabitation Légal*, which is possible not only between people who may be (sexual) spouses but also between immediate family members who are expected to create different (that is, other than sexual) types of communal relationships.¹¹⁷ Other countries strongly object to such use of ASRs,¹¹⁸ though not to the ASR itself nor to the mere existence of

116. Though not clearly permitted by legislation, such a relationship was granted recognition by a São Paulo public notary in 2012. See Yamiche Alcindor, *Three-Way Civil Union in Brazil Sparks Controversy*, USA TODAY (Sept. 1, 2012, 11:39 AM), <http://content.usatoday.com/communities/ondeadline/post/2012/09/three-way-civil-union-in-brazil-sparks-controversy/1#.UwPBUaXfskk> [<http://perma.cc/T4J7-WF5F>] (archived Jan. 26, 2015); *Three-Person Civil Union Sparks Controversy in Brazil*, BBC NEWS (Aug. 28, 2012, 2:08 PM), <http://www.bbc.com/news/world-latin-america-19402508> [<http://perma.cc/MXH2-G9JQ>] (archived Feb. 3, 2015).

117. See Swennen & Eggermont, *supra* note 17, at 34 ("[I]n Belgium . . . the legal impediments to marriage between family members do not apply to registered partners."). Despite the expectation for a non-romantic nature in such familial relationships, this Belgian arrangement is only open to couples, thus a group of three siblings, for example, could not create this relationship. See *id.*

118. The parties may nonetheless continue their de-facto relationship without the interference of most Western countries, though some would in fact intervene. See, e.g., *Stübing v. Germany*, App. No. 43547/08, 2012 Eur. Ct. H.R., ¶¶ 63–67, available at HUDOC, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-110314> (Apr. 12, 2012) (deciding that the applicant's criminal conviction permissibly interfered with the right for respect of his private life, which includes his sexual life).

relationship between the parties (as is the objection to the Brazilian possibility mentioned above). An example for similar thinking is the *Burden* case,¹¹⁹ where the English court was unwilling to recognize the long-lasting, stable relationship between two sisters as creating a civil partnership for the purpose of a tax exemption.¹²⁰ This decision did not ban English civil partnership in general, as the court did not try to strike down a part of its own law, but it refused to interpret the relationship as extending to immediate family members. Similarly, it may be assumed that, when a couple tries to assert rights based on a foreign relationship which is legitimate and available in the forum but not to people such as this couple (i.e., when a same-sex couple tries to enter marriage or when a heterosexual couple tries to be recognized as domestic partners in Germany), most countries would not generally object to recognizing the relationship. Objections may be expected only in cases where the parties are of extreme affinity, if such affinity transgresses on the public policy of the forum.

The contractual mechanism and the constant subjection of ASR to their original law may mitigate the tension created by disagreement regarding the nature of the relationship, as it leaves the relationship in its entirety—existence, nature, and outcomes—under one law which is presumed to have made the necessary adjustments to accommodate any special characteristics it has attributed to the relationship.¹²¹ Further, it mitigates the imposition caused to the forum by circumventing the need for the forum to accommodate a concept to which it objects. This notwithstanding, the long-term hosting of a foreign relationship is not without its problems. One notable concern is that the foreign relationship would be an artificial shield that would allow a couple to burden the local court with foreign law and policy. However, since the relationship is a foreign contact, that should make no difference. A country may decide that a relationship existing within the territory is in fact an evasion of its public policy since it forces it to deal with a concept it finds

119. See *Burden v. United Kingdom*, App. No. 13378/05, 2006 Eur. Ct. H.R., ¶¶ 58–66, available at HUDOC, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78427> (Dec. 12, 2006).

120. See *id.* Note that this was a local English case, thus a case where an ASR is not supposed to lose its public rights, as the state of origin was the state of which the benefit was asked.

121. Another outcome of the foreign nature of the relationship is that the dissolution of the relationship may be done by any court, see, for example, Carruthers, *supra* note 97, at 9–10, with the exception of “marriage, but” arrangements, which are considered by some countries as full-fledged marriages, and as such, part of one’s “status.” Dissolving a marriage with contractual tools may result in subsequent bigamy. Therefore, it is suggested that though the dissolution of such relationships would still be subjected to the law under which the relationship was contracted, only a country that would have had the jurisdiction to render a divorce would be authorized to discuss this dissolution. A country that is able to acquire divorce jurisdiction is a country that the rest of the world would follow when discussing the parties’ capacity to enter subsequent marriages.

unacceptable. This would indeed force the parties to readjust the relationship to local norms or move away, but it is the same case with any contractual public policy case. This is still a better-off outcome, as using contractual conceptualization frees parties from the control of their personal law, allowing them to create desired relationships elsewhere. At the same time, this allows countries to safeguard their preferences and only accommodate in their territory relationships they find acceptable.

