RECOGNITION OF A STATUS ACQUIRED ABROAD: SPAIN[*]

RECONOCIMIENTO DE UNA SITUACIÓN JURÍDICA RELATIVA AL ESTATUTO PERSONAL VÁLIDAMENTE CREADA O MODIFICADA EN EL EXTRANJERO: ESPAÑA

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Abstract: The case law of the CJEU and the ECtHR enhances the recognition of a status acquired abroad. The aforementioned case law has changed and is changing the private international law methodology and practice in national law. This paper analyses how this case law has changed Spanish private international law, particularly when a legal situation related to the status of the person that has been validly created abroad is sought to be recognized in Spain.

Key words: Personal status, personal law, recognition, status acquired abroad, national private international law.

Resumen: En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna de muchos Estados. Este trabajo analiza los efectos que ha tenido esta jurisprudencia sobre el Derecho internacional privado español cuando éste se enfrenta a una situación jurídica relacionada con el estatuto de la persona que ha sido válidamente creada en el extranjero y que se quiere hacer valer en España.

Palabras clave: estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, Derecho internacional privado de producción interna.

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Summary: I. General. A. Awareness in academia, politics, judicial and administrative practice. B. Substantive scope. C. Grounds for recognition/acceptance. II. Process of recognition/acceptance. A. Methodology. B. Requirements (formal and material). III. Implementation / Effects of the recognition or acceptance in the second State. IV. Further issues.

I. General

A. Awareness in academia, politics, judicial and administrative practice

1. The position of Spanish academia regarding the recognition of a personal status acquired abroad is highly conditioned by the current state of Spanish private international law rules on this matter.

2. As it can be seen in our recent Law for International Civil Cooperation (2015)[1], Spanish private international law does not use the method of recognition beyond judicial decisions. Broadly speaking, this means that this method is not applicable to legal situations validly created abroad by administrative acts (such as marriages) or by operation of law (the so-called, "crystallised situations", such as names, gender or legal age). When one of these legal situations seeks to have effects in Spain, the Spanish judicial, administrative or registry authority deals with it via the method of "applicable law": the situation is treated as if it had to be "created" ex novo in Spain, according to Spanish conflict of laws national rules.

3. Only two exceptions can be noted in relation to a foreign status acquired abroad. There is a legal exception in art. 56 of the Law on the civil Registry, which contains a transposition of the ECJ case law in relation to mutual recognition of surnames and a more restrictive rule that also permit the recognition of surnames acquired in third States under certain circumstances[2]. The other exception was established by case law. The Spanish Supreme Court has determined that the method of recognition shall be applicable to establish the effects in Spain of a filiation derived from a surrogacy agreement carried abroad, even if this filiation was not created by a judicial decision.

4. As a consequence, the method of recognition of a foreign status will be used or not, depending on: (i) the matter of the personal status concerned (name, capacity, gender, filiation and parentage –natural or legal-, marriage, divorce, creation or dissolution of civil unions), (ii) the proceeding –if any- in which this legal characteristic has been acquired abroad (*ex lege*, by a judicial decision, by agreement of the parties involved, by the inscription in a foreign register, by the intervention of an administrative

[1] Law n. 29/2015, of the 30 July, of international civil cooperation ("Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil"), *BOE*, n. 182, 31 July of 2015.

[2] Law 20/2011, of the 21st of July, on the Civil Registry ("Ley 20/2011, de 21 de julio, del Registro Civil"), *BOE*, n. 175, of 22 of July of 2011, available at: https://www.boe.es/eli/es/l/2011/07/21/20/con. This Law entered into force the 30 of April of 2021, after successive delays.

¨Art. 56. Surnames with a foreign element ("*Artículo 56. Apellidos con elemento extranjero").*

Whoever acquires Spanish nationality shall retain the surnames that he or she holds in a form other than the legal form, provided that he or she so declares in the act of acquiring it or within the two months following the acquisition or coming of age, and that the surnames that he or she intends to retain are not contrary to international public policy. ("*El que adquiere la nacionalidad española conservará los apellidos que ostente en forma distinta de la legal, siempre que así lo declare en el acto de adquirirla o dentro de los dos meses siguientes a la adquisición o a la mayoría de edad, y que los apellidos que se pretenden conservar no resulten contrarios al orden público internacional").*

In the case of Spanish citizens who are also nationals of another Member State of the European Union, voluntary changes of surnames made in accordance with the rules on the determination of surnames applicable in the latter State shall be recognised in Spain, except where such a change is contrary to Spanish public policy, or where such a change is the result of a court decision that has not been recognised in Spain". ("*En caso de ciudadanos españoles que tengan igualmente la nacionalidad de otro Estado miembro de la Unión Europea, los cambios de apellidos voluntarios realizados de conformidad con las reglas relativas a la determinación de apellidos aplicables en este último Estado serán reconocidos en España, salvo cuando dicho cambio sea contrario al orden público español, o bien cuando habiendo sido dicho cambio resultado de una resolución judicial ésta no haya sido reconocida en España*").

authority or of a Notary Public…) and (iii) the geographical origin of the situation that was created (UE/ third States).

