Cross-border continuity of family status and public policy concerns in the European Union

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Abstract: Continuità transfrontaliera degli status familiari e questioni di ordine pubblico nell'Unione europea – Free movement and respect for human rights impact on EU Member States' family law and conflict of law rules, granting EU citizens the right to recognition of a status acquired in (or under the rules of) another legal order. However, status can be prevented from producing effects in the forum if their recognition would be inconsistent with public policy. Having regard to the relevance of the EU citizen's rights in the European integration process, this essay theorizes the need to resize the Member States' sovereignty through a greatly attenuated public policy clause, notably when a minor's status is at stake.

Keywords: Right to private and family life; Free movement; Private international law; Human rights; Status recognition.

1. Introduction

As Advocate General La Pergola stated in his Opinion in *Dafeki*[1], necessity to grant continuity of subjective legal positions under EU law, their protection, and therefore the idea itself of integration pursued by the European legal order, impose the «*immutability of [personal] status*» anytime «*it constitutes an element of or prerequisite for a right of the individual*» granted by Community Law.

Status recognition is a matter ruled by private international law (PIL)[2]. A non-recognition of a status acquired abroad means that PIL led the law of the State where recognition is sought prevail over the law of status' establishment. PIL arises from, and expresses, legislative policies and inner values of each legal order, but more and more frequently it gives in when dealing with supranational rules'

[1] Case C-336/94, ECLI:EU:C:1996:462.

[2] Scholars debate on whether recognition has to be intended as a conflict of law rules or if it is just an aim to pursue through other mechanisms of private international law. However, this issue will not be deepened in this paper. Cfr., on this topic, P. Lagarde, *La méthode de la reconnaissance est-elle l'avenir du droit international privé?* Conférence inaugurale, session de droit international privé, 2014 (Volume 371), in *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law; G. Rossolillo, *Mutuo riconoscimento e tecniche conflittuali*, Padua, 2002, 239 ff.; M. Fallon, J. Meeusen, *Private International Law in the European Union and the Exception of Mutual Recognition*, in *Yearbook of Private International Law*, 2002, 37 ff.; M. Melcher, *(Mutual) Recognition of Registered Relationships via EU Private International Law*, in *Journal of Private International Law*, 2013, 149 ff.; H.P. Mansel, K. Thorn, R. Wagner, *Europäisches Kollisionrecht 2010*, in *IPRax*, 2011, 1 ff.

primacy[3], notably EU law and binding human rights norms as the European Convention on Human Rights (ECHR). Indeed, as we will see *infra*, EU Member States' PIL can come into conflict with supranational rules when it leads to non-recognition. Unjustified conflicts will lead–directly or indirectly[4]–to displacement of the host State's PIL and, consequently, to recognition of family status.

This paper analyses the issue of the recognition in the EU of family relationships established in another Member State and comprised of (at least) one Union citizen. It will highlight how EU Law–and, to some extent, the European Convention on Human Rights (ECHR)–impact on national PIL rules, in order to protect EU citizens' legitimate expectation to have their cross-border family status recognized (paras no. 3, 4). Then, this paper explains under which circumstances national authorities can justifiably refuse recognition, notably on public policy grounds (para. no. 5-7). The paper argues that continuity of EU citizens' family status requires a resizing of national legal orders' sovereignty, through a greatly attenuated public policy clause, due to States belonging to a community of highly integrated supranational law. Paras. no. 8 and 9 examine recognition of status *filiations* as a case-study and show how the 'best interests of the child' principle calls for recognition in the State of the forum regardless of any public policy concern.

2. Recognition of cross-border family status: a private international law perspective.

Situations like mixed marriages and partnerships, double citizenship, adoption of foreign children and migration, give rise to complex cross-border cases all over Europe[5]. People move from one Country to another, along with their family members. Movement of people often means movement of families and family ties. Citizens expect a validly established family tie to be deemed equally valid abroad[6]. They expect their family ties to be protected in their content, extent and stability, in space and time[7].

[3] On these aspects see J. Guillaumé, *The Weakening of the Nation-State and Private International Law. The "Right to International Mobility"*, in *Yearbook of Private International Law*, 2012/2013, 519 ff.

[4] In this context 'directly' means 'by virtue of the sole existence of the supranational rules', irrespectively from a national measure implementing it.

[5] More than 13 million of European citizens reside in an EU Country other than that of nationality. 'International' couples living in the EU are 16 million. Data published on December 6th, 2017 in *A Europe for mobile and international families*, European Parliamentary Research Service Blog, epthinktank.eu/2017/12/07/a-europe-for-mobile-and-international-families/

[6] This is especially true within a quite culturally homogeneous society as the European one. EU Member States share many common fundamental values, first of all those mentioned at Article 2 TEU and those affirmed by the ECHR and by the Charter of fundamental rights of the European Union (EU Charter).

[7] Thus, we refer to recognition of family status established abroad as 'the right to cross-border continuity of family status'. R. Baratta, *La reconnaissance internationale des situations juridiques personnelles et familiales*, in *Recueil des cours*, tome 348 (2011), 253 ff., 272, 320, defines the issue

However, the protection of this expectation is not to be taken for granted. Indeed, States have no obligation to recognize the validity of status and relationships established under the rules of another national legal system[8]. Therefore, uncertainty for EU citizens in cross-border situations derives from differences still existing within the EU Member States' private law, notably in family law[9], civil status matters[10] and in their PIL, which express of their social, cultural and legal identity[11].

Traditionally, the recognition of a family relationship acquired under a foreign system is ruled by the State of the forum's PIL. Where PIL asks for the application of the law of the State in which family relationship established ('*lex causae*'), the host State's authorities may consider it incompatible with domestic legislation ('*lex fori*'), thus refusing the recognition of the status acquired abroad. Lack of EU competences in family law, civil status, and harmonized PIL rules on establishment and recognition of family status, makes the legal framework in such matter extremely fragmented. Hence, it fosters a closed attitude towards foreign legal principles and relationships[12]. Consequently, (international) public policy clause operates as a limit to application of foreign rules by the State in which status recognition is sought[13], in order to preserve its innermost values and principles.

in terms of «besoin social de continuité et de stabilité de l'état de la personne» and of «portabilité des relations familiales».

[8] As noted G. Biagioni, *On Recognition of Foreign Same-Sex Marriages and Partnerships*, in D. Gallo et a. (Eds), *Same-Sex Couples before National, Supranational and International Jurisdictions*, Berlin, 2014, 359 ff. A different regime distinguishes the US legal order, where the Supreme Court, in its much-awaited ruling in *Obergefell v. Hodges*, (judgment of 26 June 2015, case no. 576 US (2015), held that same-sex marriages lawfully performed in one US State must be fully recognized in all the other US States.

[9] Family patterns adopted by different legal orders may differ more or less relevantly. Thus, a legal order may provide for family relationships unknown (if not even forbidden) in another legal order: that is the case, for example, for registered partnerships or same-sex marriages. Otherwise, a State may provide for a family status on grounds that are not recognized as valid in another State: parenthood, for example, is a universally recognized family tie, while only a few legal orders in the world provide for parenthood following surrogate motherhood.

[10] International conventions (such as the one produced by the International Commission on Civil Status), and, more recently, a EU Regulation (no. 2016/1191 of 6 July 2016, OJ L 200 of 26.7.2016, 1 ff.) afford some harmonisation. However, Regulation no. 1191 does not apply to recognition of the legal effects of public documents issued by another Member State's national authorities. See E. Pataut, *Reconnaissance des documents publics: vers un état civil européen?*, in *Revue Trimestrielle de Droit Européen*, 2013, 920 ff.

[11] On the relationship between culture and family law in Europe, see W. Pintens, *Family Law in Europe: developments and perspectives*, in *The Comparative and International Law Journal of Southern Africa*, 1, 2008, 155 ss.; M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, Antwerp, 2006; M.R. Marella, *The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law*, in *European Law Journal*, 2006, 78 ff.

[12] This is considered one of the most visible deficiencies of the current PIL system, which, as it is structured, cannot handle conflict between different traditions and legal cultures in that field, thus avoiding such consequences. Cfr. M. Lehmann, *What's in a name? Grunkin-Paul and beyond*, in *Yearbook of Private International Law*, 2008, 138.

[13] Public policy (*ordre public*) doctrine in private international law finds its roots in 19th Century, when it was noted that «foreign laws which are repugnant to fundamental principles of the lex fori, or to religion or morality, cannot claim adoption under the general comity of nations». Cfr. J. Story, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to*

Therefore, when a EU citizen moves to a State (the 'host State' or 'State of destination') other than that in which his/her family relationships have been established, national authorities do not recognize validity and/or efficacy of those family ties, thus making them void and irrelevant in the host legal order. Even where family ties are recognized as valid, host State's legislation might downgrade them within the legal scheme of a different (usually less protected) status[14].

Both situations are referred to as 'limping status'[15]. This issue affects status established years before request for recognition, as well as status the establishment of which were the only reason why people moved abroad and then immediately moved back to the country of origin asking for recognition[16].

Limping status might cause devastating consequences to status holder and his/her family members, such as impossibility to gain the citizenship of a given State, benefit from migration rights like family reunification and determine who holds parental responsibility or obligations of maintenance to a child or to a former spouse following divorce. In terms of EU law, restriction to free movement of people, genuine or strictly aimed at getting the status established, and eventually interference with the fundamental rights to private and family life may occur. Therefore, individuals can find protection under the EU legal order and the Council of Europe system.

