Introduction

Chapter 1
Introduction

1.1. Object of study and research questions

Within the European Union (EU) considerable diversity exists in respect of morally sensitive issues like abortion, assisted human reproduction (AHR), surrogacy and legal recognition of same-sex relationships. The EU Member States have made diverging choices in respect of these matters and followed different tracks in their regulation of these areas. States often expressly claim recognition of such national specificities at the European level. While the twentieth century has witnessed an increased intergovernmental cooperation between States as well as an increased transferral of state powers to supranational organisations such as the EU, certain competences have traditionally remained with the States. The aforementioned morally sensitive issues are areas of law *par excellence* where standards are primarily set at State level. It is usually considered that it should be left to each State to decide whether, for example, abortion is available on social grounds, whether couples can become parents with the involvement of a surrogate mother and whether same-sex couples can marry and/or adopt children.

While there is no strong degree of European regulation in these areas, and while diversity is generally respected at European level, there is nonetheless a certain body of European law applicable in these fields. The EU has competences in respect of issues that are strongly related to, and at times intertwined with, reproductive matters and legal recognition of same-sex relationships. Here, one may think of competences in the areas of health and equal treatment.[1] In addition, several of these morally sensitive issues come within the scope of the European Convention on Human Rights (ECHR), for instance by means of the right to respect for private life under Article 8 ECHR.[2] That raises the question whether such European standard-setting (potentially and indirectly) affects the room for States to regulate in these areas and thus whether this has implications for the existing diversity in the European Union in morally sensitive issues.

Cross-border movement within the EU adds a new dimension to this already complex picture. Cross-border movement is a given within the EU; people move around in the EU for various reasons and purposes, not uncommonly pursuing economic

1 Arts. 168 and 19 TFEU. See more elaborately Ch. 3, section 3.1.3.1 and Ch. 9, section 9.3.
2 See more elaborately Ch. 2 and Ch. 8.

objectives.[3] Such mobility is enabled and stimulated by the EU free movement rules that, *inter alia*, protect the free movement of persons and the freedom to receive services in another EU Member State.[4] Diverging regimes in the aforementioned morally sensitive matters may, however, create obstacles to such cross-border movement; they may hinder or deter persons from making use of their free movement rights. For instance, same-sex couples may be discouraged from moving to an EU Member State where they have no possibility of having their relationship legally recognised by means of a civil partnership or marriage. Differences in regimes in morally sensitive issues may, by contrast, also be the direct impetus for cross-border movement within the EU as people from Member States with less permissive regimes may wish to enjoy the possibilities, rights and benefits of more permissive regimes of other States. For example, in Member States with restrictive abortion regimes, women who wish to have their pregnancy terminated may want to travel to Member States with more liberal regimes.

Such cross-border movement and the existing obstacles thereto do not only highlight existing diversity, they also imply, among other things, that States are increasingly more confronted with (the consequences and effects of) other States' regimes. For example, same-sex couples residing in one EU Member State may claim recognition of their marriage concluded in another Member State, while women or couples who had a certain type of AHR treatment in another State that is outlawed under the law of their own State, may claim reimbursement of the costs involved in that treatment under the national health system of their State. Such confrontation may require a reaction from the States involved, whether they function as country of origin or as country of destination or both. That raises the question of how national and European law respond to such cross-border movement. Are States receptive to cross-border movement in respect of morally sensitive issues, or do they (try to) ward it off? Also, it may be asked how much room do EU law and the ECHR actually leave States to respond to such cross-border movement in different ways? A related question is whether and to what extent such cross-border movement, and the legal responses thereto, impact national standard-setting in these morally sensitive issues, and, consequently, how they influence both the existing diversity and the legal development regarding these matters in Europe.

The present research explores this cross-border dimension of morally sensitive issues within the European Union. It aims to provide an overview of trends and developments in national law and European law, as well as to give insight into the interests that are at stake both in internal and in cross-border situations. Such an overview allows for taking stock of the situation and it enables further analysis of the various interests involved in this multi-level picture. Thus, this research may assist legislatures and judiciaries in answering the question how the relevant interests

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3 See, for example, Statistics of Eurostat, as online available at www.ec.europa.eu/eurostat/statistics-explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities, visited February 2015. More elaborately, see Ch. 9, section 9.5.

