

Marriages across borders within the European Union: Private international law vs. Mutual recognition perspectives

Matrimonios transfronterizos en la Unión Europea: Derecho internacional privado y reconocimiento mutuo

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Recibido: 31.01.2024 / Aceptado: 03.02.2024

DOI: 10.20318/cdt.2024.8429

Abstract: The present paper tackles the issue of the recognition of cross-border marriages and their effects within the European Union. The current praxis allows interesting remarks on the cross-border effects of foreign marriages and their recognition in the perspective of the rights to free movement and to family life. In this framework, the paper scrutinizes a potential definition of the marriage, whether according to EU free movement law or to European human rights law. Due to the lack of a commonly accepted definition, it tests the classic approach to the circulation of foreign documents and certificates, i.e. the conflict of laws perspective. Leading on, it analyses the more fashionable method of the mutual recognition of situations created abroad, as modelled by some States and tested in some cases by the European Courts, too. Despite important advantages, this method does not seem easily accepted for the circulation of the status of spouse(s) and of the institution of marriage. With the aim to push towards enhanced free movement rights and strengthened human rights, the present paper offers some final remarks regarding the legal value of (international) family law in the framework of a social Constitution of the EU*.

Keywords: Cross-border Marriages; Mutual Recognition; Notion of Marriage; Right to Family Life; Right to Free Movement; Family Private International Law.

Resumen: El presente trabajo aborda la cuestión del reconocimiento de los matrimonios transfronterizos y sus efectos jurídicos en la Unión Europea. La praxis actual permite formular interesantes observaciones sobre los efectos transfronterizos de los matrimonios celebrados en otros Estados miembros y sobre su reconocimiento desde la perspectiva de los derechos a la libre circulación de personas y a la

* This Contribution is published in the framework of the Jean Monnet Module: “European Private International Law: Recent Trends and Challenges” (EuPILART), co-funded by the EACEA. Views and opinions expressed are however those of the authors only and do not necessarily reflect those of the European Union or the EACEA. Neither the European Union nor the EACEA as granting authority can be held responsible for them. The Contribution is the output of common research of the authors and represents their shared opinion. However, paras. 1, 2, 3, 8 are to be attributed to Silvia Marino; paras. 4, 5, 6, 7, 9 to Javier Carrascosa González.

vida familiar. En este marco, el documento examina una posible definición del matrimonio, ya sea con arreglo a la legislación de la UE sobre libre circulación o bien según la legislación europea sobre derechos humanos. La falta de una definición comúnmente aceptada pone a prueba el enfoque clásico de la circulación de documentos y certificados extranjeros, es decir, la perspectiva del conflicto de leyes. Más adelante, analiza el método del reconocimiento mutuo de situaciones creadas en el extranjero, tal como lo han modelado algunos Estados y lo han implementado también en algunos casos los tribunales de los Estados miembros y los tribunales europeos. A pesar de sus importantes ventajas, este método no parece fácilmente aceptado para la circulación del status de los cónyuges y del matrimonio. Con el objetivo de impulsar la mejora de los derechos de libre circulación y el refuerzo de los derechos humanos, el presente documento ofrece algunas observaciones finales sobre el valor jurídico del Derecho de familia (internacional) como elemento importante de la Constitución civil de la Unión Europea.

Palabras clave: Matrimonios transfronterizos; Reconocimiento mutuo; Noción de matrimonio; Derecho a la vida familiar; Derecho a la libre circulación de personas; Derecho internacional privado de familia.

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I. Introduction. Families Crossing Borders: The Experience of the European Union

1. The issue of the cross-border recognition of family status is a quite modern challenge that derives from two different trends: the increased mobility of the people through the borders and the development of human rights in the private and the family spheres. Although these can be considered as global issues, the experience within the European Union (hereafter: EU) is particularly interesting for three reasons.

2. Firstly, the free movement of people has been a key pillar of the EU since its outset¹, then becoming the ground for family reunification law and for the civil judicial cooperation in family matters², to the extent that it has been recently pointed out as “a space to define the European family”³. Therefore, the experience in the EU can simultaneously stand out the recurring problems, show the relevance of a human rights approach and finally amount to a possible example for the treatment of cross-border family issues.

3. Secondly, the EU is grounded on the sincere cooperation among States with different cultural and legal traditions and sensibilities, that keep exclusive competences in family matters⁴. Thus, the EU

¹ CJEU 1 June 1999, *Eco Swiss*, C-126/97.

² A. LANG, “Impact of the Regulations on the Free Movement of Persons in the EU”, in I. VIARENGO /F. VILLATA (eds.), *Planning the Future of Cross Border Families*, Hart, Oxford, 2020, p. 353.

³ H. KROEZE, “Parent-child relationships in EU free movement law: in-between legal and legitimate”, in E. BERNARD/ M. CRESP/M. HO-DAC (coord.), *La famille dans l’ordre juridique de l’Union européenne*, Bruylant, Bruxelles, 2020, p. 234.

⁴ C. KOHLER, “Unification of Private International Law in Family Matters in the European Union: Cultural Issues”, in *Planning the Future*, cit., p. 6 relates the legal culture and international family law to the national identity of the Member States pursuant to Art. 4, para. 2 of the TEU and Art. 67, para. 1 of the TFEU, which, according to F. SALERNO, “La costituzionalizzazione

faces the need to accommodate divergences in an acceptable way for all Member States and for the EU itself, while pursuing its targets.

4. Finally, the EU system on the protection of human rights is peculiar, due to the simultaneous relevance of numerous sources, such as the Charter of Fundamental Rights of the EU, as primary law, the European Convention on Human Rights (hereafter: ECHR) and the national constitutionally-relevant traditions as general principles of EU Law. These sources shall lead to the highest protection of family rights in the EU legislation and case law.

5. Therefore, the peculiarities and the needs within the EU create the fertile ground for experimenting new solutions and for profitable legal transplants, both inwards and outwards⁵.

6. The road towards the human-rights oriented approach to the free movement has been nevertheless long. From a historical perspective, the impact of the right to free movement on families and on family law was not immediately clear. Indeed, next to a multiplicity of economic principles, the founding EEC Treaties provided for a small core of fundamental individual rights: the principles of non-discrimination and of equal pay⁶; and none related to the family or to the social ties of the moving worker. Clearly, the sole cross-border dimension considered there was that related to the civil and commercial matters, to the mutual recognition of legal entities, to the abolition of double taxation, pursuant to former Article 293 TEEC, in a clearly pure economic perspective.

7. This approach quickly proved to be too simplistic, since the worker could be prevented from benefitting from these economic rights if his/her family could not join. A right to family reunification had to be granted in order to make the freedom of movement concretely possible without disregarding his/her affective life. The well-known measures enacted for the purposes of family reunification⁷ list the members of the family benefiting from this right, but do not define the family, neither the family relationship(s)⁸. This choice is not surprising, due to the majoritarian social and legal perspectives at the time. Families were composed of married man and woman, with their common children. Although different situations naturally occurred, these were generally not recognized by the law and sometimes covered by social shame. There was scarcely the doubt that the sole social formation that could benefit from rights was the family based on marriage between a man and a woman. Hence, there had barely been a need to define the marriage, and those cases have passed into the annals of the history. An example from the past is the judgment in *Hyde*⁹, dated back to 1866, where the marriage is linked to the religious de-

dell'ordine pubblico internazionale", *Rivista di diritto internazionale privato e processuale*, vol. 54, no. 2, 2018, p. 269, is strictly linked with the protection of human rights.

