PUBLIC POLICY: UNITED IN DIVERSITY… WITHIN THE MARRIAGE?

L'ORDINE PUBBLICO: UNITI NELLA DIVERSITÀ… NEL MATRIMONIO?

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Riassunto: Il presente lavoro indaga lo sviluppo della nozione di ordine pubblico nella definizione di matrimonio. Prendendo le mosse dalla giurisprudenza della Corte di giustizia dell'Unione europea nell'ambito della libera circolazione delle persone e della Corte europea dei diritti dell'uomo sul diritto alla vita privata e familiare, sono analizzate le incertezze derivanti dalle divergenze normative nazionali. Quindi, è esaminato l'impatto della sentenza *Coman* della Corte di giustizia sia nell'ambito dell'applicazione dei regolamenti dell'Unione europea nella cooperazione giudiziaria civile, sia nella nozione di ordine pubblico. Conclusivamente, sono proposte alcune considerazioni sulle funzioni dell'ordine pubblico in chiave moderna.

Parole chiave: ordine pubblico, diritto di famiglia europeo, libera circolazione, diritto alla vita familiare, nozione di matrimonio.

Abstract: The present paper tackles the development of the notion of public policy in the definition of the concept of marriage. It starts from brief remarks on the case law of the Court of Justice of the European Union in the field of the right to free movement of people and of the European Court of Human Rights on the right to private and family life. Then, it analyses the uncertainties stemming from the national divergences. Further, the impact of the *Coman* case on the applicability of EU measures on civil judicial cooperation and on the notion of public policy is examined. Conclusively, the paper submits some considerations on the modern function of the public policy.

Keywords: public policy, European family law, free movement, right to family life, notion of marriage

I. Introduction: the wave towards Europeanisation of public policy

1. The Europeanisation of the notion of public policy can be considered as a straightforward example of the European Union (thereafter: EU) motto "United in Diversity". Indeed, the concept of public policy itself is based on the differences of national values that coexist in the global community. At the same time, the voluntary or implied acceptance of common values unifies the general principles of the States and further their laws, in an implied development towards unification.

2. This tension between differentiation and harmonisation can lead to frictions between the State(s), faithful to its/their traditional values, and the centralised institution, pushing towards a more efficient coordination of the legislations. While fields with an economic core have barely given rise to conflicts with the public policy, especially in the relationships between EU Member States[1], the opposite seems true in the field of family law. The national sensitiveness in this matter prevents a "top-down" harmonisation[2], favoured and led by a centralised institution.

3. Nevertheless, the share of common values can unlikely be pursued by other means, different from the development of the supranational case law and the approximation of national legislation. Indeed, in the European perspective, both the EU and the Council of Europe lack competences in family law, according to their funding Treaties.

4. Indeed, art. 8 of the European Convention of Human Rights (hereafter: ECHR) grants the rights to private and family life without providing for definitions, nor distinguishing the two rights; neither art. 12 on the right to marriage defines it. The European Court of Human Rights (hereafter: ECtHR) can only include the case at stake in one of these rights and try to offer general definitions for the sake of legal certainty. However, this power is not always enough in order to push the modification of national law[3], the sole exception being the ascertainment of a structural violation of the ECHR[4].

5. The European Union (EU) has a clear competence in family law only for its cross-border aspects within the civil judicial cooperation. A strong hurdle in the harmonisation of this field rests on the

[1] Thus, these conflicts have been immediately detected due to the serious impairment of national values. The issue has been deeply discussed during the prospected recast of the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12, 16 January 2001, p. 1: P. Beaumont, E. Johnston, "Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the protection of Human Rights?", *IPRax*, 2010, p. 110; P. Oberhammer, "The Abolition of Exequatur", *IPRax*, 2010, p. 197; P. Schlosser, "The Abolition of Exequatur Proceedings – Including Public Policy Review?", *IPRax*, 2010, p. 101; S. Corneloup, "The Public Policy Exception in Brussels I Practice", *Int'l Lis*, 2011, p. 45; M. Requejo Isidro, "On the Abolition of *Exequatur*", en B. Hess, M. Bergström y E. Storskrubb (eds.), *EU Civil Justice. Current Issues and Future Outlook*, London, Hart, 2015, p. 283.

[2] M. Antokolskaia, "Harmonisation of Substantive Family Law in Europe; Myths and Reality", *Child & Family Law Quarterly*, 2010, p. 400.

