Conclusions

Chapter 14
Conclusions

14.1. Morally sensitive issues and cross-border movement in the EU

This concluding chapter firstly sketches the overall picture that arises from the two case studies on reproductive matters and legal recognition of same-sex relationships respectively. Parallels are drawn and trends are discerned in respect of balancing exercises and legislative and judicial processes in these morally sensitive issues (sections 14.1.1 and 14.1.2 respectively). Section 14.1.3 focuses on the case law of the two European Courts in these matters. Legal responses to cross-border movement in morally sensitive issues are subsequently discussed in section 14.1.4. The concluding section, section 14.2, reflects upon this overall picture by means of a number of observations.

14.1.1. Balancing exercises in morally sensitive issues

Given that both case studies concern morally sensitive issues, they have also addressed complex balancing exercises. The interests included in such balancing exercises differ in number and (sometimes) in nature between the case studies. In Case Study I on reproductive matters, a broader range of interests is involved when compared to Case Study II on the legal recognition of same-sex relationships. The spectrum of interests involved in reproductive issues ranges from interests like personal autonomy to human dignity and protection of the (unborn) child. In Case Study II on the legal recognition of same-sex relationships, by contrast, most balancing exercises concern, or at least have concerned in the past, equal treatment on the one hand and traditional notions of marriage and the family on the other.[1] This difference in the number of interests may first of all be explained by the fact that Case Study I on reproductive matters covers a wide(r) variety of issues, ranging from abortion to various types of assisted human reproduction (e.g. donation of gametes and preimplantation genetic diagnosis), to surrogacy. The subject-matter of Case Study II on the other hand, is more straightforward, as it is about access to civil status and parental rights for same-sex couples. Moreover, with each reproductive issue discussed in Case Study I, generally a broader range of interests is involved, when compared to the subject-matter of Case Study II. This may be explained by the fact that in reproductive matters generally more parties are concerned (e.g.

[1] This was different in respect of parental rights for same-sex couples, however, as there also the interests of the child came in (see below). See more elaborately Ch. 13, section 13.1.4.

the (unborn or future) child, gamete donors or surrogate mothers) whose interests the State may also intend to protect. In Case Study II any conflict is between the interests of same-sex couples and those of the State, or the general interest. This is only different in respect of parental matters, as there are also the rights of the child to consider (see below).

The present research has shown that the jurisdictions studied generally recognise the same interests in the relevant case studies, but the weight that is, or has been, accorded to these interests differs between the various jurisdictions. The ECtHR has recognised most of the relevant individual interests and has held that these fall within the scope of the ECHR. The actual protection of such interests has, however, sometimes lagged behind. Striking examples are *Schalk and Kopf*, where the Strasbourg Court held that same-sex couples come within the scope of Article 12 ECHR (the right to marry), but nonetheless considered a complete barrier on access to marriage for same-sex couples compatible with the ECHR; and *A, B and C*, where the Court held that abortion on social and medical grounds fell within scope of the right to private life (Article 8 ECHR), but nonetheless held that an absolute prohibition on this practice could be upheld.[2]

The interests of the child have prevailed in both case studies, and can thus be said to be a connecting factor between the two case studies. In Case Study I, it has been demonstrated that the rights of the (future) child have been put forward in legislative debates and in judicial proceedings, and at times they have been accepted by legislatures and courts as an argument against certain forms of reproductive treatment. In Case Study II this interest has been – increasingly – prominent in the context of parental rights for same-sex couples. Both case studies have shown that involvement of the interests of the (future) child makes a crucial difference to balancing exercises and in both case studies developments towards a more child-centred approach have been visible. Even more so once a child is born, its rights and interests are accepted to be the primordial consideration in all legal systems studied. This has proven of particular relevance in cross-border cases, such as cross-border surrogacy cases.[3]

This great focus on the interests of the child also reveals, at a more general level, a shift in the nature of interests. Both case studies point to an emerging trend of granting more protection to relatively concrete interests such as the best interests of the child, over rather abstract interests like 'the traditional institution of marriage'. This development can also be regarded as a shift from values deeply entrenched in the society and law of a specific State, to less value-charged values that are (more) commonly shared and transnational. Put differently, an erosion of the typical national is taking place. For example, 'the best interests of the child' can be regarded a value-neutral interest, to which not many would object and that is not unique to one specific State. That the ECtHR has been focusing increasingly on similarly value-neutral principles like legal certainty and information in the context

2 See Ch. 8, section 8.2.2; and Ch. 2, section 2.2.3, respectively.
3 See, *inter alia*, Ch. 2, section 2.4.2.

of reproductive matters, reveals a similar trend. That is not to say that tradition has completely dissolved as a relevant interest in the national and European debates and standard-setting. For example, the ECtHR accepts the special status of traditional marriage as a justification for reserving access to marriage to different-sex couples. Also, traditional notions of the family can be held to have indirectly played a role where importance has been attached to biological reality, as has been the case in the context of both case studies.[4] While the ECtHR will presumably not reduce the protection of traditional marriage so long as a majority of States strongly holds on to it, it is to be expected that the trend of focusing on value-neutral interests in the ECtHR case law will continue in the future, which may also have implications for traditional notions of the family.