⁵ V.L. GUTIÉRREZ CASTILLO, "Nouvelles formes familiales en Europe et en Amérique latine: vers un standard commun en matière familiale?", in *La famille dans l'ordre juridique*, cit., p. 254.

⁶ See, recently: S. MARINO, "Il lungo cammino verso la realizzazione della parità retributiva tra lavoratori e lavoratrici e la direttiva 2023/970 sulla trasparenza salariale: il punto di arrivo?", *Studi sull'integrazione europea*, vol. XVIII, no. 3, 2023, pp. 469-498.

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; 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*, 28 June 1973, p. 14; 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; Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, *OJ L 141*, 27 May 2011, p. 1.

⁸ I. QUEIROLO, "La famiglia nella prospettiva della libera circolazione delle persone: il diritto al ricongiungimento familiare", in L. CARPANETO/F. PESCE/I. QUEIROLO (a cura di), *La "famiglia in movimento" nello spazio europeo di libertà, sicurezza e giustizia*, Giappichelli, Torino, 2019, p. 38.

⁹ Court of Probate and Divorce, {L.R.} 20 March 1866, *Hyde v. Hyde and Woodmansee*, 1 P. & D. 130, on which, recently: J. CARRASCOSA GONZÁLEZ, "El concepto de «matrimonio» en el tiempo y en el espacio. En busca de la esencia de las instituciones jurídicas. El caso *Hyde vs. Hyde* 1866", available at: <http://accursio.com/blog/?p=1165>.

definition, with a stress on its life-long duration and the opposite sex of the spouses. This could appear to have been a good definition at the time of that judgment, and even one century later for the purposes of EEC family reunification. However, it is obsolete nowadays. Religious jurisdiction is clearly separated from civil jurisdiction, while national regulations on divorce and on same sex marriages were introduced in many States. The quest for a new possible definition of the marriage arose only in more recent years, with the development of new family models and the debates stemmed from the draft of EU regulations in family matters within the Area of Freedom, Security and Justice¹⁰.

II. Marriage vs. other Forms of Unions: The Traditional Interpretation

1. The Human Rights perspective: the Marriage and the Family in the case law of the European Court of Human Rights

8. The European Court of Human Rights (hereafter: ECtHR) case law has been distinguished between the heterosexual marriage, on one side, and any other forms of affective unions, on the other side, despite the lack of definition in the ECHR.

9. Article 12 of the ECHR, on the right to marriage, has been interpreted narrowly: according to the established ECtHR's case law, the right to marry is granted to couples formed by a man and a woman, subject to the conditions, e.g. minimum age requirements, established by national laws. The marriage must be real, and not for convenience: in these cases, the State is entitled to nullify it¹¹.

10. These characters have been stressed in the *Rees* case¹² on the grounds of the black letter of the provision and confirmed in *Gas and Dubois*¹³. Here the ECtHR made it clear that Contracting States have no duties to allow same sex couples to marry and that other forms of unions could not integrate the notion of marriage. In *Schalk and Kopf*¹⁴ the refusal to grant the right to marry to same sex couples under Article 12 ECHR was due to the nationally enrooted social and cultural features, and the lack of any *general consensus*¹⁵. As a result, Contracting Parties are free to regulate same sex marriages, but are not compelled to do it. Consequently Article 12 has a divergent scope of application in the Contracting States: where the same sex marriage is not admitted, the provision is applicable to heterosexual marriages only; where the marriage is granted regardless of the sex and the sexual orientation, Article 12 is applicable to all marriages.

11. Furthermore, the right to marry cannot be interpreted as meaning that it imposes uniform effects to marriages and to other forms of unions, including personal and patrimonial rights¹⁶. As a con-

¹⁰ F. PESCE, "La nozione di «matrimonio»: diritto internazionale privato e diritto materiale a confronto", *Rivista di diritto internazionale privato e processuale*, vol. 55, no. 4, 2019, p. 787. More information from a historic perspective may be found in J. CARRASCOSA GONZÁLEZ, *Matrimonio y elección de Ley (estudio de Derecho internacional privado)*, Ed. Comares, Granada, 2000, *passim*.

¹¹ ECtHR 6 January 1992, *Benes v. Austria*, 18643/91.

¹² ECtHR 17 October 1986, *Rees v. UK*, 9532/81.

¹³ ECtHR 15 March 2012, *Gas and Dubois v. France*, 25951/07.

¹⁴ ECtHR 24 June 2010, *Schalk and Kopf v. Austria*, 30141/04.

¹⁵ The comparative perspective plays an important role in the case law of the ECtHR, since it helps evaluating whether a rule is shared among the Contracting States (S. FREDMAN, "Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law", *International and Comparative Law Quarterly*, vol. 64, no. 3, 2015, p. 631). This approach has been criticized, since sometimes the ECtHR seems to follow the national trends, instead of pushing them (L. WILDHABER/A. HJARTARSON /S. DONNELLY, "No Consensus on Consensus. The Practice of the European Court of Human Rights", *Human Rights Law Journal*, vol. 33 2013, p. 248; C. SÖRGJERD, "Marriage in a European perspective", in J. SCHERPE (ed.), *European Family Law, vol III. Family Law in a European Perspective*, Elgar, Cheltenham, 2016, p. 35).

¹⁶ ECtHR 13 June 1979, *Marcks v. Belgium*, 6933/74; ECtHR 26 January 1999, *Saucedo Gomez v. Spain*, 37784/97; ECtHR 25 July 2003, *Karner v. Austria*, 40016/98.

sequence, registered partnerships and similar unions could even not be equated to the marriage as to their effects, according to the national margin of appreciation¹⁷.

12. The restrictive interpretation of Article 12 is further confirmed by the case law related to divorce. The ECtHR maintains that the right to marry has no relevance at the moment of the dissolution of the marriage, not even in combination with the wish of the interested person to re-marry after divorce¹⁸. In parallel, the Contracting State is not obliged to recognize a divorce obtained abroad under a foreign law¹⁹. These judgments have not yet been overruled, since no other similar claims have been lodged with the ECtHR since then²⁰.

13. It is not yet clear whether Article 12 is applicable to the recognition of marriages celebrated abroad. The answer should be in the affirmative, both in combination with Article 14 on the principle of non-discrimination (on the grounds of the citizenship, of the origin of the spouses, or of the place of celebration, for example), or as a stand-alone right, since the recognition depends on the formal and substantive validity of the marriage²¹.

14. Due to the restrictive interpretation of Article 12, the true key for the development of family law in the human rights context has been Article 8 of the ECHR. The distinction between private life and family life there established has enabled the ECtHR to include affective unions in the latter, in order to offer at least a minimum protection to couples which were not composed of a wife and a husband²². The first developments regarded heterosexual couples living out of wedlock: it has been relatively easy to include these relationships into the right to family life²³, although they could not be assimilated to spouses engaged in a marriage.

15. It took more consideration to reach the same conclusion for same sex couples. Indeed, for a long time these relationships have been included only into the right to private life, it being defined as the right to enter into a relationship with any person of one's choice. Only in *Schalk and Kopf* the ECtHR detected quick evolutions of social attitudes, so that it would have been 'artificial' (para. 94) to maintain a distinction between same sex and opposite sex couples, both to be finally included within the notion of family life under Article 8 of the ECHR. This development has allowed the Court to decide that Contracting States shall provide for a legal form of recognition of same sex couples²⁴ and that partnerships concluded abroad shall produce legal effects in the State of nationality of one of the partners, and where the couple resides²⁵.