[3] Furthermore, ECtHR's judgments might lack a direct effect in the faulty State: J. Gerards, J. Fleuren (Coord.), *Implementation of the European Convention on Human Rights and of the judgments of the ECTHR in national case-law. A comparative analysis*, Cambridge, Antwerp, Portland, Intersentia, 2014; A. Osti, "L'implementazione delle sentenze della Corte europea dei diritti e le resistenze nazionali: tre modelli a confronto", *Quaderni costituzionali*, 2017, p. 851 ff. The lack of direct effect of the ECHR system is confirmed by the CJEU 26 February 2013, *Åkerberg Fransson*, case C-617/10, EU:C:2013:105.

[4] P. Pirrone, *L'obbligo di conformarsi alle sentenze della Corte europea dei diritti dell'uomo*, Milano, Giuffrè, 2004; A. Drzemczewski, "Art. 46. Forza vincolante ed esecuzione delle sentenze", en S. Bartole, B. Conforti, G. Raimondi (Coord.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, Cedam, 2001; W. Sadurski, "'Partnering with Strasbourg', Constitutionalisation of the ECtHR, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments", *Human Rights Law Review*, 2009, p. 448; P. Leach, H. Hardman, S. Stephenson, B. Blitz, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and Their Impact at National Level,* Antwerp, Intersentia, 2010; S. Greer, L. Wildhaber, "Revisiting the Debate about 'constitutionalising' the European Court of Human Rights", *Human Rights Law Review*, 2013, p. 671; R. Greco, "Le sentenze "pilota" della Corte europea dei diritti dell'uomo: efficacia *ultra partes*?", *Processo penale e giustizia*, 2015, p. 105; D. Kurban, "Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations", *Human Rights Law Review*, 2016, p. 731 ff.

wording of art. 81(3) of the Treaty on the Functioning of the European Union, since it requires unanimity within the Council. The recent practice has demonstrated the difficulties to reach this threshold, so that it has proven necessary to adopt regulations establishing enhanced cooperation, binding a limited number of Member States[5].

6. Despite the lack of competence in family law and the firm limits of the competences conferred, the development of the free movement within the EU and the promotion of human rights by the ECtHR stimulate a convergence of legal notions, concepts and values among European States and especially EU Member States. On the other side, the latter's exclusive competence in family law (and an ECtHR's restrictive approach to article 12 of the ECHR[6]) is a constant trend towards nationalisation and particularism in this field.

II. The Europeanisation of the notion of public policy: the concept of marriage in the European Union

7. The right to family reunification has been a rich field for the building convergence of the pillar notions of family law. The first enacted measure was Regulation No. 1612/1968 on freedom of movement for workers[7] (Title III). Pursuant to art. 10, the workers' family members enjoyed the right to install themselves with the cross-border worker, irrespective of their nationality[8]. Subsequent Directive 73/148[9] follows the same path on the rights to establishment and to the provision of services[10].

8. Family members were listed according to a classic "male breadwinner" model[11], in a quite perfect consonance with national family laws of the then 6 Member States. As a consequence, definitions of the family, the family ties or the marriage were not provided for. Families were mostly composed of married man and woman, with their common children. Other situations were not covered by the law, and, in some cases, were even considered such as socially unacceptable. There was barely the doubt that the sole social formation that could be entitled with rights was the family based on marriage between a man and a woman. (EEC) EU law resilience to the national common standards, as sources of inspiration, prevented any conflict with national laws. No issues related to public policy could arise.

9. Directive No. 2004/38[12] was enacted in a completely different social environment, but it is not possible to detect a development of the notion of marriage, nor of the normative method employed, the

[5] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* L 343, 29 December 2010, p. 10; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *OJ* L 183, 8 July 2016, p. 1; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, *OJ* L 183, 8 July 2016, p. 30.

[6] See below, para. III.

[7] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ* L 257, 19 October 1968, p. 2.

[8] Some more conditions were requested concerning the housing of the family in the State of destination: CJEU 18 May 1989, case 249/86, *Commission v. Germany*, EU:C:1989:204.

[9] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, *OJ* L 172/14, 28 June 1973, p. 14.

[10] C. McGlynn, "The Europeanisation of Family Law", *Child and Family Law Quarterly*, 2000, p. 36.