When it comes to the actual balancing exercises, another trend is a greater legal recognition of *de facto* situations, such as *de facto* family life (see also 14.2.3 below). Over time, legislatures and courts have come to acknowledge that those in relationship forms and family forms that were not as such recognised under the law also required protection. The ECtHR in particular has given important impetus to this development that has clearly had implications for national standard-setting in these areas. Next to this, there appears to be increased focus on balancing in individual cases. Although Case Study I has made clear that there has been room under the ECHR for bright line rules in reproductive matters, generally there has been increasing attention paid to careful balancing in individual cases, with due regard for the individual circumstances of the case concerned. This holds expressly for situations where a child is involved, and it also applies in abortion cases, for example. Both these developments have proven relevant in both internal and cross-border situations.

These trends regarding the nature of interests and regarding balancing exercises have brought about concrete changes at the national level in standard-setting in these areas and there is reason to assume that further changes will be brought about in the (near) future. In both case studies there have been hints or even clear signs that change is, or may be, forthcoming in the relevant standard-setting on reproductive matters and/or legal recognition of same-sex relationships. Presumably because the balancing exercises are more straightforward, in Case Study II the direction and possible end point of debates and standard-setting in the area are clearer and more well-defined than in Case Study I. In Case Study II, generally developments towards greater protection of LGBT rights and increased legal recognition of same-sex relationships have been discernible in the various jurisdictions, and there is reason to assume that these developments will continue in the five jurisdictions included in this research.[5] In Case Study I, on the other hand, because of the advancement of medical science there is more (potential) for new scientific developments and thus new (ethical) challenges for the legislature and the judiciary whereby it is not so clear from the outset which direction they will take. For instance, recently a technique has

4 See, *inter alia*, Ch. 2, section 2.4.1 and Ch. 8, section 8.2.4.2.
5 See Ch. 13, section 13.1.1.

been developed as a result of which children may have three genetic parents, which also raises questions regarding multiple parenthood.[6] In a State like the Netherlands, this may possibly trigger the 'repeating break' process, as set out in Chapter 6, whereby such a new medical technological development will meet with concerns about its ethical acceptability, but will nonetheless been regulated for, by subjecting it to certain limitations.

14.1.2. Legislative and judicial processes in morally sensitive issues

The European jurisdictions generally have taken a rather reactive, pragmatic and incremental approach to morally sensitive issues. There has been little to no substantive standard-setting at the EU level on these matters, but the relevance of the vast body of EU law in areas like cross-border health care, the free movement of persons, and equal treatment for the two case studies, must not be underestimated. Where a case was brought before the CJEU that related to either reproductive matters or legal recognition of same-sex relationships more substantively, this Court has generally taken a very careful and reactive approach (see also 14.3.1 and 14.3.2 below). The Strasbourg Court has also generally been reluctant to intervene in these matters. States have been left much room to introduce change at their own pace, as long as the competing interests were weighed in the national legislative process, and as long as they kept the area under review. The ECtHR has never reproached States for delays in the adoption of legislation in these areas; only where States had taken a first step, has the ECtHR sometimes found violations of the ECHR (see 14.3.2 below). The ECtHR has thus enabled, or perhaps even stimulated, States to take an incremental approach in these matters.

When it comes to the legislative and judicial processes at the national level studied in the two case studies, some general trends can be discerned, although these have often been accompanied by evident exceptions. In both case studies change was generally brought about at a slow pace, often step-by-step, and in both case studies there has often been a certain or even considerable reluctance on the side of the legislature to regulate the relevant area. At times faster developments were also discernible, however, for instance in Ireland in the context of Case Study II.[7] Reluctance on the side of the legislature has also proven no ironclad rule, as, for instance, the Dutch legislature showed, with its eagerness to legislate for the legal recognition of same-sex relationships.

Presumably because a broader range of interests appears to be involved in reproductive matters (see 14.1.1 above) and because the issues discussed in Case Study I are more diverse, so the legislative and judicial processes have been broader and more diverse. In the context of Case Study I, setbacks have been identified more often when

6 C. Pritchard, 'The girl with three biological parents', *bbc.com* 31 August 2014, www.bbc.com/news/magazine-28986843, visited February 2015 and J. Callagher, 'MPs say yes to three-person babies', *bbc.com* 3 February 2015, www.bbc.com/news/health-31069173, visited February 2015.

7 See Ch. 13, section 13.1.1.

compared to Case Study II, where the developments appeared to take a more steady course, namely towards increasing recognition of same-sex relationships (see above). In Case Study II the pace at which such change was brought about has differed much though, both between the national jurisdictions studied, as within State jurisdictions.[8] As explained in Chapter 13, this difference in pace may be related to a difference in the path chosen by States. For instance, in Germany fairly early (in 2001) a separate civil partnership for same-sex couples was introduced, which was, over the years, slowly but steadily increasingly equalised with marriage. Ireland, on the other hand, for long provided for no form of legal recognition of same-sex relationships, but once it introduced civil partnerships in 2011, developments happened very fast, as that very same year the initial steps towards the opening up of marriage were taken.[9]

The interplay between the legislature and the judiciary, as well as between the European and the national levels has differed in and between the case studies. Generally, when compared to the Netherlands, in Ireland and Germany the judiciary has played a more important role in standard-setting in morally sensitive matters. The German Constitutional Court has impacted much of the national standard-setting in both case studies, while in the case of Ireland some issues were in the end decided by the ECtHR, most profoundly in the context of abortion.

14.1.3. Morally sensitive issues before the European Courts

A number of things are striking if one takes a closer look at how the CJEU and the ECtHR have dealt with cases concerning morally sensitive issues. As also noted above, these Courts have generally taken a very prudent approach to such matters, leaving ample room to States to decide on these issues at the national level. This section observes, first of all, that the approach of both Courts could at times even be described as 'evasive'. In addition, both European Courts have applied a similar kind of reasoning that is – in subsection 14.1.3.2 below – typified as the 'in for a penny, in for a pound' approach. Lastly, in the case law of the ECtHR, for both case studies variations on the margin of appreciation doctrine can be identified, as discussed in subsection 14.1.3.3.