¹⁷ A.L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ, "Ley aplicable a los regímenes económicos matrimoniales y Reglamento 2016/1103 de 24 junio 2016. Estudio técnico y valorativo de los puntos de conexión", *Cuadernos de derecho transnacional*, vol. 15, no. 2, 2023, p. 12.

¹⁸ ECtHR 18 December 1986, *Johnston a. o. v. Ireland*, 9697/82. The case was decided under very peculiar circumstances. A few days before the final deliberation in the case, the Irish people rejected divorce in a referendum. See, further: M. ANTOKOLSKAIA, "The 'Better Law' Approach and the Harmonisation of Family Law", in K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Cambridge, 2003, p. 175.

¹⁹ ECtHR 6 July 20120, *Green and Farhat v. Malta*, 38797/07.

²⁰ There are strong arguments for a prospective *révirement*, due to the possibility to detect a general consensus nowadays. Moreover, it is also possible to focus on the negative offsets of the rights granted by the ECHR, as it has been happening with the interpretation of other ECHR's provisions (for the negative interpretation of the rights positively granted, see, in the scope of application of Art. 9 of the ECHR: ECtHR 25 May 1993, *Kokkinakis v. Greece*, 14307/88; ECtHR 18 February 1999, *Buscarini a. o. v. San Marino*, 24645/94). The negative side of the right to marry under Art. 12 is the freedom not to be bound by a marriage, i.e. the right to divorce.

²¹ J. FAWCETT/M. SHUILLEABHAIN/S. SHAH, *Human Right and Private International Law*, Oxford University Press, Oxford, 2016, p. 600.

²² ECtHR 24 February 1983, *Dudgeon v. UK*, 7525/76; ECtHR 26 October 1988, *Norris v. Ireland*, 10581/83; ECtHR 22 April 1983, *Modinos v. Cyprus*, 15070/89.

²³ ECtHR *Johnston a. o. v. Ireland* case; ECtHR 13 July 2000, *Elsholz v. Germany*, 25735/94; ECtHR 18 July 2006, *Keegan v. Ireland*, 28867/03.

²⁴ ECtHR 14 December 2017, *Orlandi a. o. v. Italy*, 26431/12 a. o.

²⁵ ECtHR 17 January 2023, *Fedotova a. o. v. Russia*, 40792/10, 30538/14 et 43439/14; ECtHR 5 September 2023, *Koilova v. Bulgaria*, 40209/20.

16. Further case law relaxed the conditions for the inclusion of the affective life into the right to family life. After the *Vallianatos*²⁶ and the *Pajić*²⁷ judgments cohabitation is not a requisite in order to recognize a family life, provided that the relation is stable, lasting and cohabitation proves impossible due to objective reasons.

2. The Notion of Marriage within the European Union

17. The lack of definition of the marriage within the EU has led some couples to look for its extensive interpretation²⁸. These cases arose in the fields of family reunification, social security or status of the EU institutions' staff, but had limited success.

18. In *Reed*²⁹ the Regulation 1612/1968 was declared non-applicable to a non-married couple, on the grounds that Article 10 referred only to marriage and not to other relationships. The judgment of the General Court in *Arauxo-Dumay*³⁰ made it clear that, despite the peculiar case at stake, the notions of marriage and widow contained in the EU Staff Regulation refer to couples bound by a civil marriage, because of their legal definitions and of their common sense. This judgment has been confirmed in the field of social security for migrant workers³¹.

19. The sole case where a cohabitation out of wedlock has been characterized as a marriage is to be found in *Eyüp*³² due to the extremely particular circumstances of the case. Here the couple continued cohabitation after divorce, gave birth to children and re-married again after a few years.

20. The CJEU had the opportunity, too, to stress that the marriage must be real, and not for convenience³³. Furthermore, it may be put to an end only through divorce, while the termination of the cohabitation has no legal effects for the purposes of EU free movement and family reunification law³⁴. On the other hand, the divorce has as immediate effect the loss of these rights³⁵, aside from the grounds for divorce, even if the third Country national spouse has been subject to domestic violence³⁶.

The formal celebration of a marriage is thus the necessary condition for benefitting from the EU rights granted to spouses, not to be extended to cohabiting partners.

21. This classic interpretation of the notions of family and spouses has been confirmed in the case law related to same sex couples³⁷. After a restrictive (and contradictory) interpretation in *Grant*³⁸,

²⁶ ECtHR 7 November 2012, *Vallianatos a. o. v. Greece*, 29381/09 and 32684/09.

²⁷ ECtHR 23 February 2016, *Pajić v. Croatia*, 68453/13.

²⁸ Italian scholars have duly scrutinized the developments of the CJEU's case law; among others: L. TOMASI, "La nozione di famiglia negli atti dell'unione e della comunità", in S. BARIATTI (ed.), *La famiglia nel diritto internazionale privato comunitario*, 2007, p. 47; M. CONDINANZI/ C. AMALFITANO, "La libera circolazione della "coppia" nel diritto comunitario", *Il Diritto dell'Unione europea*, 2008, p. 399; E. BERGAMINI, *La famiglia nel diritto dell'Unione europea*, Giuffrè, Milano, 2012, p. 5; I. QUEIROLO, "La famiglia", cit., p. 47.

²⁹ CJEU 17 April 1986, *Reed*, 59/85.

³⁰ CJEU 17 June 1993, *Arauxo-Dumay*, T-65/92.

³¹ CJEU 13 June 2013 *Hadj Ahmed*, C-45/12.

³² CJEU 22 June 2000, *Eyüp*, C-65/98.

³³ CJEU 11 July 2002, *Carpenter*, C-60/00; CJEU 23 September 2003, *Akrich*, C-109/01.

³⁴ CJEU 13 February 1985, *Diatta*, 267/83; CJEU 8 November 2012, *Iida*, C-40/11; CJEU 10 July 2014, *Ogieriakhi*, C-244/13.

³⁵ CJEU 16 July 2015, *Singh*, C-218/14.

³⁶ CJEU 30 June 2016, *NA*, C-115/15.

³⁷ J. BORG-BARTHET, "The Principled Imperative to recognise same-sex unions in the EU", 8. *Journal of Private International Law*, vol. 8, no. 2, 2012, p. 359; G. WILLEMS, "La constitution d'un droit européen de la famille: l'exemple (paradigmatique) de la reconnaissance, de la protection et de la circulation des couples homosexuels et des familles homoparentales", in *La famille dans l'ordre juridique*, cit., p. 67.

³⁸ CJEU 17 February 1998, *Grant*, C-249/96.

in *Maruko*³⁹ the Court applied a more open oriented approach in detecting a discrimination in the refusal to grant survivors' benefits where the couple was bound by a civil union, provided that the law assimilated registered partnerships to marriages for all the other patrimonial aspects of the relationship. The principle of non-discrimination on the basis of sexual orientation has been strengthened in *Römer*, where national legislation established only two institutions, the marriage for heterosexual couples and the partnership for same sex couples⁴⁰.

22. Nevertheless, this did not lead to a full equivalence of same sex partnerships to marriages. Although in *D. v. Council*⁴¹ the CJEU detected an increased legal recognition of same sex couples at national level, these relationships were never considered as equivalent to marriage.