3. Recognition, non-discrimination and the right to freely move and reside in the EU.

Lack of competence does not mean that EU law cannot exercise any influence on cross-border status. EU law intersects family law[17] in different areas, including EU citizenship, free movement, fundamental rights, social policy, migration policy, the completion of the Internal market and of the Area of freedom, security

Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments, Boston/London, 1872, par. 373 ff.

[14] M. Melcher, *Private International Law and Registered Relationships: an EU Perspective*, in *European Review of Private Law*, 2012, n. 4, 1078. Downgrading is what happens in Italy under Law no. 76/2016, where same-sex marriages celebrated abroad are recognized *ope legis* as mere registered partnerships.

[15] K. Doremberg, *Hinkende Rechtsverhältnisse im internationalen Familienrecht*, Berlin, 1968.

[16] The second case mostly involves a status whose establishment is prohibited–at all or under specific circumstances–in the State of origin or residence (e.g. legal parentage established through adoption is permitted by both the State of origin and the host State, but only the latter permits adoption by a single parent or by same-sex partners).

[17] See, *ex multis*, H. Fulchiron, *La construction d'un droit "européen" de le famille: entre coordination, harmonisation et uniformisation*, in *Revue des affaires européennes*, 2014, 309 ff.; I. Queirolo, *Integrazione europea e diritto di famiglia*, in N. Parisi, M. Fumagalli Meraviglia, A. Santini, D. Rinoldi (Eds), *Scritti in onore di Ugo Draetta*, Naples, 2011, 585 ff.; C. Honorati, *Verso una competenza della Comunità europea in materia di diritto di famiglia?*, in S. Bariatti, C. Ricci, L. Tomasi (Eds), *La famiglia nel diritto internazionale privato comunitario*, Milan, 2007, 3 ff.; R. Baratta, *Verso la "comunitarizzazione" dei principi fondamentali del diritto di famiglia*, in *Rivista di diritto internazionale privato e processuale*, 2005, n. 3, 573 ff.; P. Mengozzi, *I problemi giuridici della famiglia a fronte del processo di integrazione europea*, in *Famiglia e diritto*, 2004, 643 ff.

and justice (judicial cooperation in civil matters)[18]. Some EU pieces of legislation indirectly concern family relationships[19], where a prejudicial relationship exists between the status and the exercise of a right provided for by the EU[20]. Member States, therefore, must evaluate carefully the grounds for a potential denial of status recognition, in order to not prevent the effectiveness of EU law and eventually infringe it. Moreover, despite formal distribution of competences between EU and Member States, there cannot be any national rule, even in an area that falls to be regulated exclusively by the latter, whose application may constitute a breach of EU law. Hence, the use of national competences always has to be in accordance to EU law. This justified the intervention by the CJEU (through the preliminary ruling procedure)[21], which scrutinized the compatibility of some national rules affecting personal status recognition with the principle of

[18] See G. De Baere, K. Gutman, *The impact of the European Union and the European Court of Justice on European family law*, in J. Scherpe (Ed), *European family law*, vol. I, Cheltenham, 2016, 5 ff.; G. Rossolillo, *Rapporti di famiglia e diritto dell'Unione europea: profili problematici del rapporto tra dimensione nazionale e dimensione transnazionale della famiglia*, in *Famiglia e diritto*, 2010, 733 ff.

[19] Some are very controversial, such as *de facto* partnerships (Directive 2003/86/CE on the right to family reunification, in OJ L 251 of 3.10.2003, 12 ff.), registered partnerships (Regulation (EU) 2016/1104 of the Council, of 24 June 2016, in OJ L 183 of 8.7.2016, 30 ff.), and same-sex marriages (see Article 2, par. 2, lett. a), Directive 2004/38/CE). On the interpretation of the notion of 'spouse' under Directive 38 as not solely including the opposite sex partner, see the recent judgment of the Court of Justice of the European Union (CJEU), of 5 June 2018, case C-673/16, *Coman and others*, ECLI:EU:C:2018:385, and even before H. Toner, *Migration Rights and Same-Sex Couples in EU Law: A Case Study*, in K. Boele-Woelki, A. Fuchs (Eds), *Legal Recognition of Same-Sex Relationships in Europe*, Antwerp, 2012, 285, 286–9.

[20] As highlighted by M. Fallon, *Constraints of internal market law on family law*, in J. Meeusen et a. (Eds), *International family law for the European Union*, Antwerp, 2007, 164, regulation of family status referred to by EU secondary law acts as a preliminary question to the application of EU law itself. On the protection of family status within the free movement of people and the EU policy on migration, see L. Tomasi, *La tutela degli status familiari nel diritto dell'Unione europea*, Padua, 2010.

[21] See judgments of 30 march 1993, case C-168/91, *Konstantinidis*, EU:C:1993:115; of 2 October 2003, case C-148/02, *Garcia Avello*, EU:C:2003:539; of 14 October 2008, case C-353/06, *Grunkin-Paul*, EU:C:2008:559; of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806; of 12 May 2011, case C-391/09, *Runevic-Vardyn and Wardyn*, EU:C:2011:291; of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401; of 8 June 2017, case C-541/15, *Mircea Florian Freitag*, EU:C:2017:432; of 5 June 2018, *Coman and others*, cited above in note 19. Cfr., *ex multis*, G. De Groot, *Towards European Conflict Rules in Matters of Personal Status*, in *Maastricht Journal of European and Comparative Law*, 2004, 115 ff.; A. Iliopoulou, *What's in a name? Citoyenneté, égalité et droit au nom. A propos de l'arrêt Garcia Avello*, in *Revue Trimestrielle de Droit Européen*, 2004, 565 ff.; M. Castellaneta, *Libera circolazione delle persone e norme statali sull'attribuzione del cognome*, in *Diritto comunitario e degli scambi internazionali*, 2009, 745 ff.; C. Honorati, *Free Circulation Of Names For EU Citizens?*, in *Diritto dell'Unione europea*, 2009, 379 ff.; J. Meeusen, *The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC*, in *Zeitschrift für europäisches Privatrecht*, 2010, 189 ff.; L. Besselink, *Respecting Constitutional Identity in the EU*, in *Common Market Law Review*, 2012, 671 ff.; E. Cusas, *Arrêt "Bogendorff von Wolffersdorff": la libre circulation et les titres de noblesse*, in *Journal de droit européen*, 2016, n. 232, 317 ff.; A. Tryfonidou, *Free Movement of Same-Sex Spouses within the EU: The ECJ's Coman judgment*, online in *europeanlawblog.eu*; G. Kessler, *La consécration par la CJUE du droit de séjour du conjoint de même sexe du citoyen européen: un pas supplémentaire vers la libre circulation des situations familiales au sein de l'Union européenne?*, in *Journal du droit international*, 2019, 27 ff.

non-discrimination (Article 18 TFEU) and EU citizens' free movement right (Article 21 TFEU)[22].

The Court's judgments concerned non-recognition of EU citizens' surnames bestowed under another Member State's rules. The host State's authorities registered the citizens with a different surname, determined under the *lex fori*.

In its case-law, the CJEU broadly interpreted the principle of non-discrimination and the right to free movement[23], thus allowing linkage of their compliance to previous mutual recognition of personal status, as long as denial of recognition would have consisted in denying the relevance of citizenship in another MS (and thus discrimination on the grounds of nationality[24]), or a restriction on exercise of free movement, as it could cause serious inconveniences at administrative, professional and private levels[25]. Therefore, despite EU legislation does not grant expressly automatic recognition of foreign measures on civil status, domestic legislations cannot lead to a non-recognition when this would breach EU Treaty law.

No explicit suggestion on whether this reasoning is applicable to other EU citizens' status emerges from this case-law. However, following the arguments developed in *Grunkin Paul*, a general right to mutual recognition of EU citizens' status can be envisaged insofar as:

[22] Notable legal doctrine highlighted also the relevance of the principle of loyal cooperation between Member States, now referred to by Article 4 TEU. This principle would preclude, indeed, an *a priori* refusal to recognize cross-border family relationships, due to the neutral application of host State's PIL. Cfr. R. Baratta, *Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC*, in *IPRax*, 2007, 1, 4 ff., 8 ff.

[23] That is consistent with previous CJEU judgments on free movement of people, where the Court stated that EU rules granting such right must be interpreted in a broad way. See, *ex multis*, the judgment of 19 October 2004, *Zhu and Chen*, case C-200/02, EU:C:2004:639, notably at para. 31.

[24] Case *García Avello* concerned children who resided in Belgium while having both Belgian and Spanish nationality. At birth, they were bestowed a surname under the *lex fori*. Their parents applied for a change according to Spanish law; however, the Belgian authority rejected the application, as it was considered against the applicable domestic legislation. The Court considered that prohibition of discrimination on the grounds of nationality precluded Belgian authorities from refusing to grant an application for the surname of those children to be changed to that to which they were entitled according to Spanish law and tradition. Cfr. J. Meeusen, *Le droit international privé et le principe de non-discrimination*, in *Recueil des cours*, 2011, vol. 353, 9 ff., 127.