4 *Inter alia* Arts. 21, 45 and 56 TFEU and Art. 45 CFR. More elaborately, see Ch. 3, section 3.5 and Ch. 9, section 9.6.

should be balanced and at what level (e.g. European or national) that balance should be struck. Importantly, this research does not aim to take any normative stance towards the issues it focuses on. Instead it wants to observe, clarify and typify an existing dynamic, whereby various areas and levels of law interact, and in doing so it aims to reveal the analytical framework for decision-making regarding these issues.

1.2. Approach and methodology

The basic ingredients of the present research are two thematic case studies – one on reproductive matters (Case Study I) and one on legal recognition of same-sex relationships (Case Study II) – which focus on five jurisdictions. The latter encompass three national jurisdictions – Germany, Ireland and the Netherlands – and two European jurisdictions or systems, namely the EU and the ECHR. Justification of this selection of jurisdictions, as well as further definition of the two case studies is given below in sections 1.3 and 1.4, while an outline of the present volume is provided in section 1.5 below.

The two thematic case studies investigate for the three national jurisdictions as well as for the relevant European jurisdictions what – if any – standard-setting is in place in respect of reproductive matters and legal recognition of same-sex relationships respectively, and how this developed over time. This analysis, *inter alia*, provides insight into what considerations and interests play, or have played, a role in legislative debates and case law and how change was, or may be, brought about. It also makes clear in what respects the regimes studied differ and how European law has influenced, or may influence, national standard-setting in these areas. Apart from providing insight into these matters, and apart from substantiating the claim that considerable diversity indeed exists within the EU in morally sensitive issues, this analysis of the internal picture per jurisdiction provides the basis for the subsequent analysis of the cross-border picture per jurisdiction.

After briefly indicating the scale at which cross-border movement takes place, both case studies subsequently involve further examination for each of the five jurisdictions of how they have dealt and deal with cross-border situations in these areas and how they interact in this regard. Thereby, *inter alia*, Private International Law regimes and (national implementation of) the EU free movement rules are studied, in order to answer questions like whether foreign marriages and civil partnerships of same-sex couples are recognised or whether women who wish to have an abortion in another country have a right to access to information about such foreign abortion services, as well as a right to follow-up treatment upon return.

The analysis provided in the two case studies makes it possible to discern trends in standard-setting and in judicial and legislative processes regarding these morally sensitive issues. Also, various legal responses to cross-border movement in respect of these issues can be identified. The analysis further allows for observations about what interests and considerations have informed the relevant legal responses, what

implications these responses have for the individuals involved in the cross-border movement and how the various legal responses interrelate. Finally, it allows for some conclusions to be drawn as to the extent to which cross-border movement impacts national standard-setting.

The methodology adopted in this research has consisted first and foremost of a doctrinal approach. The current book presents a systematic analysis of applicable standards in two areas of law in five jurisdictions and provides insight in how these interact. This descriptive legal analysis[5] includes binding or 'positive' law (legislation, case law), as well as legal doctrine and academic literature. Further, in order to provide for a more complete picture, non-binding documents (so-called 'soft law'), such as policy documents, reports of government appointed committees, guidelines of the medical profession and resolutions of the European Parliament have been studied. This is only different for the chapters on the ECHR (Chapters 2 and 8). Given that when it comes to the ECHR, it is the case law of the European Court of Human Rights (ECtHR) that sets the relevant framework, these chapters contain first and foremost a case law analysis, and only incidentally refer to legal doctrine and academic literature. Also, non-binding standard-setting in these areas in the context of the Council of Europe (CoE) more broadly is not separately discussed.

The research not only describes the positive law, however, but also the development of the relevant law. Moreover, it aims to provide some insight in the preceding and accompanying political and public debates. In that sense, the research fits in with the 'law in context' approach.[6] Concretely this means that also parliamentary documents, pre-legislative initiatives that did not make it into law and sometimes references to newspaper articles are included in the analysis in the case studies. Further, while for the present research no empirical legal science was carried out, incidentally reference is made to existing sociological studies, for instance to studies based on surveys amongst services recipients involved in cross-border reproductive care (CBRC), as these studies gave insight into the implications of certain legal responses to cross-border movement in these areas. Also, reference is made to statistics on the actual scale at which cross-border movement in respect of morally sensitive issues takes place within the European Union and to and from the States studied in this research. With respect to these figures the research relies completely on secondary sources.