14.1.3.1. Very careful, at times evasive, Courts

Both the CJEU and the ECtHR have repeatedly emphasised in cases concerning morally sensitive issues that their judgment applied only in the case at hand and that they were 'not called upon',[10] or that it was not their 'task'[11] to answer 'general

8 *Idem*.

9 See Ch. 11, section 11.3.6.

10 *Inter alia*, Case C-506/06 *Sabine Mayr* [2008] ECR I-1017, ECLI:EU:C:2008:119 and Case C-34/10 *Oliver Brüstle* v. *Greenpeace eV* [2011] ECR I-9821, ECLI:EU:C:2011:669. See Ch. 3, sections 3.1.1.

11 *Inter alia*, ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04 and ECtHR [GC] 3 November 2011, *S.H. a.o.* v. *Austria*, no. 57813/00. See Ch. 8, section 8.2.2 and Ch.2, section 2.3.3 respectively.

questions'[12] or 'broach'[13] ethical questions. Both Courts have at times gone to great lengths to explain what the case before them was *not* about, and what their judgment did not implicate.[14] They thus explicitly delineated the scope of the cases before them and correspondingly the effects of their rulings. While this is inherent in case law and the role of the judiciary in general, the explicitness of such statements in the relevant judgments discussed in this research have caught the eye. Moreover, although one has to be careful not to become suggestive, at times it proves difficult to avoid the impression that these Courts have been eager to find a 'way out' in such cases, in order to avoid the need to address the respective thorny issues. In any case, some of the rulings in these areas deviated from standing case law. For example, the finding of the CJEU in *Grogan*, that the link between the activity of the defendant student associations and medical terminations of pregnancies carried out in clinics in another Member State was 'too tenuous' for there to be a restriction of free movement,[15] has been received as at variance with the then existing line of case law.[16] Another example are the surrogacy cases *C.D.* and *Z.*, where the CJEU was fairly rigid in holding that the cases did not come within the scope of any of the Directives invoked by the plaintiffs.[17] One of the rulings of the ECtHR with a semblance of evasiveness, is its inadmissibility decision in abortion case *D.* v. *Ireland*. The ECtHR accepted that the exhaustion of domestic remedies criterion was fulfilled because it found it 'unlikely' that the Irish courts would interpret the Irish abortion prohibition 'with remorseless logic', a finding from which the ECtHR itself later deviated.[18] The ECtHR seems, further at times, to have been 'hiding behind' what already had been introduced at the national level. In *Schalk and Kopf*, for example, the Court noted that a civil partnership for same-sex couples had been introduced in Austria in the meantime, and therefore considered it 'not its task' to establish whether the lack of any means of legal recognition for same-sex couples would have constituted a violation of Article 14 taken in conjunction with Article 8 if this situation had persisted at the time the Court decided the case.[19] Also, the ECtHR's formal equality approach in respect of complaints about discrimination on grounds of sexual orientation, whereby the Court held that same-sex partners were not in a comparable situation to different-sex spouses,[20] can be perceived in some cases as a 'way out', especially where the Court did not take into account

12 *Inter alia*, ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07 and ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09. See Ch. 8, sections 8.2.4.1.2 and 8.2.3.4.

13 *Inter alia*, Case C-506/06 *Sabine Mayr* [2008] ECR I-1017, ECLI:EU:C:2008:119 and Case C-34/10 *Oliver Brüstle* v. *Greenpeace eV* [2011] ECR I-9821, ECLI:EU:C:2011:669. See Ch. 3, section 3.1.1.

14 *Idem*; ECtHR 26 June 2014, *Mennesson* v. *France*, no. 65192/11 and ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09. See Ch. 3, section 3.1.1; Ch. 2, section 2.4.2; and Ch. 8, section 8.2.3.4 respectively.

15 See Ch. 3, section 3.5.2.1.

16 *Idem*.

17 See Ch. 3, section 3.3.4.

18 See Ch. 2, sections 2.2.1 and 2.2.3.

19 See Ch. 8, section 8.2.2.2. See also N.R. Koffeman, 'Case note to ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04', 11 *European Human Rights Cases* 2010/92 (in Dutch).

20 See Ch. 13, section 13.1.3.

that marriage was not open to same-sex couples.[21] The latter brings us to a specific approach that both European Courts have taken on morally sensitive issues.

14.1.3.2. The 'in for a penny, in for a pound' approach

In both case studies both the CJEU and the ECtHR have taken a specific approach that has been referred to as 'in for a penny, in for a pound'.[22] It entails the idea that States may decide whether or not to grant a certain right or entitlement at the national level, but once they do indeed grant that right or entitlement and they thereby act within the scope of European law, they must do so in a way which meets European standards. In other words, the European Courts respect national decisions in these areas in their most fundamental and principled forms, but subject national measures that give effect to such principled choices to their scrutiny as soon as they have a connection with European law.

In the case law of the CJEU, the 'in for a penny, in for a pound' approach has been visible in particular in the employment cases discussed in the context of Case Study II. The Luxembourg Court there has held that *if* States introduce legislation which puts (same-sex) civil partners and (different-sex) spouses in a comparable situation in respect of a certain employment benefit, while marriage is under the law of that State open to different-sex couples only, they must then extend the employment benefit concerned to civil partners.[23] Hence, it is up to States to decide on the legal recognition of same-sex relationships, but once they have introduced a partnership form for these couples, they must ensure their equal treatment in the context of employment as provided for under EU law.