[25] CJEU has considered as a serious inconvenience the risk of being obliged to dispel doubts as to one's identity because of discrepancy in names used in different countries (case *Grunkin-Paul*, para. 26, and case *Sayn*, para. 70); encountering difficulties in proving family links with your own family members (case *Runevic-Vardyn*, para. 77, case *Bogendorff von Wolffersdorff*, para. 46); being obliged to dispel doubts as to the authenticity of personal documents or the truthfulness of information contained in those documents (case *Runevic-Vardyn* para. 77); the risk that potential clients might confuse a professional with others, due to a surname spelling modification (case *Kostandinidis*); the risk of difficulties in benefiting from legal effects of diplomas or certificates drawn up in the name recognized in another Member State (case *Garcia Avello*, para. 36). According to such case law, other examples of 'serious inconveniences' could be considered, *inter alia*, the impossibility to access a more favourable fiscal regime, or pensions and social security benefits, or hospital visitation rights and other relevant rights that would be granted in case of family status' full recognition.

a) National legislations share common guiding principles ruling each status[26] allowing a strengthened mutual trust upon which the principle of mutual recognition is inevitably grounded;

b) That status contributes to building someone's private and/or family life (as a means of personal identification and a link to a family) in the same manner as the surname does, and

c) Refusal of recognition causes inconveniences of the utmost relevance in moving freely across the EU territory.

When these prerequisites are met, EU citizens should be legitimately able to expect their family status to be recognized by the host State's authorities. In other words, they should legitimately expect that EU law prevents any hindrance to free movement and/or any discrimination grounded on nationality, actually or potentially depending on the application of the *lex fori* PIL[27].

Although the CJEU case-law seemed to be settled on recognition of surnames, the most recent judgment in case *Coman* shows that the thesis supporting the circulation of other family status orders may be based on the same reasoning and arguments, despite the very strong differences existing between them and the different axiological weight given to them by States. In case *Coman* the CJEU held that the term "spouse" in Article 2(2)(a) of the Citizens' Directive (2004/38/EC) is gender neutral and may include same-sex spouses. Therefore, Member States prohibiting same-sex marriages cannot rely on national law as justification to refuse the recognition of a same-sex marriage legally celebrated in another Member State[28]. Evidently, the Court refuses different applications of EU citizen's freedom of movement, depending on national law's discretion in allowing same-sex marriages or not. However, the Court significantly narrows the scope of its decision. First, it applies to the sole purpose of granting family reunification, while it does not impose recognition in order to grant other rights that are based on residency; then, the judgement concerns only couples married in an EU Member State and only if the marriage has been concluded during the Union citizen's period of *genuine* (the emphasis is added by the Author) residence in that

[26] C. Honorati, *Free circulation*, cit., 396 ff. Notably, such commonality seems to exist with regards to recognition of same-sex marriages and (even more so) same-sex partnerships. Indeed, also thanks to the intervention of the ECtHR (see judgment of 21 July 2015, *Oliari and other v. Italy*, Applications no. 18766/11 and 36030/11), a *consensus* towards the need to regulate establishment and effects of same-sex formal relationships is progressively forming. The same goes for the fact that there should not be any discrimination against same-sex couples by excluding them from protections granted to formally-recognized different-sex unions. See ECtHR, 24 July 2004, Application no. 40016/98, *Karner v. Austria*, and 13 February 2013, Application no. 19010/07, *X et o. v. Austria*, 23 February 2016, Application no. 68453/13, *Pajić v. Croatia*; CJEU, 1 April 2008, case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Büchnen*, ECLI:EU:C:2008:179, 10 May 2011, case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, ECLI:EU:C:2011:286; 12 December 2013, case C-267/12, *Hay v. Crédit agricole*, ECLI:EU:C:2013:823.

[27] G. Rossolillo, *Identità personale e diritto internazionale privato*, Padua, 2009, 204.

[28] The judgment applies to same-sex spouses but not necessarily to registered partners, who are entitled to a derived right of residence only if «the host Member State treats registered partnerships as equivalent to marriage», as required by Directive 38, Article 2, no. 2, lett. b).

State.

Thus, we can conclude that EU law eventually interferes with domestic legislation protecting EU citizens' right to a status' cross-border continuity. At the same time, however, we must stress that EU law guarantees this right only in situations linked with its legal order, and only insofar as this functions to guarantee effective exercise of free movement or to prevent discrimination on grounds of nationality.

4. Cross-border continuity of family status as part of the fundamental right to private and family life.

Fundamental rights and private international law are not considered mutually neutral anymore[29], so protection of human rights may impose States to regulate the coordination between national legal orders according to binding pieces of legislation as the ECHR and the EU Charter[30]. The Court of Strasbourg, indeed, has already stated that right to recognition is nothing less than one of the possible effects of the right to private and family life granted by Article 8 ECHR[31]. Non-recognition, therefore, interferes with Article 8[32] insofar as a valid family

[29] Separation between conflict of law rules and human rights rested primarily on the divergent goals distinguishing the two matters; while the former deals with coordination between legal orders, the latter are imperative rights that aim to be universally implemented and consequently eliminate any dystonia between different legal systems. See, among others, F. Matscher, *Le droit international privé face à la Convention européenne des droits de l'homme*, in *Travaux du Comité français de droit international privé*, Paris 1996-97, 211; P. Kinsch, *Droits de l'homme, droits fondamentaux et droits international privé*, in *Recueil des Cours*, 2005, t. 318; L. Picchio Forlati, *Critères de rattachement et règles d'applicabilité à l'heure de la protection des droits de l'homme en Europe*, in *Rivista di diritto internazionale*, 2005, 907; F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, Bruxelles, 2007; L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague, 2014; G. Carella, *Sistema delle norme di conflitto e tutela internazionale dei diritti umani: una rivoluzione copernicana?*, in *Diritti umani e diritto internazionale*, 2014, 523 ff.; F. Salerno, *Il vincolo al rispetto dei diritti dell'uomo nel sistema delle fonti del diritto internazionale privato*, Ibid., 2014, 549 ff.; J. Fawcett, M.N. Shuilleabhain, S. Shah, *Human Rights and Private International Law*, Oxford, 2016; Y. Lequette, *Le droit international privé et les droits fondamentaux* in R. Cabrillac, M.-A. Frison-Roche, T. Revet (Eds), *Libertés et droits fondamentaux*, Dalloz, 23ème édition, 2017, 125. On the intersection between human rights and PIL on status recognition, see G. Rossolillo, *L'identità personale tra diritto internazionale privato e diritti dell'uomo*, in *Rivista di diritto internazionale*, 2007, 1028 ff.

[30] G. Carella, *La convenzione europea dei diritti dell'uomo e il diritto internazionale privato: ragioni e prospettive di una ricerca sui rapporti tra i due sistemi*, in Id. (Ed), *La convenzione europea dei diritti dell'uomo e il diritto internazionale privato*, Turin, 2009, 10.

[31] Article 8 protects the right to private and family life. Member States of the Council of Europe must, on the one hand, refrain from engaging in any 'interference' with respect to the right enshrined therein, unless the conditions referred to in paragraph 2 are met (i.e. the interference '*is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*'); on the other hand, States must implement measures aimed at granting, through positive obligations, effective respect for private and family life.

[32] Among the most relevant ECtHR decisions, see those of 6 May 2004, in case *Hussin v. Belgium* (Application no. 70807/01), of 28 June 2007, in case *Wagner and J.M.W.L. v. Luxembourg* (no. 76240/01, noted by P. Kinsch, in *Rev. crit. DIP*, 2007, 807 and by d'Avout, in *Journal du Droit International*, 2008, 183), *McDonald v. France* (no. 18648/04), of 6 July 2010,

status[33] acquired abroad is protected by the Convention–that is to say when the parties have acquired it in good faith[34]. The CJEU has never applied Article 7 EU Charter as main nor only reference to impose recognition as a peculiar form of the right to private and family life. It has mentioned how non-recognition may affect the family life that European citizens created or strengthened in the host Member State (and that it is protected under Article 7 EU Charter); yet the Court assessed national measure's relevance to EU law only through Article 21 TFEU.

However, it does not mean that the affirmation of fundamental right to family life in the CJEU case-law is just an *obiter dictum*. On the one hand, the CJEU had already abolished a restriction to free movement within the EU on this ground[35]. On the other hand, national measures liable to obstruct free movement of persons may be justified or not; indeed, justification is admitted only where such a measure does not conflict with the fundamental rights guaranteed by the Charter. The same goes for Article 24(2) of the EU Charter when domestic measures concern children. Thus, where non-recognition or downgrading affect free movement, they must be assessed in light of fundamental rights.

Since the rights guaranteed by Article 7 EU Charter[36] correspond to those guaranteed by Article 8 of the ECHR, according to Article 52 EU Charter, the former has to be interpreted in line with the latter–having the same meaning and

in case *Mary Green and Ajad Farhat v. Malta* (no. 38797/07), of 3 May 2011, in case *Negrepontis-Giannisis v. Greece* (no. 56759/08, noted by P. Kinsch in *Rev. crit. DIP*, 2011, 889; Dionisi-Peyrusse in *Journal du Droit International*, 2012, 213). See P. Kinsch, *Recognition in the Forum of a Status Acquired Abroad – Private International Law and European Human Rights Law*, in K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides (Eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, The Hague, 2010, 259 ff.; Id., *Private International Law Topics Before the European Court of Human Rights*, in *Yearbook of Private International Law*, 2011, 37 ff.; P. Franzina, *Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad*, in *Diritti umani e diritto internazionale*, 2011, 609.

[33] 'Valid' means 'acquired legally, validly and effectively, meeting both formal and substantial standards according to the State of origin's law'.