[11] J. Mulder, "Some more equal than others? Matrimonial benefits and the CJEU's case law on discrimination on the grounds of sexual orientation", *Maastricht Journal of European and Comparative Law*, 2019, p. 509.

[12] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ* L 158, 30 April 2004, p. 77.

listing of the beneficiaries[13]. The only significant advancement was the inclusion of the partner within this list, although to a limited extent[14].

10. The development of the Europeanisation of the main notions of family law has been pushed by the case law of the CJEU from the mid-90ies. The principle of non-discrimination played an important role in the definition of the family status. We only need to consider the well-known judgment *P. and S.*, dated back to 1996[15], where the Court detected a discrimination grounded on sex due to a gender reassignment. The CJEU was prevented from considering stable relationships between same-sex partners as equivalent to marriage[16] due to the exclusive national competence in the field. Indeed, although a choice towards modernisation of national legislations was left to Member States[17], discriminations (as compared to opposite-sex couples) were nonetheless declared not admissible[18]. National family law had to be set aside to the extent that it could potentially cause hindrances to the EU citizens' right to movement, provoking discriminations.

11. This case law had an immediate impact on the national notions of public policy, making them more flexible. The principle of non-discrimination becomes a main common value able to supersede, where needed, different national principles, such as the defense of the traditional family model. The national public policy must retract when faced up to a concrete risk of discrimination due to its application. Therefore, it prevents considering affective relationships different from the classic opposite-sex married couple as conflicting with national values. The door towards potential conflicts between international needs and national traditions is here open: the legitimate differences in the national legislations must be sound with the new (or renovated) common values, among which the principle of non-discrimination is put at the highest level.

12. Another tool has silently developed the notion of family within the EU. It is the enactment of regulations in the field of the civil judicial cooperation, concerning family law and related issues[19]. These measures worked in two directions. Firstly, the regulations do not define the marriage, it leaving a wide margin of appreciation in its interpretation. Despite this, scholars tend to agree on its gender neutrality[20]. Secondly, Regulation 2016/1104 is devoted to registered partnerships, that finally enter into the EU legislation and established lexicon. Surprisingly, this Regulation provides a definition of registered partnerships, which are "the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by

[13] E. Guild, S. Peers y J. Tomkin (eds.), *The EU Citizenship Directive: A Commentary* (2nd edition), Oxford, OUP, 2019.

[14] The CJEU recently made clear that this duty applies even when the EU citizen returns with the partner to the Member State of origin/citizenship (CJEU 12 July 2018, case C-89/17, *Banger*, EU:C:2018:570).

[15] CJEU 30 April 1996, case C-13/94, *P. and S.*, EU:C:1996:170.

[16] C. Ricci, "La «famiglia» nella giurisprudenza comunitaria", en S. Bariatti (Coord.), *La famiglia nel diritto internazionale privato comunitario*, Milano, Giuffré, 2007, p. 100 ff.

[17] CJEU 17 February 1998, case C-249/96, *Grant*, EU:C:1998:63.

[18] CJEU 17 April 1986, case C-59/85, *Reed*, EU:C:1986:157; CJEU 1 April 2008, case C-267/06, *Maruko*, EU:C:2008:179; CJEU 10 May 2011, case C-147/08, *Römer*, EU:C:2011:286; CJEU 6 December 2012, joined cases C-124/11, C-125/11 and C-143/11, *Dittrich and o.*, EU:C:2012:771.

[19] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* L 338, 23 December 2003, p. 1; Regulation no 1259/2010, Regulation 2016/1103; Regulation No 2016/1104.

[20] M. Meli, "Il dialogo tra ordinamenti nazionali e ordinamento comunitario: gli sviluppi più recenti in materia di diritto di famiglia", *Europa e diritto privato*, 2007, p. 473; K. Boele-Woelki, "Brüssel II: Die Verordnung über die Zuständigkeit und die Anerkennung von Entscheidungen in Ehesachen", *Zeitschrift für Rechtsvergleichung*, 2011, p. 127; P. Franzina, "The law applicable to divorce and legal separation under regulation (EU) no. 1259/2010 of 20 december 20102, *Cuadernos de Derecho Transnacional*, 2011, n. 2, p. 102; G. Rossolillo, "Art. 1", en P. Franzina (Coord.), *Regolamento (UE) n. 1259/2010 del Consiglio del 20 dicembre 2010, relativo all'attuazione di una cooperazione rafforzata nel settore della legge applicabile al divorzio e alla separazione personale*, *Nuove Leggi Civili Commentate*, 2011, p. 1452; P. Hammje, "Le nouveau règlement (UE) n. 1259/2010 du Conseil du 20 octobre 2010 mettant en œuvre une coopération renforcée dans le domain de la loi applicabile au divorce et à la séparation de corps", *Revue critique de droit international privé*, 2011, p. 300; P. Wautelet, *Private international law aspects of same-sex marriages and partnerships in Europe- Divided we stand?*, en K. Boele-Woelki, A. Fuchs (Coord.) *Legal Recognition of Same-Sex Relationships in Europe*, Cambridge, Antwerp, Portland, Intersentia, 2012, p. 145.