Furthermore, even in cases where the forum would still find the recognition of this foreign relationship to be unacceptable, this would not necessarily be the end for the ASR in question. Courts might be willing to grant some rights resulting from the relationship using the blue pencil doctrine to rectify the contract.¹²² By doing so, it may choose to allow the parties' previously acquired property, medical decision-making, or wrongful death suit rights, all while withholding general recognition of the relationship.¹²³ Since the relationship would remain foreign, the couple would also have no claim for public rights and benefits given to local ASRs, such as tax exemptions. But, the destination country may be willing to equate the foreign ASR to the local one for the purpose of such benefits on its own initiative. These benefits, if not given to foreign ASRs, may also incentivize the couple to re-formalize their relationship using a local ASR arrangement.¹²⁴

This does not address all of the couple's needs. First and foremost, the couple might not be recognized as a couple in the forum, and one or both of the spouses would have to argue separately for each and every right, proving it does not manifestly contradict the public policy of the forum. Further, the couple or a spouse may have to deal with the fact that future rights would not be recognized, and so, the spouses will not be able to continue their legal relationship (i.e., the acquisition of legal rights) whilst in the forum. However, the outcome is not only still much improved in comparison to the existing situation, it also enables a more limited application of public policy through the contractual rule and, in any case, does not yield a worse

122. See Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 681–88 (2008) (defining the blue pencil doctrine and explaining three approaches courts take when applying the blue pencil doctrine).

123. Some courts, such as Israel, already took this approach in dealing with polygamy. See FAR 7252/15 *Estate of John Doe v. Jane Doe* [15.12.2014] (Isr.). This was also the English approach when dealing with cross-border polygamy cases. See *infra* note 125.

124. Similar to the internal affairs doctrine in corporate choice of law, which demands a corporation to reincorporate in order to change its internal rights or status while allowing the corporation to conduct any other activity everywhere in the world.

outcome than the one which achieved by the traditional status-based rules in common law.¹²⁵

2. Group-Based Objections

Another kind of objection, similar to the first one but more general, addresses the group affiliations of the parties instead of their specific details and relations. The obvious case is that of homosexual relationships. Some countries are unwilling to grant any recognition to such relationships. Such, for example, is the case of Greece.¹²⁶ There may also be other, more localized, group-based objections. Germany, for example, excludes heterosexual couples from ASRs, due to the importance it attributes to marriage and its objection to the dilution of marriage by extensive use of ASRs.¹²⁷ So while Germany does have an ASR concept in its law and is generally open to various spousal relationships, it might withhold recognition when the applying couple is a heterosexual one. Both of these objections are matters of principle, but they are different in reasoning: while Germany objects to the undermining of heterosexual relationships, Greece opposes the homosexual relationship itself.

a. Objection to the Undermining of an Important Relationship (“German” Objections)

When a country opposes ASRs because it views them as “downgrading” an otherwise prominent relationship, it does not oppose the relationship itself but rather its insufficient manifestation. Therefore, while the country may limit the recognition of the

125. The paradigmatic public-policy challenging marriage is that of potentially polygamous marriages, that is a marriage under a law where one spouse is allowed to take more than one spouse, though the specific spouse before the court opted out of that possibility. In traditional common law, such marriages would not have been considered a marriage and so the spouses were denied any matrimonial relief. *See, e.g., Hyde v. Hyde*, [1866] 1 L.R. 130 (Eng.). English law later deviated from this rule by enacting the Matrimonial Proceedings (Polygamous Marriages) Act 1972, so that nowadays potentially “polygamous marriages are recognised for most purposes.” DICEY (15th ed.), *supra* note 50, at 965–66, ¶ 17-139. Though polygamous marriages are not discussed in this Article, they may also benefit from application of the contractual mechanism suggested here on the private aspects of the relationship.

126. Not only does Greece forbid same-sex marriages, it also bars homosexual couples from entering civil partnerships despite ECHR finding this practice discriminatory. *See Vallianatos v. Greece*, App. Nos. 29381/09, 32684/09, 2013 Eur. Ct. H.R., ¶¶ 76–79, 92, available at HUDOC, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128294> (Nov. 17, 2013); *see also* Paul Johnson, *Vallianatos Judgment on Sexual Orientation Discrimination in Civil Partnerships*, ECHR BLOG (Nov. 8, 2013), <http://echrblog.blogspot.com/2013/11/vallianatos-judgment-on-sexual.html> [<http://perma.cc/CP3B-AALR>] (archived Jan. 16, 2015) (discussing the decision in *Vallianatos*).

127. *See Swennen & Eggermont, supra* note 17, at 25; Martiny, *supra* note 65, at 189–90.

relationship, it will probably not have a sound objection to allocating contractual rights between the parties. It appears that Germany would find it hard to base a public policy argument against granting a share of the communal property or demanding an orderly dissolution of the relationship just because the relationship is regulated in a way that Germany considers to be not serious enough or insufficiently projecting the importance of the union.

b. Objection to the Overrating or Mere Recognition of a Relationship ("Greek" Objections)

The objection of a country to an ASR due to the "overrating" of a relationship is a deep one. This objection is farther-reaching than the above-mentioned "German" objection, as it undoubtedly does indeed intend to withhold rights resulting from the relationship. The Greek argument against the contract is different than the German one, as Germany's argument refers only to the "label" attached to the relationship (ASR instead of marriage) while the Greek objection is to the actual relationship, either in its current form or in general. Greece may easily characterize a contract creating a spousal relationship between two men to be manifestly contradictory to its public policy, and, while in some countries such a characterization may be debatable, it would be hard to argue against it in an Orthodox Christian country. This objection would extend to the granting of any right that may imply the existence or validity of the relationship.