23. This traditional interpretation has not been superseded by Directive 2004/38 on EU citizens free movement rights, although enacted in a completely different social environment⁴². Indeed, the right to family reunification is granted for *spouses*⁴³. At the same time this notion is not defined, thus leaving the doubt as to the applicability of the Directive to same sex spouses. Moreover, the Directive does not push towards a full recognition of registered partnerships, neither to their assimilation to a marriage⁴⁴. The right to family reunification thus depends on national legislation and its legal treatment of registered partnerships.

24. The Directive takes into consideration the *de facto* cohabiting couples, too. Article 3, paragraph 2 lays down a duty to facilitate family unity, if the relationship is durable and attested. This formulation raises many doubts as to the kind of relationship concerned and to the proof of the fulfilment of the requested conditions, but it is clear, as confirmed by the case law⁴⁵, that these couples are far from being assimilated to married couples and do not enjoy a full right to family reunification.

25. Needless to say, Directive 2003/86⁴⁶ on the right to family reunification has a far more restrictive approach, because its beneficiaries are third Country nationals legally residing in the EU, whom can be granted a smaller set of rights compared to EU citizens⁴⁷. Provided that the spouse is always considered as a family member, Article 4, paragraph 4 grants reunification for one spouse only in polygamous marriages⁴⁸. This provision is interesting under two perspectives. The first is that the Regulation does not give preference to any of the wives, neither the first in chronological order, that would exclude the bachelor status in a monogamist perspective. That means that the husband is able to choose the

³⁹ CJEU 1 April 2008, *Maruko*, C-267/06.

⁴⁰ CJEU 10 May 2011, *Römer*, C-147/08.

⁴¹ CJEU 31 May 2001, *D v. Council*, C-122/99.

⁴² See, recently, N.N. SHUIBHNE, *EU Citizenship Law*, Oxford University Press, Oxford, 2023, pp. 261 ff.

⁴³ This distinction confirms 'a form of superiority of marital life over other forms of conjugal life': E. DUBOUT, "The European Form of Family Life: The Case of EU Citizenship", *European Papers*, vol. 5, no. 1, 2020, p. 13.

⁴⁴ O. LOPES PEGNA, "La determinazione dello status familiare nella disciplina del ricongiungimento", in A. CAGNAZZO/F. PREITE/V. TAGLIAFERRI (a cura di), *Il nuovo diritto di famiglia. Profili sostanziali, processuali e notarili, vol. IV, Tematiche di interesse notarile. Profili internazionalprivatistici*, Giuffrè, Milano, 2015, p. 853; F. BUONOMENNA, "Nuovi scenari di diritto di famiglia, con particolare riferimento alle unioni civili: profili evolutivi e applicativi del diritto internazionale privato ed europeo", *Studi sull'integrazione europea*, vol. 14, no. 3, 2019, p. 689.

⁴⁵ CJEU 12 July 2018, *Banger*, C-89/17.

⁴⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJL* 251, 3 October 2003, p. 12.

⁴⁷ V. PETRALIA, "Ricongiungimento familiare e matrimonio poligamico. Il riconoscimento di valori giuridici stranieri e la tutela delle posizioni deboli", *Quaderni europei*, vol. 40, 2013, p. 49; S. BARBOU DES PLACES, "Is Free Movement (Law) Fully Emancipated from Migration (Law)?", in N.N. SHUIBHNE (ed.), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law*, Oxford University Press, Oxford, 2023, pp. 6 ff.

⁴⁸ The compatibility of this approach with the protection of human rights has been indirectly confirmed by the ECtHR 6 January 1992, *Alilouch El Abasse v. Netherlands*, 14501/89. Nevertheless, the Institut de Droit International, Session de Cracovie – 2005, Ninth Commission. Cultural differences and ordre public in family private international law (available at: https://www.idi-iil.org/app/uploads/2017/06/2005_kra_02_fr.pdf) tries to overcome these limits, stating that the validity of a polygamic marriage shall not be contested for public policy reasons, if the marriage is celebrated in a State admitting it. States might not recognize these unions, if both spouses were habitually resident in a State not allowing polygamy, or if the first spouse is a citizen of, or has habitual residence in, such a State.

wife he wishes to reunite with, thus risking an infringement of the right to family life of the left behind spouses. The second is that the directive recognizes the legal model «polygamous marriage» as existing outside of the EU. This is very clear both from the wording, since Article 4, paragraph 4 uses the terms marriage and spouse, exactly as Article 4, paragraph 1 referring to family members, and from the rights conferred, since automatic family reunification in favour of one wife is granted to the same extent of a spouse in a monogamic marriage. However, the Directive attaches to the polygamous marriages limited effects and rights as to family reunification⁴⁹, making it more similar to European standard monogamist marriages when the couples enter into the EU.

26. Finally, Article 9 of the Charter of Fundamental Rights of the EU uses a gender-neutral formulation but does not impose the acceptance and the recognition of same sex marriages⁵⁰. As a consequence, Member States remain free to introduce this institution, but have no duties to regulate it or to accept same sex marriages celebrated abroad.

27. Currently, marriage is the civil formal union between a man and a woman under both ECHR and EU Law, polygamy included, and other forms of union have a limited accessibility to the rights which are instead automatically conferred to spouses⁵¹.

3. Testing the Concept of Marriage: Marriages with or between Transgender People

28. The only issue that has incurred important developments related to the notion of marriage is the treatment of transgender people. These started with the ECtHR case in *Rees*,⁵² where the claimant complained that the national legislation did not recognize any legal status consistent with his acquired physical appearance. Although the Court dismissed the claim, it recommended a constant verification of the legal and administrative situation, thus, implicitly, a future modification of the law. The same warning was present in the judgment in *Sheffield*⁵³.

29. In the subsequent case *Goodwin*⁵⁴ the ECtHR could not but state the lack of any development of UK Law. The Court stressed the emerging European consensus on the legal effects of gender reassignment⁵⁵. These included the right to marry, too, which shall depend on factual elements to be assessed at the time of marriage. It follows that the transsexual person has both the right to have his/her identity changed in all public documents, according to his/her current sexual appearance, and further to marry, taking into consideration the gender reassignment.

30. The CJEU followed a forward-looking approach through the application of the principle of non-discrimination. It started within a claim in the field of labour law⁵⁶, to reach the core of family law,

⁴⁹ P. LAGARDE, “La théorie de l’ordre public international face à la polygamie et à la répudiation. L’expérience française”, in *Nouveaux itinéraires en droit: hommage à François Rigaux*, Bruylant, Bruxelles, 1993, p. 262.

⁵⁰ As it has been pointed out by A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, “I matrimoni tra persone dello stesso sesso”, en S. BARIATTI / A.G.DANOVÌ (a cura di), *La famiglia senza frontiere*, CEDAM, Padova, 2008, pp. 81-98; A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, “Aspectos internacionales de los matrimonios entre personas del mismo sexo: notas a la Resolución-Circular de la Dirección General de los Registros y del Notariado de 29 de julio de 2005”, *Boletín de Información del Ministerio de Justicia*, año LX, núm. 2007, 15 febrero 2006, pp. 5-51; A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, “Derecho internacional privado y matrimonios entre personas del mismo sexo”, *Anales de Derecho, Revista de la Facultad de Derecho Universidad de Murcia*, 2005, n.23, pp. 11-70.

⁵¹ C. MCGLYNN, “The Europeanisation of Family Law”, *Child and Family Law Quarterly*, vol. 13, no. 1, 2001, p. 47.

⁵² ECtHR *Rees v. UK*, cit..