that law for its creation" (art. 3(1)(a)). It is the first definition ever from the EU on any family law institution, which can be even disputed, since the lack of competence could have prevented the EU therefrom.

13. Last but not least, art. 9 of the Charter of the Fundamental Rights of the EU modernises art. 8 of the ECHR[21], avoiding references to the sex of the spouses. Nevertheless, there is not yet a consistent CJEU's case law on this rule, so that it is not possible to state the impact of its gender-neutral formulation. The only anchorage is to be found in art. 52(3) of the Charter, that bases its minimum standard level in the ECHR, as interpreted by the ECtHR.

14. These developments do not impose any duty to Member States to provide for completely gender-neutral family institutions, but push on the rights of non-discrimination (grounded on nationality and/or sex and/or sexual orientation)[22], and to free movement. Consequently, the Court cannot demand Member States to modify their national family law: it can only avoid discriminations in the national regulation on family law and in the grant of free movement rights.

III. The Europeanisation of the notion of public policy: the marriage and the right to family life, according to the case law of the European Court of Human Rights

15. The ECHR envisages two provisions on family law, art. 12 on the right to marriage and art. 8 on the right to private and family life. The latter has the leading role in the development of the notion of public policy in family law[23].

16. The ECtHR prefers a quite traditional interpretation of the right to marry under art. 12, since its application is reserved to couples formed by a man and a woman, not covering same-sex marriages. The ECtHR grounds its judgments on the general consensus among contracting States[24], which can be identified only in favour of the heterosexual marriage. This statement has been repeated even quite recently, as for example in the case *Hämäläinen*[25]. Furthermore, Article 12 has only a "positive meaning", in the sense that it grants the right to marry (creation of a civil status), but not to divorce (dissolution of status). This is stated in the judgment *Johnston*[26]: despite the very particular political circumstances of the case at stake[27], the ECtHR has never contradicted nor overruled this outcome.

17. The ECtHR's self-restrain in these cases has not hindered a further progression of the notion of family life, that has proved indispensable for the modernisation of the notion of public policy. Every development has rested on art. 8, where the lack of definitions has allowed its dynamic interpretation. To the extent that the right to private life covers the right to enter into a relationship with any person of one's

[21] See below, para. III.

[22] Further: G. De Baere, K. Gutman, "The impact of the European Union and the European Court of Justice on European Family Law", en J. Scherpe (Coord.), *European Family Law, vol. I. The Impact of institutions and Organisations on European Family Law*, Cheltenham, Elgar, 2016, p. 12.

[23] Judge Sir Gerald Fitzmaurice expressed the view that art. 8 ECHR is a "whole code of family law" (Dissenting Opinion to ECtHR, 13 June 1979, *Marckx v. Belgium*, para. 15).

[24] L. Hodson, "A Marriage by Any Other Name? Schalk and Kopf v Austria", *Human Rights Law Review*, 2011, p. 176; L. Wildhaber, A. Hjartarson, S. Donnelly, "No Consensus on Consensus. The Practice of the European Court of Human Rights", *Human Rights Law Journal*, 2013, p. 248.

[25] ECtHR, 16 July 2014, *Hämäläinen v. Finland*.

[26] ECtHR, 18 December 1986, *Johnston and Others v. Ireland*.