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5 Smits describes descriptive legal science as '[…] the systematic description of the law in a certain field.' The author notes that it is '[…] usually seen as a synonym for a legal doctrinal approach or for legal systematization […]'. J.M. Smits, *The Mind and Method of the Legal Academic* (Cheltenham, Elgar 2012) p. 11.

6 Nelken has described 'law in context' as '[…] learning to think of law in terms of larger processes – bringing out, for example, the similarities between decision-making in legal and other settings. It suggests that we configure law as one stage, aspect, or method, of dealing with wider processes of disputing or social regulation, and that we treat these processes as related in some way to the needs, (social) problems and conflicts of social groups.' D. Nelken, *Beyond law in context: developing a sociological understanding of law* (London, Ashgate 2009) pp. xii-xiii. Nelken refers (at p. xii (in footnote 4) and at p. xxvii) to Twining as 'one of the founders of the law in context approach'. See also W. Twining, *Law in context, enlarging a discipline* (Oxford, Clarendon Press 1997).

The subject-matters of the present research have turned out to be 'moving targets'. Legislation and case law on the issues discussed are in a constant state of flux and the topics are characterised by fast-moving social and scientific developments. Even since 2009, the year this research was commenced, important changes have occurred, both at national level and at European level. The continuous succession of developments rendered it inescapable to choose a clear cut-off date, which was set at 31 July 2014. The case studies cover developments until that date[7] and the observations and conclusions, while also reflecting upon possible future developments, are based on that analysis.

Selection of the 'starting point' of the relevant analysis has appeared more naturally, as the discussion of the relevant national and European standard-setting begins with the first steps of regulation in the respective jurisdictions. As generally fairly 'new' topics are concerned,[8] at least when it comes to the regulation thereof by European States, this generally concerns the 1960s for liberalisation of abortion laws, the 1980s for AHR treatment and surrogacy and the 1990s for legal recognition of same-sex relationships. Evidently, as further explained in the respective chapters, sometimes much older developments lay at the basis of this standard-setting.

1.3. The two case studies

The case studies on reproductive matters and legal recognition of same-sex relationships respectively have been chosen because they concern pre-eminently morally sensitive issues and, consequently, politically controversial matters, in respect of which EU Member States have long take different positions, and still did so at the time this research was commenced (i.e., in 2009). For example, in respect of abortion it has been observed:

> 'It is difficult to imagine a more controversial and divisive topic around which opinions as to the associated penumbra of moral/legal issues are so radically and conclusively polarised than that of abortion.'[9]

In respect of equality for lesbian, gay, bisexual, transgender and intersexual persons (LGBTIs) the following was observed as recently as 2013 by a Member of the European Parliament: 'Next to abortion, it is the single most sensitive issue to work on. Politicians just prefer to stay away from it […].'[10]

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7 While there have been further interesting developments after 31 July 2014, particularly in respect of surrogacy (e.g. ECtHR 27 January 2015, *Paradiso and Campabello*, no. 25358/12; *M.R. and D.R. (suing by their father and next friend O.R.) & ors* v. *An t-Ard-Chláraitheoir & ors* [2014] IESC 60 and BGH 10 December 2014, Az XII ZB 463/13) these have thus not been included in this research.

8 Evidently, the themes as such are not necessarily new, as for instance same-sex relationships and surrogacy (the low-technological form, see 1.3.1 below) have been held to have taken place since the birth of mankind.

9 D. Curtin, 'Case note to CJEU C-159/90', 29 *CML Rev* (1992), p. 585.

10 Dutch Liberal MEP Sophie in 't Veld as quoted in: H. Mahoney, 'Reding should 'stick neck out' on gay rights', *euobserver.com* 7 May 2013, www.euobserver.com/lgbti/119977, visited 10 July 2014.