5. Taking into account the narrow scope of application of this method in Spanish private international law, it is understandable than only a few papers address the topic of the recognition of personal status acquired abroad in a theoretical way[3]. The tendency of Spanish researchers to study existing law rather than possible law has also contributed to the scarcity of work on the subject. There is a need for voices that defend that the adoption of this method would benefit private individuals and a sound administration of justice.

6. In contrast, Spanish academia has prolifically commented on the ECJ and ECHR judicial decisions applying the method of recognition to personal status acquired in another Member State[4]. These papers do not defend the extension of such a method to the cases where national private international law applies (i.e. when the name or surname is given in a third State) and to other situations created by an administrative act (such as marriage) or directly by the Law (legal age, gender) in relation to which the ECJ or the ECHR has not yet ruled.

7. In the same vein, only a few Spanish private international law handbooks focus on the study of the method of "recognition" beyond judicial decisions[5]. The rest of handbooks develop the theory of recognition in a very "classical way", focusing in this method only in relation to foreign judicial decisions. When these handbooks talk about the decisions of the ECJ and ECHR that apply the method of recognition, they don't explain the method as itself, but only the facts and the fail of the decisions[6].

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[3] Some recent papers that deal with recognition are the following: P. Jiménez Blanco, "Movilidad transfronteriza de personas, vida familiar y Derecho internacional privado", *Revista Electrónica de Estudios Internacionales*, n. 35, junio 2018; M. Gardeñes Santiago, "El Método De Reconocimiento Desde La Perspectiva Del Derecho Internacional Privado Europeo Y Español", *Anuario Español De Derecho Internacional Privado*, Tomo XVII, 2017; M. Lehmann, "El reconocimiento ¿una alternativa al derecho internacional privado?", *Cuadernos de Derecho Transnacional*, 2016, pp. 240-257.

[4] For example, about ECJ case law: M.D. Blázquez Peinado, "Tribunal de Justicia de las Comunidades Europeas: TJCE - Sentencia de 14.10.2008, S. Grunkin y D. R. Paul, C-353/06", Revista de Derecho Comunitario Europeo, vol. 13, n. 33, 2009, pp.649-664; M. Requejo Isidro, "STJCE (Gran Sala), Grunkin-Paul, 14 de octubre de 2008, asunto C-353/06", *Revista española de Derecho internacional,* vol. 60, n. 2, 2008, pp. 603-606; N. Magallón Elósegui, "La DGRN ante la jurisprudencia europea en materia de nombres y apellidos", *Revista española de Derecho internacional*, vol. 62, n. 2, 2010, pp. 149-164; G.M. Teruel Lozano, "La jurisprudencia del Tribunal de Justicia de la UE sobre el reconocimiento del nombre en el espacio europeo: Notas sobre la construcción de un estatuto personal común como ciudadanos europeos y su impacto en el derecho internacional privado de los estados", *Anales de Derecho,* n. 29, 2011, pp. 177-223. About ECHR case law, among others: A. Cañizares Laso, "Paradiso y Campanelli c. Italia: un caso para la reflexión", in J. Ammerman Yebra et al., *Mujer, maternidad y Derecho,* Tirant lo Blanch, Valencia, 2019, pp. 649-661; M. Díaz Crego, "Paradiso y Campanelli c. Italia: ¿un pronunciamiento europeo contra la gestación por sustitución?, *Revista española de Derecho europeo,* n. 64, 2017, pp. 185-200; N. Ochoa Ruiz, "Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos, de 24 de enero de 2017, en el asunto Paradiso y Campanelli c. Italia", *Revista Aranzadi Doctrinal*, n. 9, 2017, pp. 135-148. About Spanish case law (Supreme Court and "Dirección General de los Registros y el Notariado", now called "Dirección General de Seguridad jurídica y fe pública" decisions on surrogacy cases): A. de Miguel Díez, "Análisis de la gestación subrogada a la vista de los últimos pronunciamientos del Tribunal Supremo", *Observatorio de recursos humanos y relaciones laborales*, n. 130, 2018, pp. 72-73; J. Carrascosa González / A.-L. Calvo Caravaca, "Gestación por sustitución y Derecho internacional privado. Más allá del Tribunal Supremo y del Tribunal Europeo de Derechos Humanos", *Cuadernos de derecho transnacional*, vol. 7, n. 2, 2015, pp. 45-113; B. Hermida Bellot, *Gestación subrogada ¿Técnica o forma de reproducción?: conceptualización, marco jurídico y problemática en el ordenamiento jurídico español,* PhD Thesis, Universidad CEU - Cardenal Herrera, 2017; S. Zubero Quintanilla, "Efectos jurídicos de los contratos de maternidad subrogada internacional en España", *Actualidad jurídica iberoamericana*, vol. extra 8, n. 2, 2018, pp. 226-252; B. Andreu Martínez, "Una nueva vuelta de tuerca en la inscripción de menores nacidos mediante gestación subrogada en el extranjero: La instrucción de la DGRN de 18 de febrero de 2019", *Actualidad jurídica iberoamericana*, vol. extra 10, n. 2, 2019, pp. 64-85; J.M. Díaz Fraile, "La gestación por sustitución ante el Registro Civil español. Evolución de la doctrina de la DGRN y de la jurisprudencia española y europea", *Revista de Derecho Civil*, vol. 6, n. 1 (enero-marzo), 2019, pp. 53-131.