[27] The Irish People was expected to vote a constitutional referendum abolishing the prohibition on divorce. Statistics on the results are available at: https://en.wikipedia.org/wiki/Tenth_Amendment_of_the_Constitution_Bill_1986_(Ireland). For the sensitive balance between politics and civil rights at that time: S. Cretney, "Breaking the Shackles of Culture and Religion in the field of divorce?", en K. Boele-Woelki (Coord.), *Common Core and Better Law in European Family Law*, Antwerp, Oxford, Intersentia, 2005, p. 3; M. Antokolskaia, "Divorce law in a European Perspective", en J. Scherpe (Coord.), *European Family Law, vol. III. Family Law in a European Perspective*, Cheltenham, Elgar, 2016, p. 58.

choice, according to the consistent ECtHR's case law, affective unions are immediately included therein. In this framework, family life is not only the life organised within the standards codified in art. 12 ECHR.

18. The clearest example of the evolution of the notion of family law in Europe stems from the comparison of the *Rees* and the *Goodwin* cases[28]. The elapsing of time (16 years) made it possible to reach completely different outputs despite the wide similarity of the cases. Only after *Goodwin*, the ECtHR has included the marriage of the transsexual person within the protection of the right to a family life.

19. In *Schalk and Kopf*[29] the ECtHR recognised for the first time that same-sex relationships are covered by the right to family (and not private) life, again without offering any tentative definition of the family or of the family right. This development is due to the modification of the Contracting States' general consensus, gathered from the fact that a meaningful group of States had provided for a legal form of recognition for these couples. This output would not have been possible without previous national developments[30].

20. This characterisation impacts on the duties of the States, whose margin of appreciation is limited, once they establish an internal regulation on same-sex partnerships. It allows the extension of the application of the principle of non-discrimination in favour of the partners and of the partnerships. Since those Member States, admitting same-sex marriage, cannot refuse to accept "foreign" same-sex marriages (e.g. celebrated abroad, or between foreigners), Member States, regulating registered partnerships, cannot avoid to recognise similar institutions created abroad. Furthermore, according to the *Vallianatos* judgment, if States provide for any status different from marriage, as registered partnership, this must be open to same-sex couples, too[31].

21. The latest developments regard the needed formal recognition for partnerships at the national level[32], with a margin of appreciation only in the enactment of an efficient legislation (which could be reserved to same-sex partners and not extended to heterosexual partnerships[33]). Still, Contracting States are not under a duty to recognise unknown institutions created abroad, as the same-sex marriage[34].

22. This case law is of the utmost meaning for the harmonisation of the notion of public policy. Indeed, the principle of non-discrimination has strongly entered into family law, so that the gender and the sexual orientation shall not jeopardise the existence of family relationships and the full enjoyment thereof. Despite the continuing legitimate differences among Contracting Parties legislations, there is a common core of rights that shall be granted to every couple and to every person within the couple. This common core is part of the European public policy that "must be shared" by European States, and cannot be further changed by purely national traditions or values.

IV. The uncertainties derived from the national differences in family law

23. In this framework, it is possible to detect frictions between harmonisation and nationalisation, modernisation and traditionalism. The more conservative approach depends on the national exclusive competences of the Member States in family law, and by the cautious interpretation of Article 12

[28] ECtHR, 17 October 1986, *Rees v. UK*; ECtHR, 11 July 2002, *Goodwin v. UK*.

[29] ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*.

[30] P. Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?", *Human Rights Law Journal*, 1998, p. 1 ff.; H. Fulchiron, "Un modèle familial européen?", en H. Fulchiron, C. Bidaud-Garon (Coord.), *Vers un statut européen de la famille*, Paris, Dalloz, 2014, p. 171 ff.

[31] ECtHR, 11 July 2013, *Vallianatos v. Greece*.

[32] ECtHR, 1 July 2015, *Oliari and o. v. Italy*.

[33] ECtHR, 26 October 2017, *Ratzenböck and Seydl v. Austria*.

[34] ECtHR, 14 December 2017, *Orlandi v. Italy*.

of the ECHR. On the other side, progressive inputs stem from the extensive approach to Article 8 of the ECHR and the CJEU's case law on the EU free movement. These different trends avert the possibility to define coherently a shared concept of family law and of the marriage, even in an integrated system such as the EU, wider or different from the heterosexual marriage.

24. The definitions might depend on several variables. The first is the national legislation due to the exclusive jurisdiction to legislate. For example, if a State does not recognise a family institution, as same-sex marriages, hardly that legal system can accept that the equivalent institution – regulated by any foreign law - is part of family law[35]. The harmonisation of the concept of public policy can stem only from a top-down constrain, in this case. The second is the integration of the State in the European dimension, which can push towards the acceptance of different family models and, in any case, an openness to foreign values.