[34] Although the ECHR mechanism is quite similar to that defined by the CJEU (i.e., international rules working as a corrective to the application of national conflict of law rules leading to non-recognition), it cannot ask for immediate displacement where domestic rules would have led to deprive the status of any validity or effectiveness in the host State. Indeed, displacement is a consequence of EU law *primautè* and it doesn't belong to pure international law, unless domestic legislation expressly states otherwise (as in Article 55 of the French Constitution). However, it is not that Council of Europe member States can ignore the outcomes of the Court of Strasbourg's jurisprudence. National courts must interpret domestic measures according to obligations stemming from the ECHR and the ECtHR decisions, while national legislators must amend domestic law if necessary to comply with such obligations. Within the Italian legal system, where judges resorted to all the interpretative tools and nonetheless failed to give prevalence to the international obligation in the case, they have the duty to raise an issue of constitutionality. The international rule, therefore, will operate as an interposed parameter of constitutionality. See E. Lamarque, *Gli effetti delle sentenze della Corte di Strasburgo secondo la Corte costituzionale italiana, in Corriere giuridico*, 7/2010, 955 ff.

[35] As noted by C. Honorati, *Free circulation*, cit., 396, referring to case *Carpenter*, judgment of 11 July 2002, case C-60/00, EU:C:2002:434.

[36] Private and family life is considered a EU citizens' fundamental right. See M. González Pascual, A. Torres Pérez (Eds), *The Right to Family Life in the European Union*, London/New York, 2017.

scope[37]–and the limitations which may legitimately be imposed on the former are those allowed by paragraph 2 of the latter[38]. Under this perspective, a reference to the jurisprudence of the ECtHR is necessary in order to define the boundaries of a legitimate measure refusing the recognition or downgrading the status in the host EU Member State.

5. Restrictions to recognition of family status.

EU citizens shall claim a 'foreign' status to be recognized as valid in every Member State; however, EU law does not lay down an imperative rule of automatic recognition. A national measure can lead to a non-recognition any time it passes the '*Cassis de Dijon* test'[39], i.e. it is justified by objective and overriding reasons of public interest, has non-discriminatory effect, is proportionate to its objective and is necessary to protect the interests which it is intended to secure (that is to say that less restrictive measure could not protect adequately such interest)[40]. Where the application of national rules fails to strike a fair balance between the interests at stake, an infringement of EU Law occurs. It will be for the national court to decide whether non-recognition reflects a fair balance between the interests in issue[41]. Hence, it is somehow worrying that the CJEU gave no suggestions regarding under which prerequisites the State's interests can prevail on individual rights. Indeed, even a '*serious inconvenience*' to EU citizens does not necessarily imply that public interest must be disregarded, as a '*fair balance between the interests in issue*' may nonetheless be sought and may eventually lean on the State's interest[42]. Therefore, more references would be desirable. Fortunately, the ECHR case law provides for some very useful information about that. Indeed, being non-recognition (or downgrading[43]) of a status an interference with human rights, it

[37] Combined provision of Article 6, para. 3, TEU and Article 52, para. 3, EU Charter shows that fundamental rights guaranteed by the ECHR constitute general principles of EU law and insofar as the EU Charter contains rights corresponding to those guaranteed by the ECHR the meaning and scope of the former shall be the same as those laid down by the Convention (if not more extended). See J. Kokott, C. Sobotta, *Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection*, in *Yearbook of European Law*, Vol. 34, No. 1 (2015), 63 ff.

[38] As stated by Advocate General Jääskinen in his Opinion of 16 December 2010, case *Runevic-Vardyn*, ECLI:EU:C:2010:784, para. 77.

[39] L. Tomasi, *Il diritto al nome tra libertà di circolazione e diritti fondamentali*, in C. Honorati (Ed), *Diritto al nome e all'identità personale nell'ordinamento* europeo, Milan, 2010, 133.

[40] For a reference to proportionality in EU law, see N. Reich, *How proportionate is the proportionality principle?: some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ*, in H. Micklitz, B. De Witte (Eds), *The European Court of Justice and the autonomy of the Member States*, Cambridge, 2012, 83 ff.

[41] Case *Runevic-Vardyn*, para. 91. Here, the Court ruled that, according to Article 4, para. 2, TEU, the EU should respect Members States' national identity, including the national official language. Therefore, national rules that aimed to protect national identity could be accepted, even if they restricted EU citizens' free movement. However, if the national rules restricted it too much, then they would have to be set aside.

[42] *Ibidem.*

[43] However, the ECtHR held in *Schalk and Kopf* that downgrading does not necessarily consist of a breach of the ECHR.

requires justification under Article 7 EU Charter, as interpreted accordingly to Article 8 ECHR.

Under the ECHR system, proportionality[44] asks for some specific standards whereby one may assess the degree of protection that interests at stake deserve. Such standards shall apply before the CJEU too. From the individual interests' perspective, a pivotal role is that of 'stability of both the status and the relationship laying under it[45], which is strictly linked to their 'social reality'[46]. Therefore, national judges shall verify how strong is the link between the individual and the State where the status was established[47] and how deeply the relationship is rooted in the social fabric and in involved individuals' families[48].

Then come 'intensity' of the family ties affected by non-recognition[49], risk of frustration of reasonable expectations[50], nature of the interests at stake[51] and–as affirmed in the CJEU case law too–gravity of the inconvenience caused to citizens seeking for recognition[52]. From the State's perspective, Article 8, para. 2, ECHR allows an interference when it is in accordance with national law[53], it pursues one (or more than one) of the legitimate aims mentioned in the same paragraph and is considered as 'necessary in a democratic society' (meaning that it is grounded on

[44] J.J Cremona, *The proportionality principle in the jurisprudence of the European Court of Human Rights*, in J.J Cremona, *Selected papers 1990-2000. Vol. 2, Human rights and constitutional studies*, San Gwann, 2002, 31 ff.

[45] P. Kinsh, *Recognition in the Forum of a Status Acquired Abroad*, cit., 266. Anyway, the Author cannot tell whether 'stability' means a 'real and substantial link', a 'preponderant link', or even an 'exclusive link', and refers the issue to the ECtHR.

[46] L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, cit., 225.

[47] Recognition of status acquired in the State of nationality is usually grounded on a stricter link than that of a status acquired in a State in which the applicant stayed only occasionally or for a short period of time. However, conflicting opinions emerged on this topic. Notably, see R. Baratta, *Problematic elements*, cit., 10, who adopts a highly restrictive approach; *contra*, L. Tomasi, *Il diritto al nome*, cit., 136, who states that whatever kind of link between individuals and the State in which the status has been acquired, unless it is a 'significative' link, would be enough. Advocate General Sharpston, in her Opinion in case *Grunkin-Paul* (Opinion issued on 24 April 2008, EU:C:2008:246), at para n. 86, assessed as justified the denial of recognition in cases where there is no «real link» between an individual and his/her place of birth.

[48] Social reality depends, for example, on the duration of undisturbed enjoyment of the status, as held by the ECtHR in *Negrepontis-Giannisis*, par. 75.

[49] The intensity is higher when the status has been established by firm will of two adults, who were conscious of legal implications of their act, such as in a marriage or a registered partnership or an adoption of a grown-up (see again case *Negrepontis-Giannisis*).

[50] For example, as held by the ECtHR in case *Wagner*, in light of a sudden change in host State's legislation or practice.

[51] See *Van der Heijden v. the Netherlands* [GC], no. 42857/05, § 60. For example, a very intimate issue of somebody's life as sexual orientation (as in case *Oliari*, cited *supra* in note 26), or the best interests of the child, that must be assessed as primary whenever recognition is sought in respect of a status involving a minor (see *infra*, at para. 8, cases *Mennesson v. France* and *Labassee v. France*).

[52] ECtHR judgment of 25 November 1994, in case *Stjerna v Finland* (Application no. 18131/91), para. 42.

[53] The Strasbourg Court has established a threefold test to determine whether an interference is in accordance with the law. The scheme leads the Court to evaluate: 1) the presence of a national law; 2) the clearness and precision of its wording; and 3) the aim it pursues. See I. Roagna, *Protecting the right to respect for private and family life under the European Convention on Human Rights*, 2012, 37, online on www.echr.coe.int/LibraryDocs/Roagna2012_EN.pdf

a 'pressing social need'). Member States have a margin of appreciation in determining what is deemed so necessary for the collective interest to justify a restriction to citizens' fundamental rights. Margin of appreciation narrows when a '*consensus*' among Member States in regulating a specific issue[54] can be found; vice versa, the margin widens when the interference is grounded on national security, social or economic policy, ethics or moral[55]. However, in reviewing the State's assessment in this regard, the Court will evaluate whether the interference was proportionate and whether there could have been a less restrictive measure equally adequate to protect public interests.

6. Restrictions grounded on (international) public policy.

Under both EU and ECHR rules, public policy is considered an interest a State can legitimately protect where refusing the recognition of a foreign status. Indeed, in practice, public policy is the most common ground for a non-recognition order by national authorities[56] (as it was in the CJEU cases *Sayn-Wittgenstein*, *Bogendorff von Wolffersdorff*[57] and *Coman*[58], and in the ECtHR cases *Mary Green* and *Negrepontis-Giannisis*). Thus, it is necessary to understand to what extent parties' legitimate expectation of stability of the status acquired abroad can be restricted by Member States on public policy grounds without infringing the binding obligations deriving from European rules.