[5] A.-L. Calvo Caravaca / J. Carrascosa González, *Derecho internacional privado,* vols. 1 and 2, Comares, Granada, 2018; F.J. Garcimartín Alférez, *Derecho internacional privado,* Thomson Reuters, Madrid, 2016, p. 321.

[6] For example, C. Espluges Mota et al., *Derecho internacional privado,* Tirant lo Blanch, 2014, regarding names see p. 334.

8. This lack of scholar awareness has been echoed in politics. There is no significant political discussion regarding the need of introducing the method of recognition to the rest of situations not yet covered by the Law. The reason might be that Spanish legislation on this matter is very permissive in issues such as marriages between people of the same sex, gender change or natural filiation of two women and not many problems have been triggered for the application of the "applicable law" method. The only issue that has been on the political agenda is surrogacy. In addition to the political discussion related to the drafting of a law regulating this practice, there is a strong debate on the compatibility of Spanish public policy with a surrogacy carried out abroad. The most controversial matter is if the method of recognition should be used in relation to a surrogacy carried out abroad when such filiation was not established by a judicial decision. In 2019, the government expressed its rejection to the use of the method when the judicial decision is missing, even if the genetic filiation was proved by DNA tests[7], showing the tensions between the Ministry of Justice and the Directorate General for the Registers and Notaries (hereinafter, "DGRN"), the civil authority in charge of the Civil Registers (more favourable to recognition)[8].

9. Regarding the administration, the Directorate General for the Registers and Notaries[9] is the competent authority to develop in Spain the ECJ case law regarding mutual recognition in the field of names[10].

10. Regarding case law, the most outstanding one is the Decision of the Supreme Court of 6 February 2014 regarding surrogacy agreements. This decision sheds light on the method that shall be used under Spanish national PIL before registering a foreign status in Spain. In the case, the intended parents requested the registration of the birth and filiation in the Spanish Registry of a certificate of birth issued by the Californian Registry. There was a Californian judgment, but it was not included in the proceedings[11]. The actors chose the way of art. 85 of the Regulation of the Civil Registry, on the registration in the Spanish Civil Registry of foreign registry's certifications, because of its (apparent) simplicity. Of course, things would have been different if the judgment had been included in the proceedings: Spanish authorities should have applied Spanish rules on the registration of a foreign judgment in the Spanish Registries (art. 83 of the Regulation on the Civil Registry), which lead to the rules on the recognition of foreign judgments (arts. 44-49 LCJIMC –nowadays– and arts. 951-958 of the Old Law on Civil Procedure of 1881–at the time of the decision–).

11. Art. 85 of the Regulation on the Civil Registry only establishes some formal requirements for the registration of foreign registry's certificates (the document shall be "regular" and "authentic"). In addition, the officers of the Spanish Registries apply a conflict of laws approach to determine if the status to be registered is consistent with Spanish law. This substantive control is based in art. 23 of the Law of the Spanish Registry, to which the aforementioned Regulation serves as development. This article states that control has to extend not only to the reality of the fact included in the foreign certificate

[7] See pieces of news such as the one available at: https://www.elconfidencial.com/espana/2019-02-19/ucrania-vientres-de-alquiler-gestacion-pasaporte_1834958/

[8] In Spanish, "Dirección General de los Registros y el Notariado".

[9] The 28 January 2020 this Directorate General absurdly changed its name into: "Directorate General on Legal Security and Notary Attestation" ("Dirección General de Seguridad Jurídica y Fe Pública").

[10] Instruction of 24 February 2010 of the Directorate General for Registers and Notaries on the recognition of surnames registered in other Member States ("Instrucción de la Dirección General de los Registros y el Notariado de 24 de febrero de 2010 sobre reconocimiento de los apellidos inscritos en los Registros Civiles de otros países miembros de la UE"), *BOE,* n. 60, 10 march 2010, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2010-3995. See decisions of this Directorate General (hereinafter, "RDGRN" or "Resolución de la Dirección General de los Registros y el Notariado") such as RDGRN [3rd section] 27 January 2014 and RDGRN [2nd section] 27 November 2013.

[11] This is said in the Supreme Court decision, ground n. 1, par. 7 (translation of the authors): "Neither the surrogacy contract nor the judgment of the Californian court attributing paternity to the present appellants has been introduced into the proceedings, but the appellants have admitted in their pleadings the existence of that contract and reference has been made throughout the proceedings to the existence of such a judgment, which is required by the California Family Code" ("*No se han aportado al proceso ni el contrato de gestación por sustitución ni la sentencia del tribunal californiano atribuyendo la paternidad a los hoy recurrentes, pero estos han admitido en sus alegaciones la existencia del citado contrato y se ha hecho referencia a lo largo del litigio a la existencia de tal sentencia, exigida por el Código de Familia de California*").

but also to the fact that there is no doubt about the "legality according to Spanish Law" of the circumstance that intends to be inscribed. Before this decision, "legality according to Spanish law" was usually understood as a substantive control according to Spanish law.