25. The classic theme against any approximation of family law stimulated by a centralised organisation, be it the EU or the Council of Europe, is the cultural constraint argument[36]. Family law is regarded as a legal issue strictly linked with the specific culture of a State. Therefore, approximation and convergence might even be felt as impossible by the State, because it would lose part of the national culture[37].

26. In this framework, the notion of public policy gains a primary momentum. The lack of any closer harmonisation of family law, starting from the marriage, makes it necessary to keep strength on the fundamental rights, the right to family life pursuant to the ECHR and the right to free movement in the EU. The possible commonality and flexibilisation of the concept of public policy safeguard the national legislative choices but at the same time allows openness and a better understanding of the others' rules and values.

V. A push towards modernisation? The *Coman* case

27. These final remarks could appear to be contradicted by the CJEU's judgment in the *Coman* case[38], which stems from the persisting differences among Member States in family law. Indeed, it can seem as a forced top down harmonisation through case law. On the contrary, here the CJEU limited itself to interpret the notion of *spouse* for the sole purposes of the free movement of persons within the EU[39]. Accordingly, Member States must confer that minimum legal value to the foreign marriage, which is needed in order to grant the right to family reunification for the third-country national spouse. This is true even if the State has been traditionally considering same-sex marriages such as contrary to its public

[35] Italy represents a very positive exception to this consideration. The Supreme Court has accepted the characterisation pushed by the ECtHR, in the sense that a same-sex marriage is part of the family life of the spouses, notwithstanding the impossibility to recognise it in the Italian legal system (Corte di Cassazione, 15 March 2012, n. 4184).

[36] D. Bradley, "A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics", cit., p. 4; M. Antokolskaia, "Family law and national culture. Arguing against the cultural constraints argument", *Utrecht Law Review*, 2008, p. 25.

[37] M. Antokolskaia, *Harmonisation of Family Law in Europe: a Historical Perspective*, Cambridge, Antwerp, Portland, Intersentia, 2006, p. 39.

[38] CJEU 5 June 2018, case C-673/16, *Coman*, EU:C:2018:385.

[39] For further analysis: A. Favi, "Causa C-673/16 – Il matrimonio tra persone dello stesso sesso contratto in uno Stato UE va riconosciuto in tutti gli altri Stati membri al fine di garantire la libera circolazione e soggiorno del cittadino dell'Unione (2/2018)", available at: https://www.osservatoriosullefonti.it/rubriche/fonti-unione-europea-e-internazionali/2171-osf-2-2018-ue-2; S. Penasa, "Matrimonio tra persone dello stesso sesso e libertà di circolazione dei cittadini europei e dei loro familiari: osservazioni a "cerchi concentrici" sul caso *Coman c. Romania* della Corte di giustizia", *Diritto, Immigrazione e Cittadinanza*, 2018, n. 3, p. 1; G. Rossolillo, "Corte di giustizia, matrimonio tra persone dello stesso sesso e diritti fondamentali: il caso *Coman*", available at: http://www.sidiblog.org/2018/07/08/corte-di-giustizia-matrimonio-tra-persone-dello-stesso-sesso-e-diritti-fondamentali-il-caso-coman/; A. Tryfonidou, "The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The Coman ruling", *European Law Review*, 2019, p. 663; U. Belavusau, D. Kochenov, "Same-sex spouses: More free movement, but what about marriage?", *Common Market Law Review*, 2020, p. 227.

policy, consequently not admitting them in its internal legislation, neither recognising those celebrated abroad according to a foreign law.

28. The decision as such seems quite limited because of the legal reasoning behind it and the expressed practical consequences. This is due to the fact that the preliminary question itself was quite limited[40], too. Consequently, the judgment does not tackle some main issues in the perspective of both the private international law and the free movement[41]. Furthermore, the solution is far from innovative, due to other national similar previous experiences[42].

29. In this judgment it is possible to detect only a rush towards modernisation pushed by the CJEU, but no revolutions. One main legal ground justifies the CJEU's development: the free movement of the EU citizen, that risks being refrained from the exercise of his/her rights to circulation, if his/her family ties have no legal value at his/her return to the State of citizenship. States are required to treat these sensitive issues with openness, so that the EU citizens' rights are not to be jeopardized. Only as the last consequence, the right to family life of the spouses is protected. This reasoning allows the couple at stake to enjoy the marriage living together, without fearing expulsions or even criminal sanctions against the non-EU spouse. Consequently, at least one same-sex married couple lives legally in Romania: the Coman – Hamilton couple.