The ECtHR has employed the 'in for a penny, in for a pound' approach in more diverse settings and correspondingly in more diverse fashions. It has held, firstly, and following similar lines as are visible in the CJEU case law, in the context of Case Study II that States must grant rights and entitlements that come within the scope of the Convention in a non-discriminatory manner.[24] However, as noted in Chapter 13,

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21 See Ch. 8, section 8.2.5.

22 J. Gerards, 'Judicial Minimalism and 'Dependency'', in: M. van Roosmalen et al. (eds.), *Fundamental Rights and Principles. Liber Amicorum Pieter van Dijk* (Cambridge, Intersentia 2013) p. 73 at p. 81 and J. Gerards, 'The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility'', in: J. Gerards and J. Fleuren, *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis* (Cambridge, Intersentia 2014) pp. 13–94. In Dutch academia the approach has also been referred to as '*vastklikmethode*', which is most literally translated as 'pinning down method'. See, *inter alia*, J.H. Gerards, *EVRM – algemene beginselen* [ECHR – general principles] (Den Haag Sdu 2011) pp. 58–62 and N.R. Koffeman, 'Het Ierse abortusverbod en het EVRM; is uitbesteding de nieuwe norm?' ['The Irish abortion ban and the ECHR: is outsourcing the new standard?'], 36 *NTM/NJCM-Bulletin* (2011) p. 372 at pp. 374–375.

23 See Ch. 3 section 9.3.

24 In Case Study I the non-discrimination requirement has not been so visible in the case law of the ECtHR. It was applied by the Chamber in the *S.H. and Others* case concerning gamete donation, but this was later overruled by the Grand Chamber. In fact, the Strasbourg Court has – without explaining this further – held a same-sex couple, not to be in a similar situation to infertile heterosexual couples. See Ch. 2, section 2.3.3.

when compared to the CJEU, the ECtHR has taken a more formal equality approach in the relevant cases by accepting civil status as a vehicle for a difference in treatment.[25] The ECtHR has thus only applied the 'in for a penny, in for a pound' approach in cases where different-sex couples and same-sex couples with the same legal status were treated differently. In other words, the reach of the approach has been narrower in the case law of the ECtHR, when compared to that of the CJEU. On the other hand, the CJEU's application of the approach in the context of Case Study II has been – given the division of competences within the EU – confined to employment cases, while the ECtHR's case law extends to all matters that fall within the scope of a material Convention right, such as the right to respect for private life (Article 8 ECHR). In the context of Case Study I the 'in for a penny, in for a pound' approach in the case law of the ECtHR has entailed that *if* States decide to legalise abortion on certain grounds, they must ensure that there are sufficient procedural safeguards in place to make that right effective.[26] States must furthermore shape their legal frameworks in the area of reproductive matters '[…] in a coherent manner which allows the different legitimate interests involved to be adequately taken into account.'[27] Also, in respect of both case studies, the ECtHR has made clear that States must ensure that their legislation in these areas is consistent,[28] and thus that principled choices are continued on in various realms of the law.[29]

That both European Courts have employed the 'in for a penny, in for a pound' can be explained in different ways. Firstly, in respect of the CJEU it must be noted that when it comes to civil status, an area is concerned in which the EU has no competence. The CJEU can accordingly not give any ruling in respect of the question of whether States must introduce a civil partnership for same-sex couples, but it can rule upon the implications of such a choice in the field of employment, as that is an area in respect of which the EU is competent. Under the Convention, the rationale for the 'in for a penny, in for a pound' reasoning is not so much a matter of a classic division of competences, but it nonetheless has everything to do with the relationship between the ECtHR and the States. When it comes to the ECtHR, the 'in for a penny, in for a pound' approach can be perceived as a means of steering a middle course between respect for States' sovereignty and national (democratically justified) decision-making on the one hand, and protection of the rights of individuals on the other. By pressing for relatively value-neutral aspects such as consistency, the ECtHR can impose certain common standards on States without touching upon the true difficulties (see more elaborately 14.2.1 below).

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25 See Ch. 13, section 13.1.6.

26 See more elaborately Ch. 2, sections 2.2.3.5 and 2.2.4.

27 E.g. ECtHR [GC] 3 November 2011, *S.H. a.o.* v. *Austria*, no. 57813/00, para. 100. See Ch. 2, section 2.3.3.

28 *Inter alia*, ECtHR 28 August 2012, *Costa and Pavan* v. *Italy*, no. 54270/10 and ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07. See Ch. 2, section 2.3.4 and Ch. 8, section 8.2.3.1.

29 It has been noted in this regard that one may wonder if it is indeed feasible to be entirely coherent in regulation in these fields. Plus, there is a risk that 'coherence' is interpreted in a rather subjective manner. N.R. Koffeman, 'Case-note to ECtHR 28 August 2012, *Costa and Pavan* v. *Italy*, no. 54270/10', 13 *European Human Rights Cases* 2012/222 (in Dutch).