12. The Supreme Court states that a substantive control is necessary, but it shall not be conducted from a conflict of laws approach. The legal technique of recognition shall be applied. The consequence of this distinction is that the officers of the Spanish Registries shall not check if the circumstance that intends to be registered complies with Spanish law as a whole, with each and every requirement of Spanish legislation. They shall only check if it does not undermine Spanish public policy. In the words of the Court: "*We are not facing a "fact" that has to be subject for the first time of a decision of authority in Spain and that, given that it presents a foreign element (the place of birth, at least) shall be resolved according to the substantive law pointed out by the applicable conflict of laws rule. The legal technique that shall be applied is not conflict of laws but recognition. There is already an authority decision, the one adopted by the administrative authority of the Civil Registry of California when registering the birth of children and determine an affiliation in accordance with California law. We have to solve if that decision of authority can be recognized, and display its effects in the Spanish legal system, specifically the determination of the affiliation in favour of the appellants*"[12].

13. The DGRN decisions mainly focus on the ECJ perspective. However, the ECHR perspective (right to an identity, to a family, dignity of women…) is also present in the discussion and somehow lies behind the aforesaid Supreme Court decision. This case was about the inscription of the filiation of two Californian babies born in California from a surrogate mother and a couple of Spanish men. The filiation of the couple is not registered due to "*ordre public*" reasons. Regarding scholars, the arguments in favour of status recognition are most of them based in cost efficiency (no need to apply or prove the Law applicable to the situation), in the enhance of the free movement of people and in the increase of foreseeability[13]. Against this method, the possibility of "bad forum shopping" is the main argument used.

14. There is one last issue of general awareness that shall be pointed out. As A.-L. Calvo Caravaca and J. Carracosa González underlined, the method of "recognition" in relation to the personal status is not included in Spanish Private International Law because it was *de facto* "hidden" behind the conflict of laws rule regarding such status (art. 9.1 CC). In fact, through this article, which applies the connecting factor of the national law, the personal status that had been established according to such national law was directly "recognized" in Spain.

B. Substantive scope

15. A personal status acquired "abroad" can have effects in Spain according to the general rules on the validity of foreign decisions. The first thing that needs to be clarified is that "recognition" as such is only possible in relation to judicial decisions (or similar decisions held by an authority with power of "*ius imperium*"). Recognition provides the decision and therefore the personal status established by it with the force of *res iudicata* and with a "constitutive" effect. When the personal status is established

[12] Supreme Court decision, ground 3, par. 2, 2 (translation of the authors): "The legal technique applied is not that of conflict of laws, but that of recognition. There is already an authoritative decision, the one adopted by the administrative authority of the California Civil Registry when registering the birth of the children and determining filiation in accordance with Californian law. It is necessary to decide whether that decision can be recognised and its effects can be deployed in the Spanish legal system, specifically the determination of parentage in favour of the appellants" ("*La técnica jurídica aplicada no es la del conflicto de leyes, sino la del reconocimiento. Existe ya una decisión de autoridad, la adoptada por la autoridad administrativa del Registro Civil de California al inscribir el nacimiento de los niños y determinar una filiación acorde con las leyes californianas. Hay que resolver si esa decisión de autoridad puede ser reconocida, y desplegar sus efectos, en concreto la determinación de la filiación a favor de los hoy recurrentes, en el sistema jurídico español*").

[13] A.-L. Calvo Caravaca / J. Carrascosa González, *Derecho internacional privado*, Comares, Granada, 2018.

by a public document (i.e. a marriage certificate, a public deed recognizing affiliation), by a private document (i.e. a recognition of affiliation in a will) or *ex lege* (i.e. legal age), "recognition" in this narrow sense is not possible, because these documents or decisions allow appeal or review before a court.

16. However, this does not mean that personal status included in some of the latter categories cannot display any kind of effects in Spain. When the status appears in a public document, it can be registered in Spanish Civil Registries. In relation to this, the general rule is the one confirmed by the aforementioned decision of the Supreme Court in 2014. Both a formal and a substantive control of the document is required. This substantive control is made by the method of "recognition", that is to say, it is not necessary to check if the status is valid according to Spanish law, but if it is in line with Spanish public policy. It is important to underline that this inscription in the Registry does not mean that the status is being "recognized" (in the sense of granting the force of *res iudicata* and constitutive effects).

17. In relation to the inscription of public documents, we can find two relevant exceptions. The first one is marriage. The inscription of marriage is not only governed by art. 59 of the Law on the Civil Registry and art. 85 of the Regulation on the Civil Registry. According to article 65 of the Civil Code[14] and article 256 of the Regulation of the Civil Registry[15], a substantive control should be made when the recognition of a foreign marriage is requested in Spain. This control has been named by academia as the "legal flashback system" ("sistema del flashback legal"), because Spanish authorities examine the marriage according to Spanish conflict of laws rules[16]. They "go back" to the moment when the marriage was celebrated and apply Spanish conflict of laws rules to it. Spanish COL rules are applied and they point out the applicable law. However, Spanish COL rules regarding marriage ("form", particularly) are not simple. They are based in the *lex loci celebrationis* criterion, but they have got some exceptions (depending on the nationality of the spouses). As a result, marriages that were valid in their country of origin will not be valid according to the law pointed out by the Spanish COL rule and therefore not recognized in Spain.