⁵³ ECtHR 30 July 1998, *Sheffield and Horsham v. UK*, 22985/93 and 23390/94.

⁵⁴ ECtHR 11 July 2002, *Goodwin v. UK*, 28957/95.

⁵⁵ This human rights-oriented approach of the ECtHR case law is far from being completely accepted, as demonstrated by the more recent judgment ECtHR 9 July 2020, *Y.T. v. Bulgaria*, 41701/16.

⁵⁶ CJEU 30 April 1996, *P. v. S.*, C-13/94.

the right to marry. In *K.B.*⁵⁷ a discrimination appears from the fact that the transsexual is prevented from satisfying the substantial requirements for the access to marriage, due to the impossibility to change his/her documents. The CJEU refers to the ECtHR judgment in *Goodwin*: if a person has a right to adapt his/her gender, he/she has the consequent right to legal reassignment and to enjoy all the rights stemming from his/her reassigned sex, included that to marry, pursuant to the right of non-discrimination.

31. A different issue stems from the gender reassignment after the celebration of the marriage. The ECtHR judgment in *Hämäläinen* offers a good example of the flexibility required from Contracting States in tackling these sensitive situations⁵⁸. If same sex marriages are not allowed, the possibility either to divorce or to convert the previous marriage into a registered partnership respects the rights to private life and to family life of the transgender person and of the couple. Indeed, the former can have the sex reassigned, both physically and legally; the latter can choose to continue a shared life in the legal form provided for by the Contracting State concerned. Under this perspective, the judgment 170/2014 of the Italian Constitutional Court⁵⁹, decided a few weeks *before* the *Hämäläinen* case, seems to be perfectly consonant with the need to protect human rights. Provided that Italy does not admit same sex marriages and that it did not regulate registered partnership at the time of the judgment, the legally established forced divorce after the gender reassignment of one of the spouses was deemed to be infringing the right to family life. The Constitutional Court stressed that it was for the legislator to regulate new family institutions aimed to preserve the rights of same sex couples, but this could not jeopardize the rights of the current families. Under this judicial review, the judgment admits (at least) one same sex marriage – that concerned by the claim – in a State where homosexual couples could not formalize a relationship.

32. Article 1, paragraphs 26 and 27 of the Italian law 76/2016 on civil unions explicitly tackles this issue: the gender reassignment of a spouse converts the marriage into a same sex partnership, provided that the spouses do not wish to separate or to divorce. Differently drafted, this is substantially the same solution that the ECtHR declared acceptable in the *Hämäläinen* case. On the other hand, the partnership ceases in case of gender reassignment, because it is reserved to same sex unions only. This does not amount to a violation of the right to private or family right of the partners, since they are apt to marry because of the acquired different physical and legal sex at the time of marriage. Therefore, in both cases after gender reassignment it is possible to maintain or to create a legal status which formalizes the relationship, if the interested parties so wish.

III. The Limited Standard Notion of Marriage within EU Member States Legislation and EU Law

33. The retention of a classic interpretation of the notion of marriage, as a formal commitment between a man and a woman, can depend on the lack of any other common core within EU Member States. While the differences in the past stemmed from the various formal aspects of the marriage⁶⁰, the

⁵⁷ CJEU 7 January 2004, *K.B.*, C-117/01.

⁵⁸ ECtHR 16 July 2014, *Hämäläinen v. Finland*, 37359/09.

⁵⁹ Italian Constitutional Court 170/2014, available at: <http://www.giurcost.org/decisioni/2014/0170s-14.html>.

⁶⁰ Firstly, some States have a system in which religious marriage is mandatory. Today such system is in decline, as it infringes the *jus connubii*, because it prevents marriages between non-believers and / or forces them to disclose their beliefs. The system was followed in Spain from the Council of Trent (1563) until the Civil Marriage Law of 1870. Secondly, some systems were based on compulsory religious marriage, but in which a subsidiary civil form for non-believers was contemplated. This system is in decline today, too. It was followed in Spain in the period 1938-1978, under Franco's regime. Thirdly, in several countries a system of marriage by a purely private contract is observed. That was the case of some Western Countries until the Council of Trent, including Spain (the so-called "clandestine marriage" or "a yuras"). Today it still exists, with certain limitations, in some States of the USA in the form of the well-known "Common Law marriage", as well as in some Muslim States. Fourthly, a mandatory civil marriage system was propagated after the 1789 French Revolution, which is followed by a large group of States (France, the Netherlands, Belgium, Switzerland, Hungary, Romania, Germany, Honduras a.o.). Fifthly, another system considers that marriage is a civil institution that gives rise to rights and duties for the spouses, regulated in civil law. However, the marriage can be celebrated through a civil or a religious ceremony (Spain, Italy, Portugal, Norway, Sweden, Denmark, Finland, United Kingdom, Australia, Canada, New Zealand, and many States of the USA). Finally, some States

more recent works of the Commission on European Family Law (hereafter: CEFL)⁶¹ present interesting outcomes related to the substantive aspects of the marriage.

34. Although they have a purely academic nature, and despite some criticism⁶², the CEFL principles have helped to enlighten at least two main issues. First, the divergences in European Family Law at national level depend on the different national approaches towards personal freedom that started in Europe from the end of the 1960s. These movements led to changes even within the very same nature of the heterosexual marriage, since it is considered as a formalized contract in some European Nordic States, but as a religious institution in other States, with differing intermediate nuances⁶³.

35. These differences lead to the second issue, which is the difficulty to accept family institutions created abroad. With the movement of people, legal status aims to circulate and to be recognized in the State of destination. States must therefore face the models' circulation challenge⁶⁴. This fragmented situation prevents the EU from defining the notions of family and of marriage. It risks overcoming the national differences, privileging one approach and thus eroding national exclusive competences and perceived values. The EU might incur the risk of undermine the national identities, protected by Article 4, paragraph 2 of the TEU⁶⁵ and thus the trust in the EU itself. Therefore, it does not come as a surprise that definitions are lacking in the EU legislation.

36. A striking example is the civil and judicial cooperation policy, within which the EU is conferred competence to adopt measures on family law (Art. 81, para. 3 of the TFEU). Despite the enactment of a meaningful number of measures, definitions are generally missing. The pragmatic reason thereof is that the unanimity needed in the Council cannot be obtained in relation to family private international law, so that numerous regulations are established by enhanced cooperation. In this framework, the provision of specific definitions would appear inappropriate and might amount to an infringement of the rights of the non-participating Members States, which must not be affected by the enhanced cooperation (Art. 326 of the TFEU).

37. The sole exception is to be found in Article 3, paragraph 1, letter a) of the Regulation 2016/1104 on the patrimonial effects of registered partnerships⁶⁶. Recital 17 tries to limit its impact, stating that it applies solely for the purpose of this Regulation and that Member States shall not be obliged to introduce this institution in national law. Nevertheless, the definition does not resolve the main issues related to the circulation of registered partners and their status, such as the legal nature of the institution, its treatment when the registered partnership is not regulated in the State of destination, the relevance, if any, of the sexual orientation of the partners and of the different means of its conclusion and registration.

follow a system that may be called "alternative double marriage". Here, there are two different marriages, governed either by civil law or by religious regulations. Their legal regime is different, both in terms of form and substance. See, further: C. DRAGHICI, *The legitimacy of family rights in Strasbourg case law*, Bloomsbury, Oxford and Portland, 2017, p. 43.