14.1.3.3. Variations on the margin of appreciation in the ECtHR's case law

What is also striking, if one studies the case law of the ECtHR in both case studies, is that this Court has introduced some unprecedented variations on its well-established margin of appreciation in these morally sensitive areas. This especially holds for the ECtHR's case law in reproductive matters,[30] but it can also be noted in the context of Case Study II. These variations mainly concern the use of consensus based arguments for determining the width of the margin. Firstly, in some cases the Court has set a higher barrier, by holding that for a common ground to decisively narrow the margin, it had to be 'based on settled and long-standing principles established in the law of the member States'.[31] Also, incidentally the lack of consensus on a broadly defined issue could trump an existing consensus on a more specific issue.[32] A third variation has featured only in Case Study II so far and concerns the limiting of the number of States that were taken into account in the determination of the consensus. As discussed in Chapter 8, in the Austrian *X. and Others* case concerning second-parent adoption for same-sex couples, the ECtHR held that it could only compare the Austrian choice to limit second-parent adoption for unmarried couples to different-sex couples with that of those States that allowed for second-parent adoption in unmarried couples. The Court consequently found the relevant group of ten States to be too narrow a sample to draw a conclusion as to the existence of a possible European consensus on this issue.[33]

While in the first two variations the established absence of consensus resulted in the granting of a wide margin and thus in more discretion for the States, in the latter case, consensus was sidelined as a factor influencing the width of the margin of appreciation. The margin in the *X. and Others* case was narrow(ed) because discrimination on grounds of sexual orientation was concerned. While the former variations thus stood in the way of finding any violation, in the latter case it in fact 'enabled' the Court to find a violation. It is noted that the Court's determination of the width of the margin in the *X. and Others* case also fits in with the 'in for a penny, in for a pound' approach as described above, that it had taken in that case. After all, the Court ruled that States were under no obligation under the Convention to introduce second-parent adoption for unmarried couples, but once they had, they could not discriminate between same-sex and different-sex couples in this respect. That the Court in those circumstances also only compared with those States that had introduced second-parent adoption for unmarried couples, thus logically followed from the approach it had taken.

30 As observed in Ch. 2, section 2.5.

31 ECtHR [GC] 3 November 2011, *S.H. a.o.* v. *Austria*, no. 57813/00, para. 96.

32 It is recalled that in the abortion case, *A, B and C* v. *Ireland* (2010) an existing consensus towards allowing abortion for abortion on social and medical grounds was outweighed by a lack of European consensus in respect of the right to life of the unborn. Ch. 2, section 2.2.3.4.

33 ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 149.

14.1.3.4. Resumé and outlook

The European Courts have thus taken a careful, at times evasive, approach in morally sensitive matters, but have nonetheless held States to take the consequences of their choices in these matters. The wide margin of appreciation that the ECtHR generally accords in these matters and the above discussed variations on the determination of the width of the margin of appreciation resulting in an (even) wide(r) margin being accorded, fit in with the picture of a careful (or even evasive) Court. The 'in for a penny, in for a pound' approach, and – in the case of the ECtHR – the tailoring of the margin of appreciation to that approach, on the other hand, illustrate that both European Courts have in certain circumstances and to some extent intervened in these morally sensitive matters. Both these developments are likely to be continued in the (near) future, with possibly the latter taking the overhand over the former.

14.1.4. Legal responses to cross-border movement in respect of morally sensitive matters

On the basis of the research in the case studies, a range of legal responses to cross-border movement in morally sensitive issues has been identified in Chapters 7 and 13. In both case studies 'warding off' (the effects of) cross-border movement, that is the deterring of people from going to other States or from coming to their State, and the opposite, 'accommodation' of (the effects of) cross-border movement, have turned out to be taking place, with the latter gaining ground. A gradual converting of warding off into accommodation is visible for both case studies, and it also has been found that increasing numbers of accommodation obligations have been formulated at the European level. Concrete accommodation obligations that have been demanded from the European level are first of all that in cross-border abortion cases and cross-border reproductive care (CBRC) cases, information about foreign treatment options and – in any case in cross-border abortion cases – follow-up care must be provided.[34] Accommodation by means of recognition of the legal effects of foreign options, is obligatory in cross-border surrogacy cases, as parental links established abroad must be recognised, in any case if the intended father is also the genetic father. In the context of Case Study II, the accommodation obligation can be mentioned that States must 'facilitate' the entrance of stable same-sex partners of migrating EU citizens. Also, States that have a registered partnership at national level that is equivalent to marriage, must authorise the entry and residence of registered partners of migrating EU citizens.

The present research has furthermore revealed that there are different forms of accommodation. In both case studies, but particularly in Case Study II on legal recognition of same-sex relationships, there have been cases of partial accommodation or conditional accommodation, which means that accommodation is made dependent upon the national (internal) standards. For instance, none of the States studied have

[34] See Ch. 7, section 7.2.2.

recognised a civil status of same-sex couples that was not provided for at the national level,[35] while in Germany and Ireland foreign marriages of same-sex couples are downgraded to a civil partnership. An example of conditional accommodation in the context of Case Study I is that under EU law, States only have to reimburse treatment obtained abroad if their national scheme provides for reimbursement for that kind of treatment.[36] Such conditional accommodation is thus fairly passive, as it does not require any extra effort from the State concerned. There have also been more active forms of accommodation by means of recognition that were taken by States or even imposed on them by the European level. For instance, in cross-border cases involving parental rights of same-sex couples, exceptionally but recently increasingly more often, domestic courts have recognised parental links established abroad,[37] while such recognition is, under certain circumstances, obligatory under the ECHR in cross-border surrogacy cases (see above).