18. The second exception is "name recognition". A "recognition by acceptance" method shall be applied when the case falls under the scope of the ECJ decisions on the matter. The Instruction of the DGRN of 24th February 2010 explains how Spanish registers shall apply the ECJ case law on this subject matter[17]. This Instruction is not a "law" in the narrowest sense, but in practice it is followed by all the officers of the DGRN. On April 30, 2021, the new Law on the Civil Registry came into force. This new law includes a provision regarding the recognition of surnames acquired in the State of the former nationality (art. 56 of the Law on the Civil Registry). According to it, whoever acquires Spanish nationality shall retain the surnames that he or she holds, provided that he or she so declares in the act of acquiring it or within the two months following the acquisition or coming of age, and that the surnames that he or she intends to retain are not contrary to international public policy. A second paragraph of the provision particularly refers to surnames acquired in another Member State, stating that in the case of Spanish citizens who are also nationals of another Member State of the European Union, voluntary changes of surnames made in accordance with the rules on the determination of surnames applicable in the latter State shall be recognised in Spain, except where such a change is contrary to Spanish public policy, or where such a change is the result of a court decision that has not been recognised in Spain. As it can be seen, this provision does not cover all the situations where the principle of mutual recognition

[14] Royal Decree of 24 July 1889 publishing the Civil Code ("Real Decreto de 24 de julio de 1889 por el que se aprueba el Código Civil"), *Gaceta de Madrid*, n. 206, 25 July 1889, available at: https://www.boe.es/eli/es/rd/1889/07/24/(1)/con.

[15] Decree of 14 November 1958 approving the Regulations of the Civil Registry Law ("Decreto de 14 de noviembre de 1958 por el que se aprueba el Reglamento de la Ley del Registro Civil"), *BOE*, n. 296, 11 December 1958, available at: https://www.boe.es/eli/es/d/1958/11/14/(1)/con.

[16] A.-L. Calvo Caravaca / J. Carrascosa González, *Derecho internacional privado,* vol. 2, Comares, Granada, 2018.

[17] Instruction of 24 February 2010 of the Directorate General for Registers and Notaries on the recognition of surnames registered in other Member States ("Instrucción de la Dirección General de los Registros y el Notariado de 24 de febrero de 2010 sobre reconocimiento de los apellidos inscritos en los Registros Civiles de otros países miembros de la UE"), *BOE,* n. 60, 10 march 2010, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2010-3995

established by the ECJ might apply (for example, when the name is acquired at the country of the habitual residence of the person). When the article is not applicable, case law of the ECJ shall be pleaded before the Civil Registers.

19. As it will be seen below, the interpretation of the term "public policy" is different depending on the origin of the surname to be "recognized". In Spanish civil law, two surnames are required: one shall come from the paternal branch and one from the maternal branch (art. 49.2 of the Law on the Civil Registry)[18]. The DGRN has considered that these principles take part into Spanish public policy when the surname comes from a third State. As a consequence, (i) a single surname acquired in a third State cannot be recognized in Spain and (ii) two surnames coming from the same branch cannot be recognized either[19].

20. Foreign public documents and therefore the personal statuses established by them can also have incidental effects in a judicial proceeding (art. 144 and 323 of the Law on Civil Procedure[20]). Private documents too (art. 324 of the Law on Civil Procedure). A status acquired ex lege can also be pleaded before a court. To determine the validity and the effects of these personal statuses before a court or in any other context different from the inscription in the Spanish Civil Registry, a conflict of laws method is applied. The Spanish authority will apply the Spanish conflict of laws rules to determine the applicable law to that document or circumstance and will only consider it valid if it is compatible with that applicable law pointed out by the conflict-of-law rule[21].

C. Grounds for recognition/acceptance

21. In the field of name law, the grounds for acceptance of a foreign status are included in the aforesaid Instruction of the DGRN of the 24th February 2010. This Instruction alludes to ECJ *Grunkin v. Paul* case and to the principles of freedom of movement and primacy of Community law over national law. This ECJ case law is therefore understood by Spanish authorities as "judge made law". As it was issued as a result of the mentioned ECJ decision, the Instruction only refers to "surnames" and not to first names. However, in practice, it is applied to both. This acceptance of status is limited to names legally acquired in a Member State, that is, when the "State of origin" is a Member State.

22. This Instruction was issued following *Grunkin Paul*. As a consequence, it identifies the State of origin as the State of birth. When the recognition of the name is requested in a case whose circumstances are different from the ones in *Grunkin Paul*, for example, when the name was not acquired by birth (as it happened, for example, in the ECJ case *Sayn-Wittgenstein*[22]) this Instruction is not applicable. There are no other Instructions subsequent to other decisions of the ECJ on the matter. In these cases, recognition shall be granted anyway, and the requesting party shall plead the ECJ decision applicable to its case and the general principle.

23. According to this instruction of 2010, the name acquired in a foreign State will only be recognized if:

[18] If the child is single parented, the surnames of that parent are given to the child.

[19] Instruction of the Directorate General of the Registers and Notaries of 23 May 2007, on surnames of foreigners nationalized as Spanish and their consignation in the Spanish Civil Registry ("Instrucción de la Dirección General de los Registros y el Notariado de 23 de mayo de 2007, sobre apellidos de los extranjeros nacionalizados españoles y su consignación en el Registro Civil español"), *BOE*, n. 154, de 4 julio 2007, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12948.

[20] Law n. 1/2000 of 7 January on Civil Procedure ("Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil"), *BOE*, n. 7, 8 January 2000, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2000-323 .