International and EU law do not harmonize international public policy. Indeed, public policy in private international law is not a concept of international, but of domestic law. Therefore, each domestic legal order has its own notion of public policy. However, it is a common feature that this clause is aimed to protect domestic legal order's coherence and basic values, as it operates as a limit to avoid unacceptable results either of the application of a foreign law or of the recognition and enforcement of a foreign decision[59]. As what is perceived as fundamental,

[54] State's margin of appreciation, therefore, narrows where the Court's capacity to interpret the standard consensus consolidated around the criterion used by the State to justify the interference increases. This implies that the Court's control can be much more penetrating than a mere control of 'legitimacy', but can also affect other aspects connected with the necessity for the measure. See on the topic of *consensus* K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, 2015.

[55] N.A. Moreham, *The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination*, in *European Human Rights Law Review*, 2008, 1, 48.

[56] See P. Lagarde, *Différences culturelles et ordre public en droit international privé de la famille*, in *Annuaire de l'Institut de droit international, session de Cracovie*, 2004, vol. 71-1, 11 ff. and vol. 71-2, 139 ff.

[57] In *Sayn* and in *Bogendorff*, the Court ruled that the application of a national law prohibiting acquisition, possession or use of a title of nobility on the basis of which a Member State refuses to recognize one of its nationals' surname as acquired in another Member State may be justified on public policy grounds.

[58] Where the Court held that recognizing a same-sex marriage for the purpose of family reunification does not threat the public policy of the host Member State, as such recognition does not require that Member State to provide, in its national law, for the institution of same-sex marriage.

[59] See P. Lagarde, *Recherches sur l'ordre public en droit international privé*, Paris, 1959, and, more recently, Id., *Public Policy*, in *International Encyclopedia of Comparative Law, vol. III, Private*

innermost values and principles of a legal order is not set in stone, international public policy's content is a flexible and constantly evolving notion, in space and time[60]. Moreover, public policy's applicability is affected by the context in which it has to apply.

Where PIL is incorporated into the EU system, indeed, EU law redefines the role of conflict of law rules, thus ensuring that they implement the common market[61]. The nature of public policy clearly expressed in EU PIL and in the CJEU case law[62] shows the common will of Member States to limit public policy's application in very exceptional cases. A similar argument may be supported where an EU Member State's domestic PIL interferes with EU law. On the one hand, CJEU has held that public policy, as justification for a derogation from a fundamental freedom, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions[63]. It follows, therefrom, that public policy may be relied on only if there is a genuine and sufficiently serious threat to an interest considered of fundamental relevance both in the Member State society and in the EU as a whole. On the other hand, principles that make up Member States' international public policy are not solely domestic, but are taken also from supranational sources, namely EU and international human rights law. From the above we have to rethink the concept of what is essential to the forum (and, thus, what is unacceptable), towards an interpretation that is mainly centred on the European and international dimension of values and fundamental human rights. Notably, exercise of public policy clause to cross-border status' recognition in the EU must take into due consideration two factors of utmost relevance: the centrality of Union citizenship as the fundamental status of the individual in the process of European integration[64], and the incidence of this process on the scope of the forum's international public policy.

European Area of freedom, security and justice (AFSJ) is the ideal

International Law, edited by K. Lipstein, ch. XI, 1994, 61 ff.; P. Barile, *Ordine pubblico (dir. int. priv. proc.)*, in *Enc. dir.*, XXX, Milan, 1980, 1106 ff.

[60] R. Quadri, *Lezioni di diritto internazionale privato*, Neaples, 1969, 312.

[61] L. Fumagalli, *EC Private International Law and the Public Policy Exception. Modern Features of a Traditional Concept*, in *Yearbook of Private International Law*, Volume 6 (2004), 171 ff.

[62] Judgments of 4 February 1988, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, 145/86, ECLI:EU:C:1988:61; 10 October 1996, *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, C-78/95, ECLI:EU:C:1996:380.

[63] See the judgment of 28 March 2000, *Dieter Krombach c. André Bamberski*, case C-7/98.

[64] The status of EU citizen is established in both Article 9 TEU and Article 20 TFEU. Literature on the concept of EU citizenship is abundant. See J. Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in G. de Búrca, P. Craig (Eds), *The Evolution of Eu Law*, 2nd ed. 2011, 575 ff.; F. Wollenschläger, *A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, in *European Law Journal*, 2011, 1 ff.; E. Spaventa, *Seeing the Wood Despite the Trees?: On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2008, 13 ff. Significantly, G. Caggiano, *La "filigrana del mercato" nello status di cittadino europeo*, in E. Triggiani (Ed), *Le nuove frontiere della cittadinanza europea*, Bari, 2011, 209, states that «La cittadinanza europea qualifica il carattere costituzionale del processo dell'integrazione europea e trascende la mera sommatoria delle libertà del mercato e dei diritti fondamentali, che vi afferiscono».

development of an European integration process focused on citizens[65], whose freedom of movement and protection (particularly in cross-border situations) are top priorities[66] that require Member States to cooperate as effectively as possible. EU law, indeed, may restrain any Member States' measure "which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union"[67]. The close correlation between AFSJ and EU citizenship[68], both built on free movement right, implements, ultimately, the transition from 'negative' integration–typical of the Single market–founded on non-discrimination based on nationality, to 'positive' integration, where citizens' fundamental rights express the values of the political community in which they live. Fundamental rights include individuals' identity [69], intended as a bundle of social and emotional relationships represented by family and personal status, and protected by Article 7 of the EU Charter[70], similarly to the provisions of Article 8 ECHR and with the same force and effectiveness of EU primary law. In a highly integrated context like this, public policy should facilitate the reception of other Member States' laws and judgments, and thus ensure a better continuity in treatment of cross-border private relationships.

This approach considers that where States belong to a legal entity that is as culturally, socially, politically and economically integrated as the European Union is, international values deriving from the EU and from the ECHR must have primary relevance among the fundamental values protected by their international

[65] A. Di Stasi, *Spazio europeo e diritti di giustizia*, Padua, 2014, 8. The completion of the European Area is mentioned by the EU Charter, just like EU citizenship, as an expression of the choice made by the same Charter to put individuals at the centre of the European system. On the relevance assumed by individuals in the EU law, see also B. Nascimbene, *La centralità della persona e la tutela dei suoi diritti*, in *Studi sull'integrazione europea*, 2013, 9 ff.; L. Azoulai, S. Barbou des Places, E. Pataut (Eds), *Constructing the Person in EU Law*, Oxford/Portland, 2016.

[66] See Article 3, para. 2, TEU, which, as noted by A. Di Stasi, *Spazio europeo e diritti di giustizia*, cit., 4, put the European Area of Freedom, Security and Justice's completion among the main aims of the EU, just after the promotion of peace, EU values and the well-being of its citizens.

[67] Case C-34/09, *Gerardo Ruiz Zambrano, v. Office national de l'emploi*, ECLI:EU:C:2011:124.

[68] On this topic, see, *ex multis*, B. Nascimbene, F. Rossi Dal Pozzo, *Diritti di cittadinanza e libera circolazione nell'Unione europea*, Padua, 2012, 79 ff.; A. Tizzano, *Alle origini della cittadinanza europea*, in *Diritto dell'Unione Europea*, 2010, 1031 ff.; C. Morviducci, *I diritti dei cittadini europei*, Turin, 2010, 3 ff.

[69] *Rectius*: its continuity and stability.

[70] It is known that the Charter applies to EU institutions and Member States only in the implementation of EU law. Therefore, its applicability to family status would seem to be excluded. However, violation of the aforementioned rights due to non-recognition of family status would depend on the application of national rules but implementing a prerequisite of EU law, namely the right to free movement of EU citizens. In a similar situation (judgment of 5 October 2010, *McB*, case C-400/10 PPU, ECLI:EU:C:2010:582) the CJEU has already upheld the extension of EU Charter's scope. Cfr. C. Campiglio, *L'applicazione della Carta dei diritti fondamentali dell'Unione europea in materia familiare*, in *Diritti umani e diritto internazionale*, 2015, 279 ff., notably 286 ff. Moreover, on the scope of the EU Charter, see B. Nascimbene, *Il principio di attribuzione e l'applicabilità della carta dei diritti fondamentali: l'orientamento della giurisprudenza*, in *Rivista di Diritto Internazionale*, 2015, 49 ff. On the interrelation between family law and human rights in the EU, see G. De Baere, K. Gutman, *The impact of the European Union and the European Court of Justice on European family law*, in J. Scherpe (Ed), *European family law*, vol. I, Cheltenham, 2016, 15.

public policy[71]. At the same time, in situations falling within the scope of EU law–especially in areas such as the AFSJ, where the highest integration is desirable–it is not allowed to rely on a broad, traditional and mainly domestically-oriented notion of public policy, whenever this consists of a conflict with the fundamental values of the EU[72].

AFSJ, indeed, «appears to be in the process of constructing a 'public order' at the level of the European Union founded on fundamental rights, citizenship and a community of values»[73]. Thus, genuine exercise of a fundamental right, as the right to freely move and reside in another Member State, must lead to a highly attenuated public policy clause[74], as it cannot be a circumstance in which citizens are asked to sacrifice the most relevant issues of their individual identity in favour of collective interests. Based on that need, status will only be ruled to be contrary to public policy in very exceptional cases in which the collective interest, on the basis of a case by case evaluation of the specific circumstances, deserves a higher level of protection inasmuch as it expresses core values shared by Member States, such as human dignity, life, and equality of individuals. If it was the other way round, it would result in a contradiction that goes as far as to call into question the whole EU integration process. Therefore, when dealing with an issue so deeply linked to fundamental rights such as the protection of EU citizens' personal and family identity, Member States should have a very narrow margin of application of their domestic international public policy.