⁶¹ For the establishment, the working methods, the results of the CEFL: K. BOELE-WOELKI, "Building on Convergence and Coping with Divergence in the CEFL Principles of European Family Law", in M. ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, Intersentia, The Hague, 2007, p. 253; K. BOELE-WOELKI/N. DETHLOFF/W. GEPHART (eds.), *Family law and culture in Europe*, Intersentia, The Hague, 2014; K. BOELE-WOELKI, "The Impact of the Commission on European Family Law (CEFL) on European Family law", in J. SCHERPE (ed.), *European Family Law, vol. I, The Impact of institutions and Organisations on European Family Law*, Elgar, Cheltenham, 2016, p. 209.

⁶² D. BRADLEY, "A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics", *Oxford University Comparative Law Forum*, vol. 4, 2005, p. 4.

⁶³ C. DRAGHICI, *The legitimacy of family rights*, cit., p. 43.

⁶⁴ J. SCHERPE (ed.), *European Family Law, vol. II. The Changing Concept of 'Family' and Challenges for domestic Family Law*, Elgar, Cheltenham, 2016 presents national reports on the concept of family and related challenges due to the current modernization within a meaningful number of European States.

⁶⁵ J. SCHOLTES, *The Abuse of Constitutional Identity in the European Union*, Oxford University Press, Oxford, 2023.

⁶⁶ 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, *OJL* 183, 8 July 2016, p. 30.

Therefore, the definition can still overcome national legislations of the participating Member States⁶⁷, provided that some national institutions can be excluded or included therein, notwithstanding the willingness or unwillingness of the State to characterize the national institution as part of family law⁶⁸.

38. The approach followed under Regulation 2016/1103 on matrimonial property regimes⁶⁹, i.e. no definition, leaves many open issues, but has the merit of being coherent with the scarce competences conferred to the EU in the field of family law and with the limited participation thereto⁷⁰. In the current situation, the issue of the circulation and the recognition of family status is left to Member States, which should tackle it in conformity with the ECtHR and the CJEU case law.

IV. Multiplicity of Laws Applicable to Marriage. The Non-Existent “*Lex Matrimonii*”

39. The preliminary issue of private international law aspects related to marriage depends on the fact that the notion of marriage is not clear at all. The word is the same - “marriage” -, but the meaning is different⁷¹. What is in a name? That which we call a rose (marriage) by any other name would smell as sweet, Shakespeare wrote.

40. Failing any common definition of the marriage, private international law shall intervene in balancing the differences, thus respecting them. The EU has never enacted private international law rules on its formation and celebration pursuant to Article 81, paragraph 3 of the TFEU⁷². It is curious to see that, on the contrary, the EU has enacted conflict of laws rules governing the dissolution of marriage, included in the so-called “Rome III” Regulation⁷³. Despite the political difficulties in its approval, that led to the establishment of an enhanced cooperation, it is interesting to stress that the EU is more interested in divorce than in marriage, regardless of the fact that the latter is a right granted by the ECHR, while the former is not.

41. Each EU Member State has its own national conflict of laws rules to set the law applicable to the formation of marriage in cross-border cases. In this scenario, most Member States do not have

⁶⁷ These are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain and Sweden.

⁶⁸ For example, it is debatable whether the *contratto di convivenza* (cohabitation contract) regulated by Art. 1, paras. 50 ff. of the Italian law No 76/2016 on the registered partnerships is included therein.

⁶⁹ 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, *OJL* 183, 8 July 2016, p. 1.

⁷⁰ Participating Member States are the same as for Regulation 2016/1104.

⁷¹ See, with regard to divorce and legal separation under EU law, J. CARRASCOSA GONZÁLEZ, „Artículo 2: Definiciones“, in *Comentario al nuevo Reglamento (UE) Bruselas II ter. Relativo a la competencia, el reconocimiento y la ejecución de resoluciones en materia matrimonial y de responsabilidad parental, y sobre la sustracción internacional de menores*, (dir. Esperanza Castellanos Ruiz y coord: Castellanos Ruiz, María José), Tirant lo Blanch, Colección Derecho Internacional, 2023, pp. 127-164. Also J. CARRASCOSA GONZÁLEZ, „First dates, promesa de matrimonio y Derecho internacional privado“, *Cuadernos de Derecho Transnacional*, n.13-2, 2021, pp. 10-76.

⁷² After several years of uncertainty, no one doubts now that the EU has full competence to regulate issues of private international family law, thanks to Art. 81 of the TFEU. Nevertheless, EU Law does not provide for the formation of marriage (C. KOHLER, “L’art. 220 du traité CEE et les conflits de juridictions en matière de relations familiales, premières réflexions”, *Rivista di diritto internazionale privato e processuale*, vol. 28, no. 2, 1992, p. 221; R. BARATTA, “Verso la comunitarizzazione dei principi fondamentali del diritto di famiglia”, *Rivista di diritto internazionale privato e processuale*, vol. 41, no. 4, 2005, p. 573; S. BARIATTI (ed.), *La famiglia nel diritto internazionale privato comunitario*; F. MORO, “Observations sur la communautarisation du droit de la famille”, *Rivista di diritto internazionale privato e processuale*, vol. 43, no. 4, 2007, p. 675; A. RODRÍGUEZ BENOT, “La unificación del derecho de familia en los procesos de integración regional: la experiencia europea”, in N. GONZÁLEZ MARTÍN/A. RODRÍGUEZ BENOT (eds.), *El Derecho de familia en un mundo globalizado*, Porrúa, Ciudad de México, 2007, p. 93; S. MARINO, “Common core or enhanced cooperation in European family law?”, in A. CEBRIÁN SALVAT/I. LORENTE MARTÍNEZ (Coord.), *Protección de menores y Derecho Internacional Privado*, Comares, Granada, 2019, p. 73.

⁷³ 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, *OJL* 343, 29 December 2010, p. 10.

a unique law applicable to all marriage requirements (*lex matrimonii*). For instance, in Spain, the law applicable to marital capacity is determined in accordance with Article 9, paragraph 1 of the Spanish civil code — and it is the national law of each intending spouse⁷⁴. The law applicable to matrimonial consent is also established in accordance with Article 9, paragraph 1 of the Spanish civil code — and, again, it is the national law of each intending spouse⁷⁵. Finally, the law applicable to the form of marriage is specified in accordance with Articles 49 and 50 of the Spanish civil code — and it is the law of the country where the marriage is celebrated. Nevertheless, Spaniards can also marry abroad in accordance with the forms set out in Spanish law and foreigners can marry in Spain in accordance with the forms established by their personal laws. In Italy, nuptial capacity and matrimonial consent are again subject to the national law of each intending spouse (Art. 27 of the law 218/1995). The law applicable to the form of the marriage is the law of the place of celebration or the national law of either of the intending spouses at the time of the celebration or the law of the State of common residence of each intending spouse at that time (Art. 28 of the law 218/1995)⁷⁶. The existence of capacity, consent and form requirements for the valid celebration of marriage raises complicated characterization problems⁷⁷.

42. These complex rules find a more general limit: in the event that the application of a provision of foreign law is contrary to the public policy of the Member State where the marriage is celebrated, that law shall not apply. Public policy can operate in the case of foreign laws that admit “arranged marriages” or “forced marriages”, laws that contemplate a marriage without matrimonial consent, “temporary marriages” or marriages of convenience⁷⁸. Public policy must also intervene in the event of foreign laws that prevent marriages due to difference of religion or race, foreign laws that allow marriages between very close relatives, marriage of children and other similar situations. In any case, it should be stressed that international public policy is a “national” legal concept and it is frequently different from one State to another⁷⁹.