[21] F.J. Garcimartín Alférez, *Derecho internacional privado,* Thomson Reuters, Madrid, 2016, p. 322.

[22] Judgment of the CJUE (Second Chamber) of 22 December 2010, case c-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, ECLI: EU:C:2010:806.

(1) That foreign State is (i) the State of birth and (ii) a Member State of the EU. Additional conditions should be fulfilled:
(2) Both parents, or at least one of them in case of bilateral determination of the affiliation by both lines, or the only parent whose affiliation is determined, shall have their habitual residence fixed in the country in which the child was born.
(3) The legislation on Private International Law of the State of birth shall link the determination of surnames to the criterion of habitual residence.
(4) The surnames corresponding to the material laws of that country shall have been recorded in the birth certificate of the child in the Civil Registry of the country of birth, without admitting the "renvoi" that their conflict rules may make to laws different from the Spanish ones (cf. art. 12. 2 of the Civil Code).
(5) The option for surnames determined under the law of the country of birth shall be requested by both parents or by one of them with the consent of the other, in accordance with the general principle set forth in the first paragraph of article 156 of the Civil Code, unless one of the parents has been deprived or suspended from the exercise of parental rights[23].

24. This Instruction is not applicable to binational children born in Spain if one of their nationalities is the Spanish. There is another Instruction for these cases: Instruction of the 23rd May 2007, on the surnames of foreigners[24].

II. Process of recognition/acceptance

A. Methodology

25. First of all, it is necessary to underline that the geographical origin of the decision or situation to be recognized is relevant. When the decision or situation related to the personal status comes from a State connected to Spain by an instrument of international judicial cooperation (European Regulations or International Conventions), this instrument will apply, provided that the decision falls into the scope of application of such instrument of cooperation.

26. In the absence of such an instrument, national laws will apply. The aforementioned Law for International Civil Cooperation (2015)[25] is the landmark of the Spanish system. This law establishes the legal regime for the recognition of foreign judgments (arts 44-49), the execution of public documents (arts. 56-57) and the inscription in Public Registries of foreign judgments and public documents (arts. 58-61). As it was stated before, there are no specific rules for the recognition of "public documents", "private documents" or "situations" established *ex lege*, that is to say, not established by a public document or a judgment, because "recognition" cannot be granted in relation to them. The validity and effects of these personal statuses will be determined by the application of PIL rules[26].

27. As a consequence, depending on the source establishing the characteristic related to personal status, the methodology used and the effects given to it will vary:

[23] For further information on this Instruction, see N. Magallón Elósegui, "La DGRN ante la jurisprudencia europea en materia de nombre y apellidos", *Revista Española de Derecho Internacional*, vol. 62, n. 2, 2010, pp. 149-164.

[24] Instruction of the Directorate General of the Registers and Notaries of 23 May 2007, on surnames of foreigners nationalized as Spanish and their consignation in the Spanish Civil Registry ("Instrucción de la Dirección General de los Registros y el Notariado de 23 de mayo de 2007, sobre apellidos de los extranjeros nacionalizados españoles y su consignación en el Registro Civil español"), *BOE*, n. 154, de 4 julio 2007, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12948.

[25] Law 29/2015 of 30 July 2015 on international legal cooperation in civil matters ("Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil"), *BOE,* n. 182, 31 de julio de 2015.

[26] F.J. Garcimartín Alférez, *Derecho internacional privado,* Thomson Reuters, Madrid, 2016, p. 322.

28. When the personal status is established by a judicial decision, the regime of recognition for judicial decisions included in the Law of International Civil Cooperation will apply. This regime follows the scheme of "traditional recognition" according to the terminology of the Comparative Report. The law differentiates between the recognition in a special procedure and incidental recognition, which is only effective for the parties to the case at hand (art. 44.2). The name of the special procedure that shall be used to obtain recognition as a principal claim –not incidental- is confusing: it is called "exequatur" proceeding (art. 42). When recognition is granted, the foreign decision can display the same legal implications as in its State of origin (art. 44.3). Recognition provides the decision with "constitutive" effect and force of *res iudicata*.

29. There is no possibility to formally provide "recognition" to a personal status established by a public document. Following Brussels I Regulation Recast, the Law of International Civil Cooperation only regulates the "execution" of public documents and not its recognition (art. 56)[27]. As it was stated before, this does not mean that foreign public documents cannot display any kind of effects in Spain.

30. Firstly, they can be inscribed in the Spanish Public Registries. The Law for International Civil Cooperation regulates this inscription in articles 60 and 61. Article 60 establishes two formal requirements: (i) what has been called "juicio de equivalencia" ("judgment of equivalence"), which means that the foreign authority that issued the document shall have intervened developing the same functions as Spanish authorities develop in the subject and (ii) that the public document shall have the same or very similar effects in the State of origin as it will have in Spain (art. 60 Law for International Civil Cooperation). It also states that specific laws can add other requirements. Art. 85 of the Regulation on the Civil Registry is also applicable. According to it, and to the latest case law of the Supreme Court of 2014 already explained, the document establishing the personal status shall be "regular" and "authentic" and shall not collide with Spanish public policy.