Even when a couple is met with this kind of approach, the use of a contractual definition may ease their lot. While Greece would clearly oppose any public or formalized component of the relationship, and so is likely to object any status-based recognition, it may be willing to grant some rights as a result of a private accord between the parties. Moreover, even a country that not only bans certain relationships from any public formalization but also bans them from existing (as is still the case in quite a few countries regarding homosexual relationships)¹²⁸ may still be willing to consider specific rights in extreme circumstances such as medical decision making¹²⁹

128. See generally LUCAS PAOLI ITABORAHY & JINGSHU ZHU, INT'L LESBIAN GAY BISEXUAL TRANS & INTERSEX ASS'N (ILGA), STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS: CRIMINALISATION, PROTECTION AND RECONGITION OF SAME-SEX LOVE (8th ed. 2013), available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf [<http://perma.cc/QKN4-NRAS>] (archived Jan. 26, 2015) (listing a number of nations and entities categorically banning the existence of certain types of relationships).

129. See Silberman, *supra* note 107, at 2209–10 ("A prohibition on same-sex marriage—even one expressed in legislation—does not necessarily mean that all economic benefits should be denied. Interestingly, polls have shown that while a substantial majority of the public rejects the idea of same-sex marriage, a narrow majority also believes that same-sex couples should receive equal treatment with respect to economic rights." (footnotes omitted)). Such cases do exist. For example,

and other short-term rights of that sort¹³⁰ as a humanitarian gesture, particularly in cases where there is no acceptable alternative decision maker.¹³¹ This very minimal acknowledgement of the parties' agreements could somewhat mitigate the risk to such couples, without directly infringing on the forum's policies and preferences.¹³²

VI. CONCLUSION

ASRs are a relatively new way to live as a couple and could promote autonomy and create meaningful and accurate relationships. Unlike marriage, ASRs are not standardized. They vary in existence and terms between jurisdictions. The potential social importance of ASRs require that legislators and scholars give proper attention to the overall function of these relationships, adding regulation where needed. The cross-border side of these relationships is clearly lacking, and the solution suggested in this Article may help better the situation.

The proposed solution is not perfect, it may be rejected by some (though probably not many) jurisdictions based on justified public policy arguments, and it does not transform the relationship as a whole, only the private aspects of it. However, this last disadvantage is an advantage in a world where there is disagreement regarding legitimate and illegitimate ASRs. It allows focusing and basing the solution solely on justice between the parties, thus limiting the public

Mississippi, which banned inter-racial marriages, was willing to grant inheritance rights as this would not force the relationship itself on it. See KOPPELMAN, *DIFFERENT STATES*, *supra* note 16, 39–42 (giving several examples of this phenomenon, including this Mississippi case). Furthermore, in this context it may be helpful to discuss the connections of the parties to the country asked to recognize the relationship: does the couple live in the country and just left briefly to create a forbidden relationship in a place where it is possible or are they guests only passing through or even arriving accidentally to the country. See Koppelman, *Interstate Recognition*, *supra* note 107, at 2152–63 (discussing four types of marriages: evasive, migratory, visiting, and extraterritorial); KOPPELMAN, *DIFFERENT STATES*, *supra* note 16, at 101–13 (exploring the categories of “evasive,” “migratory,” and “visitor” marriages).

130. Medical decision making is rather unique in two aspects. On the one hand, allowing one's loved one to make a decision for him or her could be easily characterized as a fundamental humanitarian issue not of love (relationship-related matter) but of life (autonomy-related matter). On the other hand, such rights are semi-public as they aim to bind a third party—the hospital. Therefore, parties would be wise to create a durable power of attorney, separate from the ASR contract, which would be more easily accepted by reluctant third parties.

131. Note that if the recognition is limited to humanitarian bases and is not recognized as a binding contract that grants the parties rights and privileges, any immediate family member's decision would trump that of the spouse.

132. Koppelman dismisses this opposition by arguing, “[t]he clause referring to ‘contractual rights’ makes little sense. Rights that arise by virtue of a marriage . . . are not contractual rights.” KOPPELMAN, *DIFFERENT STATES*, *supra* note 16, at 142. But formulating the relationship as a contract as suggested here directly exposes the relationship to this kind of objection, allowing opposing states to withhold recognition. This could be helped not by choice of law tools, but only by political ones.

policy objections and allowing recognition of what seems to be the most important part of the relationship and also the majority of rights in most cases. By doing so, this solution promotes fairness, clarity, and stability, thus making a small contribution to the protection of parties in such relationships. It also fits the general tendency of family law toward contractual rather than status-oriented thinking, thus promoting correlation between the substantive law and the choice of law on this matter.