7. *Fraude à la loi* and (non-)recognition of family status.

Nevertheless, a peculiar situation in which public policy concerns must be considered as predominant also as concerns family status, is *fraude à la loi* (in English 'evasion of law'). A family status is considered acquired in *fraude à la loi* where the parties were aware that the relationship was intentionally brought

[71] Cfr. O. Feraci, *L'ordine pubblico nel diritto dell'Unione europea*, Milan, 2012; D. Rinoldi, *L'ordine pubblico europeo*, Naples, 2005.

[72] Such as in *Sayn-Wittgenstein*, where the national rule intended to protect equality between individuals, that is one of the core values protected by EU Law too. EU fundamental values form the core around which European experience consolidates and are therefore an indisputable premise of coexistence of the Member States within the EU. Such recalling for a common legal ground shared by Member States evokes the reference which the ECtHR makes to *consensus* while interpreting the clauses of interference to the exercise of civil freedoms.

[73] S. Coutts, *The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration*, in *Croatian Yearbook of European Law and Policy*, 2011, 87 ff., 107.

[74] French legal doctrine and–with some peculiarities–Anglo-Saxon jurisdictions theorized 'attenuated public policy' as a way to protect vested rights and therefore the stability of legal situations from damages that would result from their non-recognition, notably in situations where a link of the foreign situation with the forum lacks. See A. Bucher, *L'ordre public et le but social en droit international privé*, in *Recueil des cours*, tome 239 (1993), 9 ff.; M. Ekelmans, *L'ordre public international et ses effets atténués*, in J.-F. Romain (Ed), *L'ordre public. Concept et applications*, Bruylant, 1995, 283; J. Guillaume, *Ordre public plein, ordre public atténué, ordre public de proximité: quelle rationalité dans le choix du juge?*, in *Le droit entre tradition et modernité, Mélanges Patrick Courbe*, Paris, 2012, 295. Following the most recent CJEU case-law, see J. Carlier, *Vers un ordre public européen des droits fondamentaux – L'exemple de la reconnaissance des mariages de personnes de même sexe dans l'arrêt Coman*, in *Revue trimestrielle des droits de l'homme*, 2019, N°117, 203 ff.

about abroad in order to bypass a restriction or a prohibition provided for by legislation of the State in which they ask for recognition[75]. The evaded national rule is usually a public policy one.

In the EU legal order, if the only parameter take into account following the CJEU reasoning is the relevance of the opposite interests and their balance, nothing seems to prohibit recognition of status acquired abroad in *fraude à la loi*. Therefore, under CJEU case law, exercise of free movement rights for the sole purpose of acquiring a status circumventing national law could not prevent recognition, even if recognition is asked immediately after acquisition[76]. Indeed, non-recognition may cause relevant inconveniences that could hinder EU citizens' free movement at the very moment in which a status is established. If a new-born who was born in State X is not recognized (as soon as it is requested) as his/her father's child in State Y, he/she may face consequences concerning (EU) citizenship's acquisition, inheritance rights, free movement rights within EU, the right to be represented by his/her parents before public authorities, etcetera. Hence, even though status' consolidation likely means a lot more inconveniences in case of denial of recognition and therefore a stronger interest of the applicant for his/her application to be accepted, a temporally stable social reality should not be strictly necessary in order to invoke legitimately status recognition under EU law.

Actually, two strong arguments suggest to embrace the opposite conclusion. The first one is that of 'abuse of EU law'. It must be borne in mind that in *Centros*[77] the CJEU held that a Member State is entitled to take measures designed to prevent its nationals from attempting, under cover of the rights created by the Treaty, to improperly circumvent its national legislation, which is considered an abuse of EU Law. This means that, even if in a specific case individual interest for

[75] For example, a same-sex marriage involving two Italian citizens and celebrated in The Netherlands because it is prohibited in Italy, or a parent-child relationship involving a couple of Slovenian citizen and a baby delivered by a British surrogate mother established following a surrogate motherhood that is legal in the UK but forbidden in Slovenia. However, evasion of law in private international law is as well committed in case of 'avoidance', that is if the application of law is avoided by intentionally not fulfilling the necessary requirements for application. See *Evasion of laws (fraus legis)*, in *Encyclopedia of Private International Law*, edited by Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio, Cheltenham, 2017.

[76] Advocate General Sharpston, in her Opinion in *Sayn-Wittgenstein*, at para 57, noted that «[t]here can be no legitimate expectation in the maintenance of a situation which is contrary to express legislation», and that «[i]f it transpired that the appellant had acted in bad faith in seeking to [have registered a status] to which she knew she was not entitled, or had in any way misled any of the authorities in question, then [not recognition] might seem a just and proportionate measure». Nevertheless, the same Advocate General held that, the length of the period in which the 'unlawful situation' was allowed to continue, the issuance of certificates and other documents reporting the discussed status and the official use the appellant has made of the status arise questions of proportionality. They are factors to be weighed necessarily in the balance of interests (para 68), even in such a case of fraud or bad faith. So it could be held that even a fraudulently acquired status may deserve protection under EU Law when its stability and social reality is adequately settled and proved. This is even more true when the host State has played a role in the settling of the status (because of unclear praxis or legislation).

[77] Judgment of 9 March 1999, case C-212/97, EU:C:1999:126, para. 24.

recognition should prevail on public policy, abuse of law allows the Member State to restrict the application of EU Law thus preventing individuals from taking advantage of such rule, including Treaty rules on fundamental freedoms[78]. Parties' behaviour could be considered an abuse merely on the basis of sufficient telling evidence, particularly considering the intention that moved the EU citizens to seek status acquisition abroad as assessed in relation to the allegedly abused EU provision's aim[79]. Therefore, a principle of *bona fide* in exploiting EU law should apply in status recognition cases. This has been confirmed eventually by the CJEU in case *Coman*[80], where acquisition during a period of *genuine* residence (the emphasis is added by the Author) is necessary for status recognition.

The second argument is compliance with Article 7 EU Charter in the light of Article 8 ECHR and ECtHR case law. Indeed, the Court of Strasbourg has held[81] that Article 8 ECHR grants higher protection to stable relationships and, more significantly, it protects only status that have been acquired by the parties in good faith abroad. The ECtHR had the same approach in case *McDonald v France*[82], where the Court dealt with an applicant that resided abroad temporarily in order to obtain divorce decree under more convenient jurisdictional rules. Due to this perceived misuse (or 'jurisdictional fraud'), the party's expectation has not been assessed as legitimate, and refusal to recognize the status obtained abroad was not considered an interference to the right to respect for family life. Hence, in cases of *fraus legis*, where the parties were aware that the relationship was artificially brought about abroad, restrictions to free movement on public policy grounds are justified under the right to private and family life. However, the next paragraph will show how the 'best interests of the child' principle is able to subvert this conclusion where recognition concerns children's personal and family status and notably status *filiationis*.

8. Recognition of status *filiationis* (or how *fraude à la loi* and public policy cannot jeopardise the best interests of the child).

Status filiationis follows the establishment–by operation of law, by the will of the parties or by order of a public authority (usually a judicial one)–of parental relationship. Such status is ruled by two (almost) universally adopted principles:

[78] Cfr. F. Munari, *Il divieto di abuso del diritto nell'ordinamento dell'Unione europea*, in *Diritto e pratica tributaria*, 4/2015, 519 ff., 522. See also S. Marinai, *Frode alla legge e abuso del diritto nel diritto internazionale privato dell'Unione europea*, in *Il diritto dell'Unione Europea*, 2017, 485 ff.

[79] On the topic of abuse of EU Law see, among other, See also A. Saydé, *Defining the concept of abuse of Union law*, in *Yearbook of European law*, 33 (2014), 138 ff.; A. Adinolfi, *La nozione di «abuso di diritto» nell'ordinamento dell'Unione europea*, in *Rivista di Diritto Internazionale*, 2/2012, 329 ff.; K. Sørensen, *Abuse of Rights in Community Law: A Principle of Substance or Merely Rethoric?*, in *Common Market Law Review*, 2006, 423 ff.; M. Gestri, *Abuso del diritto e frode alla legge nell'ordinamento comunitario*, Milan, 2003; P.J. Wattel, *Circumvention on National Law; Abuse of Community Law?*, in *Common Market Law Review*, 1995, 1257 ff.

[80] At para. 40.

[81] See *supra* at para. 3.

[82] Decision of 29 April 2008, Application no. 18648/04, in *Journal de Droit Internationale*, 2009, 193, with annotation by Marchadier.

that of '*mater semper certa est*' and that of non-discrimination between legitimate and children born out of wedlock[83]. Besides that, status *filiationis* sticks out for a great regulatory fragmentation at national level. Substantial differences exist about establishment and denial of legal parentage, legitimacy of ARTs (assisted reproductive techniques), stepchild adoption, adoption by single parent or by same-sex couples, etcetera. Where people try to evade domestic legal restrictions to establish status *filiations* abroad, public authorities refuse recognition on (international) public policy grounds[84]. However, children's vulnerability and unawareness require further caution in adopting domestic measures that make ineffective and void the status *filiationis* established abroad. Indeed, international human rights undertakings (namely, the 1989 Convention on the Rights of the Child[85], Article 8 ECHR and Article 24 EU Charter[86]) state that insofar as status' cross-border continuity is a fundamental part of the child's personal identity, reference should be made to the best interests of the child.