31. When it comes to marriage, which is generally established by an administrative decision, there is the specific rule that was mentioned before. According to article 65 of the Civil Code[28] and article 256 of the Regulation of the Civil Register[29], an applicable law control should be made when the recognition of a foreign marriage is requested in Spain. This control has been named by academia as the "legal flashback system" ("sistema del flashback legal"), because Spanish authorities examine the marriage according to Spanish conflict of laws rules[30]. As it was mentioned before, the authority in charge of the recognition "goes back" to the moment when the marriage was celebrated and applies Spanish conflict-of-laws rules to examine its validity.

32. The second exception is "name recognition". A "recognition by acceptance" method shall be applied when the case falls under the scope of the ECJ decisions on the matter. The requirement of Instruction of the DGRN of 24th February 2010 have already been exposed[31].

33. Foreign public documents and therefore the personal statuses established by them can also have incidental effects in a judicial proceeding (art. 144 and 323 of the Law on Civil Procedure). Private

[27] This article establishes only two conditions: the accordance to Spanish public policy and that these decisions must have at least the same or equivalent effectiveness as those issued or authorized by Spanish authorities.

[28] Royal Decree of 24 July 1889 publishing the Civil Code ("Real Decreto de 24 de julio de 1889 por el que se aprueba el Código Civil"), *Gaceta de Madrid*, n. 206, 25 July 1889, available at: https://www.boe.es/eli/es/rd/1889/07/24/(1)/con.

[29] Decree of 14 November 1958 approving the Regulations of the Civil Registry Law ("Decreto de 14 de noviembre de 1958 por el que se aprueba el Reglamento de la Ley del Registro Civil"), *BOE*, n. 296, 11 December 1958, available at: https://www.boe.es/eli/es/d/1958/11/14/(1)/con.

[30] A.-L. Calvo Caravaca / J. Carrascosa González, *Derecho internacional privado,* vol. 2, Comares, Granada, 2018.

[31] Instruction of 24 February 2010 of the Directorate General for Registers and Notaries on the recognition of surnames registered in other Member States ("Instrucción de la Dirección General de los Registros y el Notariado de 24 de febrero de 2010 sobre reconocimiento de los apellidos inscritos en los Registros Civiles de otros países miembros de la UE"), *BOE,* n. 60, 10 march 2010, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2010-3995.

documents too (art. 324 of the Law on Civil Procedure). A status acquired *ex lege* can also be pleaded before a court. To determine the validity and the effects of these personal statuses before a court or in any other context different from the inscription in the Spanish Civil Registry, a conflict of laws method is applied. The Spanish authority will apply the Spanish conflict of laws rules to determine the applicable law to that document or circumstance and will only consider it valid if it is compatible with that applicable law pointed out by the conflict-of-law rule[32]. To sum up, when the personal status is established by a private document or *ex lege,* there is no "recognition" as such. Neither these personal statuses have access to the public Registries.

B. Requirements (formal and material)

34. The requirements for recognition are regulated in relation to judgments. The Law for International Civil Cooperation was inspired by the European model, so it follows a system of "grounds for non-recognition" and not a system of requirements for recognition (art. 46 of the Law). Among these requirements, some of them are formal and others are material:

(a) if such recognition is contrary to public policy;
(b) where the judgment was given in a breach of the rights of defence. Where the judgment was given in default of appearance, there is a breach of the rights of defence if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence;
(c) if the judgment was given in a breach of the exclusive jurisdiction of Spanish courts or when the connection to the Judge of origin is not reasonable.
(d) if the judgment is irreconcilable with a judgment given in Spain;
(e) if the judgment is irreconcilable with an earlier judgment given in another State, provided that the earlier judgment fulfils the conditions necessary for its recognition in Spain; or
(f) if a proceedings involving the same cause of action and between the same parties is pending in the Spanish courts, provided that it had started before the foreign proceeding.

35. In addition, the Law for International Civil Cooperation requires the translation of the judgment according to art. 144 of the Law of Civil Procedure (Law of Civil Procedure[33]).

36. For the registration of a foreign status in the Spanish Registries, the requirements have already been mentioned above. Regarding the contravention of public policy, it was the argument used in the aforementioned decision of the Supreme Court regarding surrogacy to deny the inscription of the affiliation of the intended parents in the Spanish Registry. The Court found that the recognition of such a filiation would go against the best interest of the child and the dignity of the surrogate mother. However, as scholars have pointed out, the public policy exception is wrongly applied in this decision because it was understood in an abstract way and not in relation to the case[34].

37. In relation to the recognition of surnames from third Sates enshrined in article 56 of the Law on the Civil Registry (and article 199 of the Regulations on the Civil Registry), Instruction of the 23rd May 2007, on the surnames of foreigners[35] shall be taken into account. This instruction starts by stating

[32] F.J. Garcimartín Alférez, *Derecho internacional privado,* Thomson Reuters, Madrid, 2016, p. 322.

[33] Law n. 1/2000 of 7 January on Civil Procedure ("Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil"), *BOE*, n. 7, 8 January 2000, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2000-323 .

[34] A.-L. Calvo Caravaca / J. Carrascosa González, "Gestación por sustitución y Derecho internacional privado. Más allá del Tribunal Supremo y del Tribunal Europeo de Derechos Humanos", *Cuadernos de Derecho Transnacional*, vol. 7, n. 2, 2015, pp. 45-113.