Moreover, the issues covered by the two case studies are not 'just' morally sensitive issues, they also concern areas in which fundamental rights claims can be made. While this implies that there is room for European influence, this has been the case to a limited extent only. Particularly when this research was commenced (i.e., in 2009) there was, and in fact there is still, limited European standard-setting in these areas.[11] This makes these case studies all the more interesting for investigating the interaction and interrelationship between European law and national law.

Further, and importantly given the focus of this research, these also concern areas that have a demonstrable cross-border dimension. Not only has cross-border movement for abortion – in the past often referred to as 'abortion tourism' – been much reported on,[12] but cross-border reproductive care (CBRC) has also become a widely recognised phenomenon.[13] Further, it is self-evident that same-sex couples (often referred to as 'rainbow families', particularly where they have children) cross borders within the EU, even though exhaustive statistics on the scale at which they do so are lacking.[14] Over the years there has been increasingly more academic and political attention for the free movement of rainbow families within the EU.[15]

1.3.1. Definition of Case Study I

Case Study I on reproductive matters covers three subjects, namely abortion, assisted human reproduction (AHR) and surrogacy. In the discussion of regulation of AHR a number of issues that may occur in the course of AHR treatment are included. Firstly, AHR may involve the donation of gametes (both sperm (semen) and egg cells (ovum)) and embryos. In the discussion of the relevant standard-setting in Case Study I, attention is paid to the question of whether, and if so, under what circumstances, donors can remain anonymous.[16] Further, standard-setting in respect of preimplantation genetic diagnosis (PGD) is explored. PGD '[…] involves checking the genes and/or chromosomes of embryos created through [*in vitro* fertilisation (IVF treatment)].'[17] It '[…] enables people with an inheritable condition in their family to

11 As set out more elaborately in Ch. 2, Ch. 3, Ch. 8 and Ch. 9.

12 See, *inter alia*, Ch. 5, section 5.4.

13 See, *inter alia*, A.P. Ferraretti et al., 'Cross-border reproductive care: a phenomenon expressing the controversial aspects of reproductive technologies', 20 *Reproductive BioMedicine Online* (2010), p. 261. See also Ch. 3, section 3.4.2.

14 More elaborately, see Ch. 9, section 9.5.

15 For instance, 'freedom of movement for LGBT people' is one of the five priorities of the European Parliament's Intergroup on LGBT rights. See www.lgbt-ep.eu/work/priority-1, visited January 2015. More elaborately, see Ch. 9, section 9.6.

16 In the context of high-technological surrogacy (see below) a distinction can be made between the biological mother (the woman who carries and gives birth to the child) and the genetic mother (the woman whose egg-cell is used in creation of the embryo). Evidently no such distinction can be made between biological and genetic fathers. For purposes of clarity, however, the choice has been made in this research to use the terms 'genetic parents' and also 'genetic father' in most cases. Only where the term 'biological' has been referred to expressly in regulations or case law, this may be different.

17 Website of the UK Human Fertilisation and Embryology Authority (HFEA) www.hfea.gov.uk/preimplantation-genetic-diagnosis.html, visited 12 March 2015.

avoid passing it on to their children.'[18] A related issue that is addressed is whether gender selection in the course of IVF treatment is allowed for under the national law. Also addressed is the vitrification of egg cells (also referred to as oocyte freezing), whereby egg cells are frozen and stored for use in future treatment.[19] Lastly, surrogacy, a highly divisive topic which may include AHR treatment, is included in the case study. Surrogacy concerns the situation where another woman carries and gives birth to a child for an individual or couple who want(s) to have a child. There are two types of surrogacy: so-called low-technological surrogacy, where the surrogate mother is also the genetic mother of the child; while high-technological surrogacy refers the situation where the surrogate mother is not genetically related to the child, because the child that she carries and to which she gives birth was conceived during IVF treatment with the use of the gametes of donors (often, but not necessarily the intended parents).

For each of these topics, Case Study I first of all sets out whether the relevant reproductive service is at all legalised and if so under what conditions access to these services is provided. Also, the financing of abortion and AHR treatment under each State's national health system is briefly addressed. Thereby only State regulation is discussed, since that gives the clearest expression of a State's (moral) position on the matter. Private regulation (i.e., private insurance) is thus excluded. In the discussion of national regulation of surrogacy, the possibilities (if they exist at all) for intended parents to establish parental links with a child born following a surrogacy arrangement are also discussed.