That accommodation is gaining ground may be explained by an increased acknowledgement of the fact that in cross-border situations different interests are at stake, or in any case that these interests are weighted differently in cross-border situations. While the relevant individual and general interests do not cease to exist at the border,[38] other interests may become weightier once a cross-border situation is concerned. This holds true particularly in cross-border situations where individual burdens exist, and even more so when a child is involved whose interests must prevail. For instance, in the cross-border surrogacy case *Mennesson*, the ECtHR understood that the respondent State in international surrogacy cases aimed to protect children and surrogate mothers by refusing recognition of parental links established abroad and acknowledged that it had an interest 'in ensuring that its members conform[ed] to the choice made democratically within that community'. Still, a fair balance had to be struck between this interest of the State and individual interests, the best interests of the child concerned being paramount.[39] In this international surrogacy case, this finding resulted in an obligation to recognise parental links legally established in another State.

While accommodation may alleviate or remove individual burdens that are involved in cross-border movement, certainly not all individual burdens involved in cross-border movement have been addressed at State level. From the analysis in both Chapters 7 and 13 it can be concluded that sometimes States have appeared unwilling to alleviate individual burdens, taking the stance that these are the responsibility of the individuals. It must also be noted in this regard that some individual burdens may prove very difficult to protect unilaterally, as for the protection of certain interests, States are dependent upon other States. For example, if a State wants to protect the right of children to know their genetic origins, it must make arrangements with

35 See Ch. 13, section 13.2.2.3.
36 See Ch. 3, section 3.6.2.1 and Ch. 7, section 7.2.2.2.
37 See Ch. 13, section 13.2.2.2.
38 Compare the dissenters to ECtHR [GC] 3 November 2011, *S.H. a.o.* v. *Austria*, no. 57813/00, para. 13 and ECtHR 26 June 2014, *Mennesson* v. *France*, no. 65192/11.
39 See Ch. 2, section 2.4.2.

another State in situations where the children have been conceived with the use of gametes donated in that other State.

Legal responses at a more abstract level to the phenomenon of cross-border movement in morally sensitive issues have been: 'outsourcing' as identified in Case Study I; 'backing out' as identified in Case Study II; and 'adaptation' as has been visible in both case studies, albeit in Case Study I more expressly than in Case Study II. As explained in Chapter 13, the fact that 'outsourcing' – whereby foreign options contribute to the justification of restrictive regimes at domestic level – has not occurred in the context of Case Study II, may be partly explained by the fact that foreign registration and marriage options are not always easily accessible.[40] In 'backing out', fear that other countries may not accept or recognise the domestic legislative choices has been a ground for not introducing certain change. That this particular response has not been so expressly visible in the context of Case Study I may be explained in different ways. For Germany and the Netherlands it is possibly explained by the fact these States have not contemplated introducing a reproductive method that included a risk that its legal effects would not be recognised in other States. In Ireland, by contrast, there were plans on the table to legalise surrogacy, but these were withdrawn. Whether 'backing out' was part of the motivation behind this decision, is insufficiently clear.

Chapters 7 and 13 have pointed out that the various legal responses also have implications for the individual. Although foreign options in principle contribute to the range of options that individuals have, cross-border movement inherently brings with it burdens for individuals, which, in fact, may be considerable, particularly in outsourcing situations.[41] The warding off of cross-border movement may add to such burdens, while accommodation may alleviate some of them. Burdens for individuals that can only be removed by means of adaptation, are burdens involved in the travelling itself and burdens that occur in the daily lives of families living in a State that does not legally recognise their civil status or their parental links.

14.2. Observations

14.2.1. Limited substantive European standard-setting, but nonetheless…

Despite limited competences at EU level and the granting of a wide margin of appreciation by the ECtHR in many of the morally sensitive issues addressed in this research, it cannot be denied that there is increasingly more (indirect) European standard-setting in these areas, both in internal and cross-border situations.

As noted in section 14.1.4 above, the present research has made clear that there is a growing set of European standards for cross-border situations. States' legal responses

[40] As noted in Ch. 13, section 13.2.1.1, various States subject access to marriage or partnership registration to conditions relating to residency and/or nationality.

[41] See Ch. 7, section 7.2.4.

to cross-border situations are increasingly more dictated by European law. However, the (potential for) (indirect) impact of European law on internal situations can also not be overlooked. This may first of all be the consequence of the 'in for a penny, in for a pound' approach, as described in section 14.1.3.2 above. This rather pragmatic approach of the European Courts has created obligations for States that cannot be ignored. In other words, while not encroaching upon the most fundamental moral choices of States, there is European standard-setting in these areas, albeit in a more implicit manner. After all, *if* States recognise the existence of a right at the national level, they are also obliged to set up sufficient preconditions for the effective and non-discriminatory enjoyment of that right.[42] They furthermore have to ensure that their legal framework in the area is coherent and consistent. While this is not harmonisation *per se*, such reasoning may nonetheless have a harmonising impact. States can only escape such European influence by not making a first step at all (see also 14.2.1 below), but whether that is a realistic scenario, can be questioned. Particularly where other (non-European) States are taking steps in these areas, and where medical scientific developments keep progressing, States may desire to make their regimes more permissive, at least to some extent.

It has furthermore proven increasingly difficult to separate the 'European' from the 'national' in these areas, since terminology is employed at the European level that is, in principle, defined at the national level. EU law texts contain terms such as 'spouse', 'embryo' and 'pregnant worker', which concern or relate to matters in respect of which the Member States are exclusively competent. Even though the relevant documents generally refer to national legislation in this regard, it can be difficult to keep these two levels of jurisdiction apart. The CJEU has repeatedly stressed in the relevant cases that its definition of such terms is a legal definition concerning the relevant Directive only (see also 14.1.3.1 above), but it remains very difficult to rule out any radiating effect of any such definition adopted by the CJEU. It may affect standard-setting at the national level, and/or may influence other realms of EU law. For example, in academia often references have been made to the CJEU case law in staff cases and employment cases to substantiate an argument on the approach the CJEU should take in free movement cases involving same-sex couples.[43] The Court may be indeed inclined to take that case law into account if such a case should come before it. This effect may be reinforced by non-binding standard-setting in the EU, in particular in the area of LGBT rights.[44] Related hereto is that obligations of States under EU equal treatment legislation may also have a radiating effect on national standard-setting in other fields of law. For instance, the more States are required to equalise the position of same-sex couples with that of different-sex couples in the area of employment, the more likely it seems that they will also do so in other areas, possibly including parental matters.