VI. The impact of the *Coman* case…

1. … on the civil judicial cooperation

30. Although the current practical issues of the same-sex spouses seem partially resolved, the judgment leaves it open to some further questions. Some issues have a practical relevance because of the potential applicability of EU private international law regulations on family law. Thus, the Coman - Hamilton family situation challenges the applicability of EU regulations, potentially impairing the uniform application of EU law.

31. Let's keep considering the Coman - Hamilton couple. Are EU regulations on civil judicial cooperation in family matters applicable to their marriage? Provided that Romania does not take part to the enhanced cooperation established with the twin regulations of 2016, how will this relationship be dealt with, according to the national law? In the field of maintenance, must Romania consider this couple such as a «family relationship, parentage, marriage or affinity» according to art. 1(1) of the regulation no. 4/2009[43] for the determination of its material scope of application?

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[40] M. Grassi, "Sul riconoscimento dei matrimoni contratti all'estero tra persone dello stesso sesso: il caso *Coman*", *Rivista di diritto internazionale privato e processuale*, 2019, p. 65.

[41] These are, for example: the validity of the status acquired abroad, from the perspective of the Member State of origin, which remains free to regulate the marriage and the family ties, and the Member State of destination, responsible for setting the conditions for its recognition; the impact of the judgment on the whole range of personal and patrimonial effects of the marriage. For these issues, the solutions remain those stemming from the scarce ECtHR's case law within the field and those debated by the scholars.

[42] The Tribunal administratif du Grand-Duché de Luxembourg, 3 October 2005 recognised a residence permit to a non-EU citizen married to a same-sex Belgian citizen where the marriage was celebrated in Belgium. The Tribunale di Reggio Emilia and the Tribunale di Pescara (Italy; Tribunale di Reggio Emilia, 1st Civil Section, decree 13 February 2012, available at: http://www.articolo29.it/decisioni/tribunale-di-reggio-emilia-prima-sezione-civile-decreto-del-13-febbraio-2012/, accessed on 15 November 2020; Tribunale di Pescara, ord. 15 January 2013, available at: http://www.articolo29.it/decisioni/tribunale-di-pescara-ordinanza-del-15-gennaio-2013/, accessed on 15 November 2020) reached the same conclusions with regard to respectively a Spanish and a Portuguese same - sex marriage. The solution is known outside the EU, too (Y. Merin, "Anglo-American Choice of Law and the Recognition of Foreign Same-sex Marriages in Israel – on religious Norms and Secular Reforms", *Brooklyn Journal of International Law*, 2011, p. 509).

[43] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* L 7, 10 January 2009, p. 1.

32. The characterisation might completely change the output on the jurisdiction and on the applicable law. Let's suppose that the couple moves to Italy, where same-sex partnerships are regulated but same-sex marriages are not admitted. Shall Italy apply the regulation on the matrimonial property regimes, or the one on the patrimonial effects of registered partnerships, or, finally, neither, since this relationship is not a marriage according to national law, neither a partnership according to the law applied to the creation of the status?

33. These issues are not only related to the scope of application of the regulations, but to the human rights indirectly protected therewith. If the grant of a residence permit correctly preserves the right to family life, the application of the succession, the maintenance or the property regime (but which one?) regulations ensure the legal certainty on the assets for the present and for the future, thus protecting the right to private property. The applicability of the divorce regulations produces the same effect in relation to the right to private life, to be interpreted in this case as the right not to be involved in a relationship with a person.

34. In that perspective, one can wonder whether the judgment has potentially extensive effects, insisting on the fundamental rights, that risk being jeopardised if the couple is not treated as a married couple. There can be an escape within the judgment. It appears to be coherent, if, instead of the repeated words 'for the sole purpose of granting a derived right of residence', we put "for the sole purpose of granting a pension", or succession rights, or personal rights, etc. Therefore, for the sake of legal certainty and of the protection of the full set of the fundamental rights of the couple and of the individuals, it is possible to «recognise» the singles' needed effects, to the extent that the recognition of the status is not possible[44].