Because the focus lies on reproductive treatment, scientific biomedical research and cloning fall outside the scope of the case study. Also, Case Study I does not cover adoption. While a means of family building as well, it has been considered too remote from the issue of reproduction. Further, this Case Study concentrates on the rights and interests of services recipients, not on care providers and intermediaries. For that reason, areas of law like EU competition law, state aid rules and public procurement rules in respect of (cross-border) health care are not included in the analysis.[20]

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18 *Idem*.

19 The website of the UK Human Fertilisation and Embryology Authority (HFEA) explains this method as follows: 'The use of frozen eggs in treatment is a relatively new development. […]. […] vitrification (a new method for egg storage) has recently been shown to improve the chance of eggs surviving the freeze-thaw process and therefore increase the success rate. To help boost egg production, fertility drugs are used to stimulate the ovaries to produce follicles (which contain the eggs). The developing follicles are monitored and when they are large enough, they are carefully emptied to collect the eggs that they have produced. […] To freeze the eggs, they are placed in storage in liquid nitrogen.' See www.hfea.gov.uk/46.html, visited 12 March 2015.

20 See, *inter alia*, J.W. van de Gronden et al. (eds.), *Health care and EU law* (The Hague, T.M.C. Asser Press 2011) pp. 265–359 and L. Hancher and W. Sauter, 'One step beyond? From Sodemare to Docmorris: The EU's freedom of establishment case law concerning healthcare', 47 *CMLRev* (2010) p. 117.

1.3.2. Definition of Case Study II

Case Study II explores what the various jurisdictions provide in respect of legal recognition of same-sex relationships. Thereby a first focal point is whether same-sex couples have (a right to) access to a registration form – civil partnership or marriage – under the relevant jurisdictions and, if so, what these entail. The discussion thus focuses on special institutes; other forms of granting of certain rights or benefits to unmarried (stable) couples, such as housing benefits for cohabiting couples, are not discussed separately. The Case Study aims not so much to provide an exhaustive comparative overview of all public and private effects of these institutes, but mainly to give insight into the differences between the protection that same-sex couples enjoy under the law of the relevant regimes if compared to different-sex couples. Hence, the public effects of these institutes in areas like taxes and pensions are discussed in some detail where there have been noteworthy developments in this regard in case law or legislation in the various jurisdictions. The applicable property regimes and rules concerning private law aspects like name and inheritance, are not included in the research, although developments in this regard are sometimes noted where they appear to be highly relevant for the overall picture. Also, while briefly addressed, no detailed assessment of the regulation of divorce and separation is included in Case Study II.

Secondly, especially since this has proven a controversial matter in many EU Member States, the case study also covers the question of parental rights for same-sex couples. Thereby various forms of adoption are discussed, namely second-parent adoption,[21] successive adoption[22] and joint adoption. Also, legal parenthood by operation of the law and access to AHR treatment for same-sex couples are addressed.

Case Study II, in the same vein as Case Study I, focuses on services recipients, thereby concentrating on the rights and interests of same-sex couples and rainbow families. Standard-setting regarding third parties, such as civil servants, is not included in the case study.[23]

1.4. The five jurisdictions

As noted above, the present book presents an in-depth study of the moral choices of three EU Member States, namely Germany, Ireland and the Netherlands. Thereby the deliberate choice has been made to study three national jurisdictions in-depth, instead of covering a wider array of States more superficially. Only such an in-depth study provides a true insight into the development of the relevant legal frameworks, in legislative and judicial processes and in the relevant legal dynamics.

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21 The term second-parent adoption concerns the adoption of a child by the partner of the child's legal and genetic parent.

22 Successive adoption concerns the situation where a partner adopts the child of an adoptive parent.

23 Hence, the issue of conscientious objections of civil servants against concluding marriages or civil partnerships between same-sex couples is not discussed separately.