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42 Heringa and Van Hoof speak in this regard of 'the socialising effect of Article 14'. Heringa and Van Hoof, 'Prohibition of discrimination (Article 14)', in: P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, Intersentia 2006) p. 1051.

43 See Ch. 9, section 9.6.

44 See Ch. 9, section 9.4.

On the basis of the above one could conclude that EU law, as well as the ECHR, are spreading like oil in these areas. The 'European' and the 'national' are thus becoming increasingly interwoven. This may also have implications for (variety in) national moral choices.

14.2.2. Implications for (the variety in) national moral choices

The present research has confirmed the premise that there is (a wide) diversity in national standard-setting in morally sensitive issues in the European Union. At the same time, it can be observed that various factors have or may have implications for (the variety in) national moral choices throughout the European Union. This holds, firstly, for the increased indirect impact of European law on national standard-setting in morally sensitive issues, as described above. Further, cross-border movement in itself, as well legal responses thereto – whether deliberately chosen by States or imposed on them by European law – have an impact in this respect.

When it comes to internal situations, it can be observed that the implicit or indirect harmonising effect of the 'in for a penny, in for a pound' approach of the European Courts as described above, is a particular one. It namely risks becoming an 'all or nothing' approach, and may in this way drive a wedge between the European States. States may either choose not to recognise a certain right or to grant a certain entitlement at all – a principled approach for which the European level leaves room – or they recognise the existence of a right at the national level, but are also obliged to set up the above-mentioned sufficient preconditions for the enjoyment of that right. This effectively limits States' room for manoeuvre; either they take no steps at all or they take the first step, which often, although not necessarily, results in an obligation to take even more steps or many steps at once. The latter implication is reinforced by the fact that States must provide for a coherent framework in these areas, which entails that any principled choice made must be followed up on in all realms of the law. Also, the principle will keep applying to each new step that States make. The States' range of options has thus become rather black-and-white; either they take a very traditional approach to these matters,[45] or they join the States in the vanguard. There is not much middle ground left, as intermediary and partly discriminatory or partly ineffective approaches to these morally sensitive issues cannot be easily justified. This particularly holds true in the context of Case Study II where the range of options is more black-and-white to begin with, but also applies in respect of Case Study I. All in all, the variety in moral choices may be delimited by the 'in for a penny, in for a pound' approach.

Turning to the cross-border picture, it has been observed that in some circumstances cross-border movement can provide a means to uphold national standards for internal situations, and thus (a variety in) moral choices. This may hold particularly true in

[45] *Cf.* F. de Londras and K. Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, A, B & C v Ireland', 62 *International and Comparative Law Quarterly* (2013) p. 250 at p. 262.

the context of Case Study I, and academic literature has been especially elaborate in respect of such an effect of cross-border reproductive care (CBRC). Pennings has opined, for example, that CBRC should be seen as '[…] a safety valve that avoids moral conflict, and as such, contributes to a peaceful coexistence of different ethical and religious views in Europe.'[46] The present research has shown that any such effect of cross-border movement in morally sensitive issues may, however, be diminished if the discretion of States to react to such cross-border movement is restricted by European standard-setting. Whether this is indeed the case, depends on the type of legal response that is imposed on States by the European level. Where States are required to recognise the legal effects of cross-border movement, this is more likely to have an impact on their standard-setting at the national level in the area.[47] Hence, in those situations cross-border movement may not function as a safety valve. Where no such recognition of legal effects is involved, however, as is the case in respect of some of the types of reproductive treatment discussed in Case Study I, this may be different. The 'mere' accommodating of such cross-border movement by means of arranging practicalities such as information and follow-up care, may put less pressure on national standard-setting and may thus may enable States to uphold less permissive regimes. Here, outsourcing – whereby foreign options contribute to the justification of restrictive regimes – becomes more realistic.[48] Storrow has observed in respect of CBRC that '[…] the opportunity for patients to go abroad for treatment tempers organized resistance to the law and allows government to pass stricter regulations than it otherwise might.'[49] In other words, where the ECtHR applies an outsourcing approach and combines it with accommodation obligations of a limited impact, as it has done in the context of Case Study I,[50] States with less permissive regimes may be less inclined to move towards the more permissive side of the moral spectrum. They may instead remain on the less permissive side.

Where there are no realistic outsourcing options, however, cross-border movement and legal responses thereto may instead impact national standard-setting for internal situations and lead to the dominance of more permissive regimes in this regard. Firstly, it has appeared in the context of Case Study I that cross-border movement may in itself be a trigger for adaptation of the national standard to those of States functioning as countries of destination in these situations. For instance, in the context of CBRC, quality and safety concerns about foreign treatment options have been put forward as grounds for such adaptation.[51] In addition, in both case studies

46 G. Pennings, 'Legal harmonization and reproductive tourism in Europe', 19 *Human Reproduction* (2004) p. 2689 at p. 2694. See also 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 at p. 262.