43. Once the marriage is celebrated in a Member State in accordance with the material rules designated by its national conflict of laws rules, the marriage is correctly formed. Under the law of the Member State where it has been celebrated, this marriage exists and creates a specific civil status of the spouses. It is a validly formed legal situation in that State.

V. Cross-Border Validly Celebrated Marriages and the Mutual Recognition Perspective

44. Not only does EU Law lack uniform conflict rules to designate the law applicable to the formation of marriage, but it also falls short of legal rules to ensure that a marriage validly celebrated in a Member State is considered valid in other Member States. It is odd but, as it has been already pointed

⁷⁴ With regard to the law applicable to capacity to enter into a marriage: D. BRADSHAW, “Capacity to Marry and the Relevance of the *Lex Loci Celebrationis*”, *Anglo-American Law Review*, vol. 112, no. 2, 1986, p. 127; Y. AMIN/A. ROOK, “Capacity to marry and marriages abroad”, *Solicitors Journal*, vol. 152, 2008, p. 8; G.P. ROMANO, “Is Traditional Multilateral Rule Relating to Capacity to Marry in Line with the Constitution”, *Yearbook of Private International Law*, vol. 7, 2005, p. 205.

⁷⁵ With regard to the law applicable to consent to enter into a marriage: C.M.V. CLARKSSON, “Marriage in England: Favouring the *Lex Fori*”, *Legal Studies*, 1990, p. 88; G.P. ROMANO, “La bilateralité éclipée par l’autorité. Développements récents en matière d’état des personnes”, *Revue critique du droit international privé*, vol. 95, 2006, p. 457; R. GAFFREY-RHYS, “Developments in the Field of Forced Marriage”, (*International Family Law*, vol. 25, 2008, p. 26; C. BRIÈRE, “Nullité du mariage pour défaut de consentement”, *Journal du droit international*, vol. 136, 2009, p. 147; C. HEATON/L. MCCALLUM, *Forced Marriage*, Jordan, London, 2009; M.C. DE LAMBERTY-ATRAN, “Note: Cour de Cassation civ. 1^{re} 29 janvier 2014”, *Revue critique du droit international privé*, vol. 103, 2014, p. 605.

⁷⁶ S. ADROHER BIOSCA, *Forma del matrimonio y Derecho internacional privado*, Bosch, Barcelona, 1993; M. REQUEJO ISIDRO, *Ley local y forma de los actos en el Derecho internacional Privado español*, Eurolex, Madrid, 1998.

⁷⁷ C.J. MALMQVIST, “Die Qualifikation der Brautgabe im schwedischen IPR”, *IPRax*, vol. 32, no. 12, 2012, p. 191; F. STURM, “Handschuhe und Selbstbestimmung (OLG Zweibrücken, S. 442)”, *IPRax*, vol. 33, no. 5, 2013, p. 412.

⁷⁸ F. NIBOYET, *L’ordre public matrimonial*, L.G.D.J., Paris, 2008; R. GAFFREY-RHYS, *op. cit.*, p. 26.

⁷⁹ T. LUTZI, “Der gleichberechtigte Zugang zur Ehe als Teil des französischen ordre public international”, *IPRax*, vol. 35, no. 4, 2015, p. 381.

out, EU Law does guarantee the free movement of divorce decrees through the Brussels IIb Regulation, on jurisdiction in matrimonial matters⁸⁰, but it does not support the free movement of marriages.

45. In this context, the validity in the Member State B of a marriage validly celebrated in the Member State A depends on the national rules regarding extraterritorial validity of public documents and certificates in force in Member State B. If these rules are too strict, they can result in a violation of the fundamental right to the free movement of persons within the EU (Art. 21 of the TFEU), or to family rights (Art. 8 of the ECHR), thus creating cross border limping relationships. This means, for example, that a marriage validly celebrated in Spain between a Portuguese and an Italian might be considered “existing and valid” in Spain but not in Italy, because Italian legal rules might reject the recognition of such a marriage. In such case, the spouses may feel discouraged from living and working in a country, Italy, where they are not legally considered as “spouses”.

46. In this framework, the application of the conflict of laws rules of the Member State of origin is of the essence. It is necessary to establish upstream the State law that governs a marriage to determine that this has been validly created in accordance with the law. Consequently, it may be affirmed that the conflict of laws method is still fundamental to state that the marriage exists and has been validly celebrated in the State of origin⁸¹.

47. Downstream, notwithstanding the silence of the EU law maker on the recognition of marriages within the EU, the CJEU has generated a method to guarantee the free movement of certain legal situations in the EU. It is the so-called “mutual recognition” method, already outlined by ample specialized academic literature, too⁸². Mutual recognition of legal situations validly created in one Member State in accordance with national conflict of laws rules makes it possible to ensure that the legal situation of individuals does not change when they cross the border to another Member State. Thus, legal certainty is reaffirmed. This method eliminates the obstacles to the free movement caused by the national rules of the Member States governing the recognition of marriages celebrated in other countries. It is a method that invigorates private international law as it makes it more sensitive to specific cases⁸³, where human rights are at stake.

VI. Mutual Recognition vs. Conflict Rules

48. Marriages celebrated in a Member State are created through the intervention of non-judicial public authorities: civil registrars, mayors, notaries and other public officials. Their acts could be considered as “hybrid decisions”⁸⁴: indeed, these decisions involve a private element – a legal business between individuals – and a public element – the intervention of a public authority that ensures the

⁸⁰ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, *OJL* 178, 2 July 2019, p. 1.

⁸¹ See, with further references, A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, “Capítulo 9. La celebración del matrimonio y sus efectos personales en el Derecho internacional privado (epígrafes XXII a XXIX)”, in M. YZQUIERDO TOLSADA/M. CUENA CASAS (Dir.), *Tratado de Derecho de la Familia*, vol. I (*Derecho de Familia y Derecho de la Familia. La relación jurídico-familiar. El matrimonio y su celebración*), Pamplona, Thomson Reuters Aranzadi, 2011, pp. 1083-1109 y 1113-1114.

⁸² Among others: D. COESTER-WALTJEN, “Anerkennung im Internationalen Personen-Familien- und Erbrecht und das Europäische Kollisionsrecht”, *IPRax*, vol. 26, no. 4, 2006, p. 392; K. FUNKEN, *Das Anerkennungsprinzip im internationalen Privatrecht: Perspektiven eines europäischen Anerkennungskollisionsrechts für Statusfragen*, Mohr Siebeck, Tübingen, 2009; R. BARATTA, “La reconnaissance internationale des situations juridiques personnelles et familiales”, *Hague Collected Courses*, vol. 348, 2010, p. 256.

⁸³ H.-P. MANSEL/K. THORN/R. WAGNER, “Europäisches Kollisionsrecht 2010: Verstärkte Zusammenarbeit als Motor der Vereinheitlichung?”, *IPRax*, vol. 31, no. 1, 2011, p. 1.

⁸⁴ C. PAMBOUKIS, *L’acte public étranger en droit international privé*, L.G.D.J., Paris, 1993; C. PAMBOUKIS, “L’acte quasi public en droit international privé”, *Revue critique du droit international privé*, vol. 42, no. 3, 1992, p. 565; H. MUIR-WATT, “La rencontre dans l’espace de figures hybrides (variations autour du conflit international de décisions)”, *Revue générale des procédures*, vol. 1, 1998, p. 311.

adjustment of such business to the law. The new legal situation of the spouses is officially reflected in a “public document” after the intervention of an authority of the State of origin⁸⁵.