In selecting three States, it was first of all ensured that these States cover a certain range in approaches in respect of reproductive matters and legal recognition of same-sex relationships; that they are, so to speak, on different sides of the moral spectrum. Generally speaking, although one must be very careful with such generalisations, one could say that Ireland represents the more traditional approach in Europe, or at least did so at the time the research was commenced (in 2009). The Netherlands, on the other hand, belongs to the more progressive, liberal tradition, while Germany may – or in any case could – be seen as representing the middle ground.

Further, the three States selected have different (constitutional) profiles. While Germany and Ireland have a strong Constitution, whereby the German Constitutional Court and the Irish Supreme Court can review the constitutionality of legislation,[24] in the Netherlands the Constitution is comparatively 'weak', and Dutch courts cannot review the constitutionality of Acts of Parliament.[25] Also, the relationship with European law differs or has differed amongst the three States. For example, the Irish Constitution is strongly dualist[26] and implementation the ECHR[27] has appeared to be a lengthy and rather arduous process, while in respect of EU law various reservations and opt-outs apply.[28] The Dutch legal order, by contrast, is very open to European and International Law, as self-executing International Law standards, have direct effect in the Dutch legal order.[29] The German legal order has its own

24 The German Constitutional Court may rule upon the formal or substantive compatibility of Federal Law or Land law with the Basic Law (Art. 94(2) Basic Law). This Court also has jurisdiction to rule upon constitutional complaints from individuals, who are alleging that one of their basic rights has been infringed by a public authority (Arts. 93(2) and 93 (4a) Basic Law). In Ireland, the President may, after consultation with the Council of State, refer a bill passed by both Houses of Parliament to the Supreme Court for a decision on the question of whether such a bill or any specified provision or provisions of such a bill is or are repugnant to this Constitution or to any provision thereof (Art. 26.1.1° Irish Constitution). Although some type of bills are excluded, the President has total discretion in referring any bill (see B. McCracken, 'The Irish Constitution – an overview', in: J. Sarkin and W. Binchy (eds.), *Human Rights, the Citizen and the State. South African and Irish Approaches* (Dublin, Round Hall Sweet & Maxwell 2001) p. 52 at pp. 56–57). The President shall not sign any bill which is the subject of a reference to the Supreme Court pending the pronouncement of the decision of the Court (Art. 46.3° Irish Constitution). The Court has to give a ruling within 60 days. If the Supreme Court decides that any provision of a bill is repugnant to the Constitution or to any provision thereof, the President must decline to sign such a bill.

25 Art. 94 of the Dutch Constitution reads: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' Translation taken from www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html, visited 12 March 2015.

26 Art. 29 Irish Constitution.

27 See, *inter alia*, D. O'Connell, 'Ireland', in: R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe. The ECHR and its Member States 1950–2000* (Oxford, Oxford University Press 2001) p. 425 and S. Besson, 'The Reception Process in Ireland and the United Kingdom', in: H. Keller and A. Stone Sweet (eds.), *A Europe of Rights. The impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press 2008) p. 31 at p. 52.

28 See more elaborately Ch. 5, section 5.2.

29 Art. 93 of the Dutch Constitution. In practice, Dutch Courts tend to examine the compatibility of statutory law with International Treaty law, with the general effect that the European Convention has come to serve as a kind of shadow constitution. J.H. Gerards and M. Claes, 'National report – The Netherlands', in: J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction*

relationship with European law,[30] and the German Constitutional Court in particular has been both an important generator of European integration and has at the same time applied the brakes on various occasions.[31]

Lastly, language considerations have also played a role in the selection of these three national jurisdictions. Given the aim of making an in-depth analysis of the laws of the various jurisdictions, it is considered important to study them in their original language, without needing to rely on secondary sources or translations. It is for that reason that jurisdictions like Poland or Greece – even though highly interesting for the present research and even though they concern non-Western European systems – have not been included in the present research.