2. …on the notion of public policy

35. Without any need to go deeper in the notion of public policy as a national limit to be invoked even against the free movement, the judgment impacts strongly upon it. The concrete consequence is in the sense that Member States cannot preclude the issue of a residence permit for family reunification, based on same-sex marriage[45], since this does not impair the national public policy[46].

36. This does not mean that same-sex marriages are not intended to offend the national public policy. If this were the case, the judgment's reasoning would not have been limited to a discourse on the free movement. Here lies the difference between the recognition of the status as such and the allowance of the residence permit. The former is not required after this case. Therefore, the State can refuse its recognition because of public policy reasons. The latter is mandatory for the protection of other rights, such as the right to free movement within the EU and the right to family life.

37. Traditionally, from von Savigny's time[47], one of the examples of possible opposition of a foreign law to public policy has been the unknown institution. On the opposite, in this judgment is appears a scission. The unknown foreign institution can be refused, but it must be able to produce some legal effects, notwithstanding its blatant contradiction with public policy. Some Member States courts have started to accept this principle, thus declaring that same-sex spouses enjoy the constitutionally protected

[44] Preliminary questions on personal status are starting being submitted to the Court: Opinion of the Advocate general Kokott, 15 April 2021, case C-490/20, *V.M.A.*, EU:C:2021:296; reference for preliminary ruling in case C-2/21, *Rzecznik Praw Obywatelskich*.

On the same basis the Advocate general Kokott in the opinion in the *V.M.A.* case suggests that the refusal to issue a national birth certificate amounts to a violation of the rights to free movement of the Bulgarian mother, married with a UK citizen female, who gave birth to a child in Spain.

[46] M. Bosch, C. Mariottini, "The European model of "couple" within the dissolution of marriage", en E. Bernard, M. Cresp, M. Ho-Dac (eds.), *La famille dans l'ordre juridique de l'Union européenne*, Bruxelles, Bruylant, 2020, p. 189.

[47] F.C. von Savigny, *System des heutigen Römischen Rechts*, 1886.

right to family life[48], so that the residence permit shall be issued[49]. In most cases it is possible to detect a very open approach, that allows the recognition of the marriage exactly as a marriage, despite the lack of national regulation of same-sex marriages[50].

38. The judgment mitigates the edges of the notion of public policy, because the national jurisdiction must be permeated by the effects of foreign undesired institutions. The State at stake is required to leave the foreign same-sex marriage interpenetrate through the Europeanised textile of public policy. The respect of the European freedom of movement and of the right to family life requires it.

VII. Some concluding remarks

39. The CJEU's approach in this case appeared effective in order to balance the exclusive competence of Member States in family law and the right to free movement of the couple concerned. It does not infer the recognition of the status, neither an evaluation of its validity: it simply allows the spouses to benefit from some of the rights dependent on the marriage.

40. However, an open approach towards the individuals' and the couples' rights is already quite common within some EU Member States. The credits of this judgment are to be found in the impact on the functioning of the public policy. Indeed, it becomes less stringent even in those situations that are not directly affected by the EU harmonisation, that could appear marginal to the European integration and that are left to the exclusive national competence to legislate.

41. The values and principles included in the notion of public policy have changed in the last years. Now, its structure and function are developing, too. It does not anymore serve the sole need to grant the coherence of a national jurisdiction. Rather, the part of the public policy made up by EU and European fundamental rights integrates national constitutional rights[51]. Through this way, public policy is a means to claim an open approach towards situations and status created abroad, in consonance with those rights.

42. Therefore, the public policy is not anymore a severe policeman, sanctioning the infringement with the high penalty of closing the border to the reception of foreign values and laws. Rather it is a careful parent, that prevents big harms only. These values are graduated in a sort of – covered and unsaid – hierarchy, so that the protection of national values cannot hamper the enjoyment of the EU individuals' fundamental freedoms and the principle of non-discrimination. The primacy reigns over the values to be included within the public policy, so that the European rights must prime over national principles, even against the will of the State. In a "divergent unity", such as that created with EU Law, all values are equal, but some values are more equal than others.

[48] Decision of the Supreme Court of Estonia, 3-3-1-19-17.

[49] Decision of the Supreme Court of Estonia, 21 June 2019.

[50] Administrative Court Sofia - City, 8 January 2018, dec. no. 180.

[51] F. Salerno, "La costituzionalizzazione dell'ordine pubblico internazionale", *Rivista di diritto internazionale privato e processuale*, 2018, p. 268.