Worth mentioning some recent decisions issued by the ECtHR, starting from cases *Mennesson* and *Labassee*[87]. They concerned two couples of intended

[83] In case *Marckx v. Belgium* (Application no. 6833/74), the ECtHR acknowledged that a common *consensus* about legal recognition of equality between legitimate and illegitimate children exists among the Council of Europe's Member States.

[84] As we will see *infra* in this paragraph and in the next one, the public policy exception appears more frequently in the context of ARTs. See M. Wells-Greco, *The status of children arising from inter-country surrogacy arrangements*, The Hague, 2015; concerning issue on conflict of law rules, see E. Bergamini, *Problemi di diritto internazionale privato collegati alla riforma dello status di figlio e questioni aperte*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2015, 315 ff. To what concern adoption, see case *Wagner and J.M.W.L. v. Luxemburg* and the case-law dealing with Islamic *kafala* (cfr. A. Borrás Rodríguez, *The protection of the rights of children and the recognition of kafala*, in *A commitment to private international law: essays in honour of Hans van Loon*, 2013, 77 ff.; A. Di Pascale, *La kalafah al vaglio della Corte europea dei diritti dell'uomo: tra tutela dell'interesse del minore e preoccupazioni di ordine pubblico*, in *Diritto immigrazione e cittadinanza*, n.4, 2012, 113 ff.), and with homoparental adoption (see G. Rossolillo, *Riconoscimento di 'status' familiari e adozioni sconosciute all'ordinamento italiano*, in *Diritti umani e diritto internazionale*, 2016, 335 ff.; C. Mécary, *Homoparenté et homoparentalité à la lumière de la jurisprudence de la Cour européenne des droits de l'homme*, in *Droit des familles, genre et sexualité*, 2012, 227 ff.)

[85] Article 3 of the CRC states that 'In all actions concerning children, whether undertaken by public or private social welfare *institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'*. However, several other articles of the Convention make explicit reference to this principle, in relation to family ties (see Article 9, 18, 20, 21, 37).

[86] For a commentary see R. Lamont, *Article 24*, in S. Peers, T. Hervey, J. Kenner, A. Ward (Eds), *The EU Charter of Fundamental Rights – A Commentary*, Oxford, 2014, 209 ff.

[87] Decisions issued on 26 June 2014, cases no. 65192/2011 and no. 65941/2011. See H. Fulchiron, C. Bidaud-Garon, *Reconnaissance ou reconstruction?: à propos de la filiation des enfants nés par GPA, au lendemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l'homme*, in *Revue critique de droit international privé*, 2015, 1 ff.; P. Beaumont and K. Trimmings, *Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?*, Working Paper No 2015/2; R. Baratta, *Diritti fondamentali e riconoscimento dello* status filii *in casi di maternità surrogata: la primazia degli interessi del minore*, in *Diritti umani e diritto internazionale*, 2016, 309 ff.; S. Tonolo, *Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo*, in *Diritti umani e diritto internazionale*, 9, 2015, 202 ff.; I. Anrò, *Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue*, in *Diritto dell'Unione europea*, 2016, 465 ff. These

parents who travelled to the USA for the sole purpose of contracting a surrogate[88]. The applicants were all French citizens who applied for registration of the children's birth certificate in the French civil register. In doing so, they ran into France's law prohibiting surrogacy as a public policy rule from which parties have no freedom to derogate. Moreover, they committed *fraude à la loi*, as the procedure to have a baby abroad was entered for the sole purpose of avoiding or circumventing the application of French law.

In previous similar cases, domestic courts did not recognize the paramountcy of the interest of the child when dealing with *fraude à la loi*[89]. The same happened to the Mennessons and the Labassees. Thus, they brought the case before the ECtHR, which found a breach of Article 8 ECHR. Indeed, everyone has the right to «establish the substance of his or her identity», and parent-child relationship is part of it.[90] Non-recognition of the legal parent-child relationship that had been established abroad «undermined the children's identity within French society».[91] Therefore, insofar as an essential aspect of one's identity is at stake, the margin of appreciation afforded to the State must be reduced[92] despite the lack of a *consensus* on the discipline of surrogacy and despite any public policy and *fraude à la loi* argument.

Where it is in the best interest of the child to enjoy private and family life together with intended parents, a child born as a result of international

were the first cases in which the Court examined the refusal to recognize the parent-child relationships between children born from a surrogate mother abroad and the couple who had recurred to the surrogacy agreement. Three other similar cases were then brought before the Court: case *Laborie v. France* (no. 44024/13), case *Foulon v. France* (no. 9063/14) and case *Bouvet v. France* (no. 10410/14). See. M. Gervasi, *The European Court of Human Rights and Technological Development: The Issue of the Continuity of the Family Status Established Abroad Through Recourse to Surrogate Motherhood*, in *Diritti umani e diritto internazionale*, 2018, 213 ff. Other cases where applicants relied on Article 8 ECHR to challenge administrative decisions in their home states refusing to legally recognize parent-child relationships established abroad between children born as a result of surrogacy are cases *Paradiso and Campanelli v. Italy* (Application no. 25358/12), and *D and others v. Belgium* (Application no. 29176/13).

[88] Surrogacy agreements are concluded by a woman who bears a child for a couple who takes responsibility for the plans and for conception, and to whom the child will be handed over after his or her birth. In a surrogacy agreement, the gametes may come either from the couple seeking to have a child (the intended parents), or from one member of that couple, or from two donors, including the surrogate mother.

[89] French Cour de cassation (1ere chambre civile), on 13 September 2013, rejected the applicant's request for the parent-child relationship to be recognized. Considering that: «(...) en l'état du droit positif, est justifié le refus de transcription d'un acte de naissance fait en pays étranger [...] en fraude à la loi française, d'un processus d'ensemble comportant une convention de gestation pour le compte d'autrui, convention qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public aux termes des articles 16-7 et 16-9 du code civil ; [...] en présence de cette fraude, ni l'intérêt supérieur de l'enfant que garantit l'article 3, § 1, de la Convention internationale des droits de l'enfant, ni le respect de la vie privée et familiale au sens de l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ne sauraient être utilement invoqués; (...)», the Court of Appeal had rightly inferred from the fact that there had been a fraud on the part of the first applicant and that the recognition of paternity had to be annulled.

[90] *Menesson*, para. 99.

[91] *Ibid*, para. 96.

[92] *Ibid*, para. 80.

commercial surrogacy has the right to have the relationships with his/her *biological* parents legally recognized[93]. The ECtHR thus considers the best interests of the child as a 'counter-limit' to public policy exception[94]: the former must be guaranteed as a priority and is, therefore, part of those values that must prevail over the application of the latter[95]. As the ECtHR stated in *Labassee*, a State may wish to deter national citizens from going abroad to benefit from methods of assisted reproduction prohibited in its own territory.[96] Nonetheless, where consequences of evasion of law substantially affect children's right to respect for their private life, respect for the children's best interests imposes recognition[97].

The CJEU has not yet intervened in the matter of recognition of the child status *tout court*. However, protection of the child's interests–i.e. not depriving him/her of an effective family, avoiding to bear severe adverse consequences in terms of identity, maintenance, inheritance rights, etcetera–under Article 24 EU Charter must lead to an almost absolute compression of the margin discretion of Member State in in cases similar to *Mennesson* and *Labassee*.

Indeed, there is no doubt that failing to recognize parent-child relationship in the host State would deprive the child of almost any legal protection. Hence, where recognition of status *filiationis* is linked to EU law and there's a genetic link between the child and the parent seeking for recognition, Article 24 EU Charter may impose the forum's State to 'neutralise' *fraude à la loi* or public policy concerns if it is in the best interest of the child [98].

9. Status *filiationis* and public policy: recent developments before the ECtHR and European domestic courts.

A gradual implementation of the principles developed by the Strasbourg Court

[93] However, in its judgment of 24 January 2017 in *Paradiso and Campanelli* (*supra* in note 87) the Grand Chamber acknowledged, at para. 53, that a *de facto* family life between an adult and a child can exist even «in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties». For a detailed analysis of the Grand Chamber decision see P. Beaumont and K. Trimmings, *Surrogacy before the European Court of Human Rights*, in J. Scherpe, C. Fenton-Glynn, T. Kaan (eds), *Eastern and Western Perspectives on Surrogacy*, Cambridge, 2018, 329 ff.

[94] S. Tonolo, *Identità personale, maternità surrogata e superiore interesse del minore*, cit., 206-7.

[95] Cfr. C. Ragni, *Gestazione per altri e riconoscimento dello status di figlio*, in *GenIUS*, 2016/1, 6 ff.

[96] See *Labassee*, cit., § 62 and 63.

[97] R. Baratta, *Recognition of a foreign status* filii*: pursuing the best interests principle*, in E. Bergamini, C. Ragni (Eds), *Fundamental rights and best interest of the child in transnational families*, London, forthcoming, at para. 3, outlines 'the best interests of the child test'. It «entails to assess the real and genuine interest of the child in any specific situation whenever a form of international filiation comes under national authorities' scrutiny. Actually, any decision on care of a child must be based on pragmatic evaluation of the child's concrete welfare while considering every element of the case».