The two European jurisdictions studied are EU law and the ECHR. The standard-setting in these jurisdictions gives context to and sets limits to national standard-setting in these areas. It requires little explanation that EU law is included in this research, which concentrates on the legal dynamics within the EU. Also, EU law standards are binding upon the Member States and have primacy over conflicting national standards,[32] and many EU law provisions are directly applicable in the legal orders of the Member States.[33] The ECHR, for its part, sets the context for any State or Union action in these areas, as not only all EU Member States are High Contracting Parties to the Convention, but the fundamental rights as guaranteed under the ECHR also constitute general principles of EU law.[34]

International standards, such as human rights standards other than the ECHR or (non-binding) standard-setting within the Hague Conference on Private International Law,[35] or the International Commission on Civil Status,[36] are not separately discussed in this study. There are only few applicable binding international standards, and such

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between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, Reports of the XXV FIDE Congress Tallinn, Vol. 1 (Tartu, Tartu University Press 2012) p. 613.

30 Following Art. 25 German Basic Law, the general rules of international law form an integral part of and take precedence over German Federal Law and directly create rights and duties for the inhabitants of the federal territory. The Basic Law furthermore contains a particular provision concerning the European Union (Art. 23). It provides that the Federal Republic of Germany shall '[…] participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.' To this end the Federation may transfer sovereign powers. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement the German Basic Law, or make such amendments or supplements possible, are subject to the procedure for amendment of the German Basic Law (Art. 23(1) in combination with Art. 79(2) and (3) German Basic Law).

31 For example, BVerfG 29 May 1974, Az. 2 BvL 52/71, *NJW* 1974 p. 1697 (*Solange I*); BVerfG 22 October 1986, Az. 2 BvR 197/83, *NJW* 1987 p. 577 (*Solange II*); BVerfG 14 October 2004, Az. 2 BvR 1481/04, *NJW* 2004 p. 3407 and BVerfG 30 June 2009, Az. 2 BvE 2/08 a.o., *NJW* 2009 p. 2267 (*Lissabon Urteil*).

32 Case 6/64 *Costa/ ENEL* [1964] ECR 585, ECLI:EU:C:1964:66 and Case C-399/11, *Melloni* [2013] ECR 0000, ECLI:EU:C:2013:107.

33 Case 26/62 *Van Gend en Loos* [1963] ECR 0001, ECLI:EU:C:1963:1.

34 Art. 6(3) TEU.

35 See www.hcch.net/index_en.php, visited June 2014.

36 See www.ciec1.org, visited June 2014.

standards as exist have often been integrated in standard-setting in one or more of the jurisdictions studied.[37] Hence, where relevant, international standards are covered by the discussion of the relevant standard-setting in the jurisdictions studied.

1.5. Outline

The two case studies introduced above, form the backbone of this volume. Each one consists of six chapters, five describing the standard-setting in the five selected jurisdictions, and one drawing conclusions for the case study.

Each of the ten substantive chapters of the two case studies first sets out the development of the law in respect of reproductive matters, respectively legal recognition of same-sex relationships in the five jurisdictions, as well as their current state of affairs. For a better understanding of the relevant standard-setting and – where relevant – the debates in politics and legal scholarship concerning these often controversial matters, a general (constitutional) framework is sketched first. A brief introduction is given to very prominent rights in the relevant jurisdictions (e.g. the protection of the unborn on the Irish jurisdiction and the protection of marriage under the German Basic Law), as well as to a selection of themes and – in the case of the EU – competences that are key in the respective case studies. Subsequently, the chapters sketch both the internal picture and the cross-border picture. The analysis of the internal picture addresses matters like whether, and if so under what conditions, (a right to) access to a certain reproductive treatment is in place under the law of the respective jurisdictions or what parental rights same-sex couples enjoy under the respective regimes. The relevant discussions of the cross-border picture, start – where available – with some statistics on the scale of cross-border movement in the context of the respective case study. Thereafter there is discussion of what the various jurisdictions provide in respect of issues like access to information about foreign reproductive treatment options and the recognition of parental links established abroad.

On the basis of the analysis provided in the various substantive chapters, conclusions are drawn per case study (Chapters 7 and 13). The concluding chapter, Chapter 14, provides a synthesis of the relevant findings of Chapters 7 and 13, as well as a number of observations about morally sensitive issues and cross-border movement within the EU more generally.

[37] For example, as further explained in Ch. 12, section 12.4.2, Dutch Private international law is firmly rooted in international Treaty law. In respect of marriage, the applicable law was for 70 years, the Hague Convention relating to the settlement of the conflict of the laws concerning marriage of 1902.