47 See Ch. 7, section 7.2.2.3 and Ch. 13, section 13.2.2.3.

48 See Ch. 7, section 7.2.4.

49 R.F. Storrow, 'The pluralism problem in cross-border reproductive care', 25 *Human Reproduction* (2010) p. 2939 at p. 2941.

50 See Ch. 7, section 7.2.4.

51 See Ch. 7, section 7.2.3. Concerns about 'deleterious extra-territorial effects' (Storrow 2010, *supra* n. 50, at p. 2941) of such cross-border movement could potentially be another ground for adaptation. Here one may think of concerns about risks of exploitation of gamete donors or surrogate mothers in foreign countries.

(potential for) more implicit impact on national standard-setting by means of legal responses to cross-border movement has been identified. As also noted above, accommodation consisting of the recognition of the legal effects of such cross-border movement – a civil status or parental links established in another country – may affect national standard-setting for internal situations. Possibly even more so when such accommodation is imposed upon them by European law, States acting as host States or countries of origin in such cross-border situations may feel pressurised to adapt their national standard-setting in these areas to the standard that they (must) apply in cross-border situations.[52] This may hold particularly true in situations where States are required under European law to recognise a civil status or forms of parental links that their national law does not even provide for. There is thus reason to assume that, in certain circumstances, because of cross-border movement and because legal responses to such movement are required, States are inclined to move in the direction of more progressive regimes. Whether this also inherently implies a move to the most progressive regime, cannot be firmly concluded on the basis of the present research, but requires further (sociological) research. It seems a probable conclusion, since so long as more progressive regimes exist, adaptation or implicit pressure of accommodation may occur. In other words, cross-border movement may imply that also States that are yet on the fairly progressive side, (feel pressurised to) move towards the most progressive regime. This is further confirmed by the fact that while 'backing out' has been visible as well, this has been only incidentally and only occurred when a State was considering being very first to take a step towards a more progressive side of the moral spectrum.[53]

There are thus simultaneous dynamics in opposite directions taking place, that all may have implications for (the variety in) national choices in morally sensitive issues in the European Union. Where an outsourcing approach is applied, it may be more likely that States with less permissive regimes remain on that side of the moral spectrum, while accommodation obligations and concerns about implications of cross-border movement, may prompt States to move to or towards the other side of this spectrum. These dynamics not only have implications for individuals involved in cross-border movement in these matters (see also 14.1.4 above), but – as national standard-setting for internal situations may be affected by these dynamics – also for the nationals of the States concerned that do not cross borders.

14.2.3. Reality outpaces and dictates the law, particularly in cross-border cases

The present research has, furthermore, shown that in many situations complex balancing exercises and ethical objections to certain practices were outpaced by real time developments. This applies in internal situations, but even more so in cross-border situations. Even if national legislatures desired so on ethical or moral

52 See Ch. 7, section 7.2.2.3 and Ch. 13, section 13.2.2.3.
53 See Ch. 13, section 13.2.3.

grounds, they have not been able to prevent certain matters from becoming reality and correspondingly from becoming facts of law. Particularly relevant for Case Study II has been the reality that States cannot prevent that *de facto* family life is being formed. Particularly in the ECtHR case law, increasingly more protection has been granted to *de facto* family life.[54]

States may ban or limit certain practices deemed undesirable within their own jurisdictions, but to prevent people from going abroad for such practices has proven much harder. As a result it has been even more so in cross-border situations that reality has outpaced and dictated the law. The *faits accomplis* of a born child and of parental links having been established abroad in cross-border surrogacy cases, with which States have been confronted in cross-border situations, have proven forceful arguments for narrowing the room for manoeuvre for States in such situations. Although so far not confirmed in any European case law, in the future this also may hold for the *fait accompli* of an established civil status in the context of Case Study II.

This time the dynamic of cross-border movement has thus had clear implications for legal responses to cross-border movement. Accommodation obligations have most often been dictated by reality. The reality of cross-border movement as such has furthermore at times been the ground for pragmatic responses like adaptation, as also observed above.

14.2.4. The cross-border dimension of multilevel jurisdictions

Lastly, the present research has provided the insight that in cross-border situations in fact a unique realm of law applies. Those who cross borders (within the EU), enter a special dimension of law. EU free movement law and Private International Law are the readiest and most established areas of law that set standards for cross-border situations, but the present research has revealed that standard-setting for cross-border situations in morally sensitive issues is more comprehensive than those two realms of law alone. It encompasses the aforementioned areas of law, but also includes others, most profoundly human rights law. This shows all the more that the cross-border dimension is not confined to one level of jurisdiction in the European multilevel jurisdiction. Cross-border situations cut diagonally through horizontal and vertical interaction of legal systems and form the trigger, the legal stepping stone, for such interaction. Moreover, apart from such interaction between legal systems, cross-border movement may establish an interrelation or interdependency between legal systems, in the sense that foreign options can contribute to the justification of domestic restrictions. This makes it even more likely that cross-border situations concern a distinct realm of law.

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[54] ECtHR 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 145, under reference to ECtHR 28 June 2007, *Wagner and J.M.W.L.* v. *Luxembourg*, no. 76240/01, para. 119; ECtHR 25 January 2007, *Eski* v. *Austria*, no. 21949/03, para. 39 and ECtHR 13 December 2007, *Emonet a.o. v. Switzerland*, no. 39051/03, paras. 63–64.

For individuals involved in cross-border movement this generally implies that they have more legal means to have their interests protected. For States it implies that their decision-making in cross-border situations is encroached upon. This may, as observed above, indirectly affect national standard-setting in morally sensitive issues and thus have implications for (the variety of) moral choices in the European Union.