[35] Instruction of the Directorate General of the Registers and Notaries of 23 May 2007, on surnames of foreigners nationalized as Spanish and their consignation in the Spanish Civil Registry ("Instrucción de la Dirección General de los Registros y el

that the legal instrument that determines in Spain the law applicable to names and surnames is the Munich Convention of 1980. The cited above does not rule on "mobile conflict", i.e. the effects on surnames of a change in a person's nationality. The solution to this legal lacuna can be two opposing theories on the subject. The first, which can be named as the "non-retroactivity thesis" and it postulates the solution of understanding that the surname remains as it was established in accordance with the previous national law and should not be changed even if the subject acquires a new nationality. This thesis has the disadvantage that children of the same parents may have different surnames, but it has the advantage of continuity of the name of the subject. The second, known as the "retroactivity thesis", reaches the opposite conclusion, on the understanding that the subject who changes nationality must change his surname to adapt it to his new national law. This is the thesis that has found acceptance in the official doctrine of the DGRN (cf. Resolutions of 5 March 1997, 12 September 2003, etc.)[36].

38. Certainly, this interpretation has the disadvantage that it leads to a forced change in the surnames of the person whose national status has been modified. To avoid this disadvantage, the new national law can establish mechanisms to preserve the surnames held under the previous national law, in order to avoid the undesired effects of a forced change of surname. This is exactly what article 56 of the Law on the Civil Registry and article 199 of the Civil Registry Regulations does, allowing a period of two months following the acquisition of Spanish nationality to express the wish to retain the surnames. This is a case of ultra-application of the previous national law which prolongs its application over time with regard to a subject who loses the previous nationality on acquiring Spanish nationality[37].

39. There are two requirements to be examined in order to assess the applicability of the preservation option provided for in this provision: the timeliness of the exercise of the option, i.e., compliance with the time limit set, and the non-contradiction with public order of the result of the declaration of preservation. And while the first of these requirements does not offer particular interpretative difficulties, the second requires certain clarifications in order to achieve the objective of its uniform application in registry practice[38]. The public policy exception has been applied by the DGRN, at least, in relation to two guiding legal principles of the Spanish legal system in matters of surnames, which are:

40. a) The principle of the duplicity of surnames of Spaniards. It is a constant doctrine of the DGRN that, in any case, two surnames must be entered in accordance with the Spanish system of identification of persons (art. 49.2 of the Law on the Civil Registry and 194 of the Regulation on the Civil Registries), since it must be considered that the principle that each Spaniard must be legally designated by two surnames is a principle of public order which directly affects social organisation and is not subject to any variation (except for what for binational Spanish-EU nationals), under penalty of establishing a privilege for a certain category of Spaniards which, lacking sufficient objective justification, would be contrary to the constitutional principle of equality of all Spaniards before the Law. Therefore, although the purpose of article 194 of the Civil Registry Regulations is to prevent those acquiring Spanish nationality from being subject to the Spanish surname regime, it cannot be interpreted as permitting the retention of a single surname. The provision entitles the naturalised Spanish foreigner to keep, if he so requests within a certain period, 'the surnames' (in the plural) which he holds in a form other than the legal Spanish one[39].

41. b) The principle of the infungibility of lines. Our legislation on surnames is based, in addition to the rule of duplicity of surnames, on the concurrent principle of duplicity of lines, in accordance with the so-called principle of infungibility of the paternal and maternal lines, in the case of bilateral de-

Notariado de 23 de mayo de 2007, sobre apellidos de los extranjeros nacionalizados españoles y su consignación en el Registro Civil español"), *BOE*, n. 154, de 4 julio 2007, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12948.

[36] *Ibid.,* part. III, par. 1.

[37] *Ibid.,* part. III, par. 2.

[38] *Ibid.,* part. III, par. 3.

[39] *Ibid.,* part. III, par. 4.

termination of filiation by both lines. The exclusive transmission of the two surnames by only one of the lines, whether paternal or maternal, is contrary to our public order (cfr. Resolution of 23 May 2007)[40].

III. Implementation / Effects (Result) of the recognition or acceptance in the second State

42. There is no specific rule on the matter in relation to the recognition of judicial decisions or public documents.

43. Regarding the inscription of judgments and public documents to the Spanish Registries there is a particular rule: article 61 of the Law for International Civil Cooperation. This article deals with the "adaptation" of measures or institutions which are unknown to Spanish Law. According to this provision, when the resolution or the foreign public document orders measures or incorporates rights that were unknown in Spanish law, the registrar will proceed to adapt this right or measure, if possible, to a measure or right provided or known in the Spanish legal system that has equivalent effects and seeks a similar proposal and interest, although such adaptation will have no more effect than those established in the law of the State of origin. Before registration, the registrar will notify the right holder regarding the adaptation to be made. However, any interested party may challenge the adaptation directly before a court.

44. In relation to the cases that are solved by a "conflict of laws approach", the effects of the status are governed by the law which applies to that area of the status (i.e. filiation: by the law determined by article 9.4 of the Civil Code).

IV. Further issues

45. The Spanish system of recognition is only developed in relation to judicial decisions. When the personal status is not established by such a judicial document, we find ourselves in a scenery of legal uncertainty. The decision of the Supreme Court in relation to surrogacy is a first step in the development of a method of recognition of situations, potentially applicable to other areas related to personal status.

[40] *Ibid.,* part. III, par. 5.