[98] However, recognition can encourage cross-border *commercial* surrogacy, thus origining some serious human rights issues that usually concerns women and children involved this kind of surrogacy, notably exploitation of women and treating children like object for sale. See P. Beaumont, K. Trimmings, *Surrogacy before the European Court of Human Rights*, *supra* in note 93.

concerning the protection of the best interests of the child and of private and family life, is ongoing before the courts of the EU Member States to justify the recognition of status *filiationis* related to surrogacy, medically assisted procreation, joint adoption, and step and second parent parenthood. Indeed, the above described evolution of the relationship between status *filiationis*, public policy and evasion of law seems to progressively gain consensus in national courts.

Decisions no. 4481/12[99] and 19599/16[100] of the Italian Corte di Cassazione upheld a perspective of the concept of international public policy no longer seen as a shield towards foreign and supranational law, but rather as a gate devoted to opening the interaction between the national legal system and the international community as a whole, as the latter expresses principles that are generally shared and released from the incidental and discretionary choice of national legislators. Thus, public policy stands as a bulwark not for the whole national legal system, but only for one of those fundamental principles that qualify its essential core *and* are harmonized within the International community[101].

More recently, and for the second time, the German Bundesgerichtshof affirmed that the child has the right to be recognized as the son of both his/her parents, including the merely intended (non-biological) one, following surrogacy in the United States[102].

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[99] On the registration of a same-sex marriage established abroad. See C. Sgobbo, *Il matrimonio celebrato all'estero tra persone dello stesso sesso: la Cassazione abbandona la qualifica di «atto inesistente» approdando a quella di «non idoneo a produrre effetti giuridici nell'ordinamento interno»*, in *Giustizia Civile*, 2013, 2183 ff.

[100] On the registration in the civil status register of the foreign birth certificate including the names of two mothers. See G. Ferrando, *Ordine pubblico e interesse del minore nella circolazione degli* status filiationis, in *Corriere giuridico*, 2017, n. 2, 190 ff.; O. Feraci, *Ordine pubblico e riconoscimento in Italia dello status di figlio "nato da due madri" all'estero: considerazioni critiche sulla sentenza della Corte di Cassazione n. 19599/2016*, in *Rivista di diritto internazionale*, 2017, 169 ff. On the following judgments issued by the Corte di Cassazione see C. Baruffi, *Diritto internazionale privato e tutela degli status acquisiti all'estero. Le incertezze della Corte di Cassazione con riguardo alla maternità surrogata*, in A. Di Stasi, *Cittadinanza, cittadinanze e nuovi status: profili internazionalistici ed europei e sviluppi nazionali*, Neaples, 2018, 161 ff.; E. Falletti, *Il riconoscimento in Italia dello status di figlio nato da* surrogacy *straniera*, in *Giurisprudenza italiana*, 2018, 1830 ff. See also Corte d'Appello di Trento, 23 February 2017, on the transcription in the civil status register of the foreign birth certificate including the names of two fathers; Corte d'Appello di Napoli, 30 March 2016, on the co-parental adoption asked by a female couple; Tribunale per i minorenni di Firenze, decrees of 7 March 2017, cases no. 105/15, 211/2015 A and 212/2015 A, on the adoption pronounced abroad, of children who are nationals of that State, adopted by Italian citizens residing in that State.

[101] As noted A. Schillaci, *Le vie dell'amore sono infinite. La Corte di cassazione e la trascrizione dell'atto di nascita straniero con due genitori dello stesso sesso*, online at www.articolo29.it/, the Italian Court recalls a decision of the German Bundesgerichtshof that recognized the transcription of the birth certificate of a child born following international surrogacy that mentioned as parents the intended parents (who were a male couple). See BGH, 10-19 December 2014, *X. v. Land of Berlin.*

[102] Judgment of 5 September 2018, XII ZB 224/17, online at www.jurion.de/urteile/bgh/2018-09-05/xii-zb-224_17/. See A. Schuster, *La Corte federale tedesca si esprime ancora in materia di GPA*, online at www.articolo29.it/2019/13045/#more-13045. The first judgment is of 12 December 2014. See R. De Felice, *Maternità surrogata e ordine pubblico internazionale: Germania e Italia a confronto*, online at www.personaedanno.it/articolo/maternit-surrogata-e-ordine-pubblico-internazionale-germania-e-italia-a-confronto-roberto-de-felice.

This approach greatly expands the children's expectation of recognition to a potentially huge amount of cases in which no hope of obtaining recognition could be previously nurtured. Moreover, domestic courts' approach somehow goes beyond that of ECtHR in *Mennesson* and *Labassee*, as the former implicitly acknowledges the worthiness of protection for those family status that were established abroad for the sole reason of the legal (and not *de facto*) impossibility to validly establish them in the State of residence–thus making irrelevant any kind of status' stability and the genuineness of the link with the *lex causae* irrelevant– and for relationships with non-biological parents.

The most recent judgment on this matter is, however, a historical one. The ECtHR has indeed published its first advisory opinion on a surrogacy rights case[103], at the request of the French Court of Cassation. The Court unanimously declared that the child's right to respect for private life within the meaning of Article 8 ECHR requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the commissioning mother, where she is designated in the foreign birth certificate as the 'legal mother' and where the legal parent-child relationship with the intended father has been recognized in domestic law. States' margin of appreciation is highly narrowed, because status *filiationis* is not just a matter of identity; indeed, it concerns essential aspect of the child's private life. Therefore, a possibility of recognition is due. However, States are not necessarily required to recognize the legal parent-child relationship with the intended mother in the specific form of registering the birth certificate in the civil registers. Other means of recognition, as adoption or court proceedings not involving adoption, may be used insofar as they are suitable to protect the best interests of the child «promptly and effectively»[104].

Today, as a survey undertaken by the ECtHR and mentioned in the advisory opinion shows[105], more than thirty Council of Europe's Member States permit the intended (biological) father to establish paternity after surrogacy, while some twenty Member States permit the establishment of legal parent-child relationship between children and the intended (non-biological) mother.

10. Conclusion.

In presence of a very fragmented legal framework, in which the EU legislator cannot uniformly regulate families (unless with regard to specific aspects), Member States are still willing to maintain their sovereignty. Indeed, where Member States wanted automatic recognition of foreign measures through common rules, they expressly did so establishing proper EU PIL rules.

[103] Advisory opinion of 10 April 2019, concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (Request no. P16-2018-001). The opinion is delivered under Articles 1 and 2 of Protocol no. 16. Its value lies in providing the national courts with guidance on questions of principle relating to the ECHR applicable in similar cases.
[104] *Ibid.*, para. 55.
[105] *Ibid.*, paras. 22-24

Nonetheless, we could affirm that free movement and protection of fundamental rights of EU citizens must influence the recognition of family status, even though States expressly decided to keep their competence on this subject. The European Union is not just a common market anymore. It is first an area in which individuals are protected as the main beneficiaries of integration, while integration is sought through common values and fundamental rights. Hence, although the process of integration of the European Union cannot lead to a harmonization of family law, promoting free movement within an area of freedom, security and justice claims at least mutual recognition of the treatment of persons and families.

Nonetheless, duty of recognition does not prevent States from enjoying some space for manoeuvre insofar as national legal orders do not share the same foundational values in family matters or the host State's national identity itself would be harmed in case of recognition. Yet, we have to acknowledge that the CJEU recognizes to States the power to restrict circulation of status acquired abroad. Therefore, this paper did not intend to theorize, in the sphere of family law, the replacement (in any case) of EU law to national laws and jurisdictions, which are closer to the legal, cultural and social realities in which the disputes covered by this study sink their roots. Instead, it aimed at drawing the boundaries of 'EU control' on the choices and decisions made on such topic at domestic level, so that these choices do not frustrate the very essence of the European Union citizenship and the protection of fundamental rights. Indeed, restrictions are allowed only as long as there is proportionality between the restrictive measure and the goals it pursues, and proportionality calls for strict compliance with human rights. Notably, when it comes to public policy, the protection of the EU citizens' identity and status, covered by the fundamental right to private and family life, should be a sufficient reason to resize, under certain circumstances, the sovereignty of the EU Member States' legal orders, through a greatly attenuated public policy clause, due to their belonging to a community of highly integrated supranational law.

The fragmentation of substantive family law and the margin of appreciation doctrine, while being both an inevitable consequence of the current distribution of competences between States and the European Union, do not always constitute sufficient grounds for a strong closing by individual jurisdictions to family patterns legally accessible in another Member Union, and still less when the best interests of the child are at stake. Indeed, being part of a community based on integration, on the protection of fundamental rights and on the utmost relevance of the right of citizens to freely establish and strengthen their family life within the EU, requires Member States to cooperate in a 'unified transnational perspective', in order to allow the continuity of the legal status of the individual where the free movement of persons may lead to conflicts between national jurisdictions.

EU law must protect EU citizens' rights against any domestic prerogative which is non strictly essential in the light of EU values and principles. Protecting such values and principles may require to set aside the differences between

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Member States and to circumscribe the exercise of their discretion (*rectius*: sovereignty) still reserved to them in the subject-matter. Therefore, I think it's time for a new, unwritten goal to be put under the responsibility of EU law. That is stabilizing unity of citizens' personal and family status in cross-border contexts, in order to best ensure the respect for their (fundamental) right to private and family life while enjoying the effectiveness of free movement in a much broader array of situations than ever before.