49. In order to assess the validity of these marriages in other Member States, the “public element” of these situations must be taken into account. Indeed, this is the key element for the existence of the new status as such. Therefore, although these marriages do not appear in judicial decisions such as “judgments” or similar with an *erga omnes* and *res judicata* effect, they do appear in documents granted by public authorities. Consequently, in order to assess the validity of these marriages in other Member States, the Member State of destination should not apply its conflict of laws rules⁸⁶. The marriage has already been celebrated and has been certified by a public authority in the State of origin. Now it is time to examine the validity in a State B of a marriage celebrated in a State A⁸⁷. The method to be implemented to face this question is the key.

50. The problem is well-known, and some solutions have been attempted. One of them is the Convention to facilitate the celebration of marriage abroad, signed in Paris on 10 September 1964. However, it requires an administrative cooperation among the States of habitual residence and/or citizenship and/or place of marriage of the intending spouses, under certain circumstances, that could facilitate the future recognition of the marriage. Furthermore, automatic recognition is not imposed by the Convention. Therefore, its solutions cannot be considered straightforward, if compared to the ECtHR’s and CJEU’s approaches.

51. A large number of private international law standards include legal rules that embrace the perspective of mutual recognition of legal situations. These are not conflict of laws rules, but rather rules on the recognition of legal situations created abroad⁸⁸, like the renowned Article 45, paragraph 1 of the Swiss Private International Law Act. Similarly, Article 9 of the Hague Convention of 1978, on the celebration and recognition of marriages, forces the contracting States to incorporate into their legal systems the validity of marriages legally celebrated abroad. In this international convention, the State of destination of the marriage must not control the validity of a marriage through its conflict of laws rules, but through its rules on the recognition of legal situations created in other States⁸⁹. It is unfortunate that this convention must be the ‘true sleeping beauty of private international law’,⁹⁰ as it is only in force for Australia, the Netherlands and Luxembourg. Moreover, its awakening is quite unlikely, mostly for two reasons. If it was to be successful, it would have received more ratifications in 43 years. The lack of participation denotes a scarce interest therein and/or share of its contents in the global context. Moreover, it is not possible to impose in the international community the same mutual trust that can be presumed in the EU and that would be necessary in order to give effects to the 1978 Convention’s modern solutions⁹¹.

⁸⁵ G. GOLDSTEIN /H. MUIR WATT, “La méthode de la reconnaissance à la lueur de la Convention de Munich du 5 septembre 2007 sur la reconnaissance des partenariats enregistrés”, *Journal du droit international*, vol. 137, no. 4, 2010, p. 1085.

⁸⁶ R.M. MOURA RAMOS, “Regards sur les sources et les méthodes du droit international privé de la famille dans l’espace européen”, in I. PRETELLI/G.P. ROMANO/T. ROSSI (Coord.), *Tui Memores – La dimensión culturelle du droit international privé. Actes de la Journée en l’honneur de Tito Ballarino du 13 juin 2014 à Lausanne et Essais recueillis par ses amis et élèves*, Schulthess, Zürich, 2017, p. 85.

⁸⁷ P. OREJUDO PRIETO DE LOS MOZOS, *La celebración y el reconocimiento de la validez del matrimonio en Derecho internacional privado español*, Aranzadi, Navarra, 2002, p. 99.

⁸⁸ E. JAYME, “Diritto di famiglia, società multiculturali e nuovi sviluppi del diritto internazionale privato”, *Rivista di diritto internazionale privato e processuale*, vol. 29, no. 2, 1993, p. 295.

⁸⁹ P. LALIVE, “La convention de La Haye du 14 mars 1978 sur la célébration et la reconnaissance de la validité des mariages”, *Annuaire suisse de droit international*, vol. 34, 1978, p. 31; C. ROEHRICH, “La convention de La Haye du 1^{er} octobre 1977 sur la célébration et la reconnaissance de la validité des mariages. Droit international privé”, *Droit international privé: travaux du Comité français de droit international privé*, vol. 2, 1980, p. 3.

⁹⁰ P. NYGH, “The Hague Marriage Convention – A Sleeping Beauty?”, in G. DROZ/A. BORRÁS/A. BUCHER/M. VERWILGHEN/T. STRUYCKEN (eds.), *E pluribus unum. Liber amicorum Georges A. L. Droz. On the Progressive Unification of Private International Law*, Martinus Nijhoff, The Hague, Boston, London, 1996, p. 253.

⁹¹ The mutual trust is indeed presumed and cannot be taken for granted neither among the EU Member States: K. LENAERTS, “La vie après l’avis: exploring the principle of mutual (yet not blind) trust”, *Common Market Law Review*, vol. 54, no. 3, 2017, p. 805.

51. A similar modern approach is followed by the Convention on the recognition of registered partnerships, signed at Munich on 5 September 2007. Here, it is possible to detect a mutual recognition principle in favour of registered partnerships. The open-oriented approach of the 1978 Convention has not disappeared, but seems still not particularly successful even for a new family status.

52. After all, neither the EU has been able to codify the mutual recognition of status in its recent Regulation 2016/1191, devoted to the circulation of public documents⁹².

53. In the method of mutual recognition, the conflict rule of the receiving State of the legal situation does not apply. Furthermore, for the requested State the law applied to the creation of the status is totally irrelevant, provided that the status is valid for the Country of origin, according to its private international law. This was strongly pointed out by the resolution of the *Institut de Droit International* in Cairo 1987⁹³. This is the true distinctive mark of the mutual recognition method⁹⁴: the conflict rule of the State of destination of the marriage is completely neutralized⁹⁵.

54. It must be emphasized that the traditional conflict rule technique survives within the mutual recognition perspective. It is a '*question irréductible*'⁹⁶. Indeed, when the marriage is celebrated, it is necessary to apply, in any case, one or several State laws. These are determined in accordance with the conflict rules of the State of origin of the marriage. At that point, the private international law system of the State of origin works in a fully Savignyan way. In fact, these conflict rules lead to the application of the laws with which the formation of the marriage has the closest connection⁹⁷. Therefore, the mutual recognition method coexists with the traditional "conflict of laws" perspective. Mutual recognition embeds a conflict rule, as it has been emphasized⁹⁸. However, this conflict rule is applied to guarantee the validity of the marriage in the State of origin, and not to decide on the validity of the marriage in the State of destination.

VII. The Advantages of the Mutual Recognition Perspective

55. Mutual recognition ensures that the legal regime of situations created in a State is the same in other States. Besides, it saves costs for the international life of individuals. It is not necessary to apply a specific national law in State B, to a legal situation created in State A: it suffices to prove that the legal situation meets the requirements for recognition in the competent State. This perspective promotes the free movement of legal situations validly created abroad. This is also consonant with the legitimate expectations of individuals regarding the validity of the situation already established in one country by authorities of that State. It increases legal certainty, since situations and status have a validity that exceeds the borders of the State of creation⁹⁹: a family formed in a State does not cease to be a family when it moves and crosses the border¹⁰⁰. This method fits perfectly with the freedom of movement as a

⁹² Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, *OJ L* 200, 26 July 2016, p. 1.

⁹³ Institut de Droit International, Session du Caire – 1987, Quinzième Commission. La dualité des principes de nationalité et de domicile en droit international privé (available at: https://www.idi-iil.org/app/uploads/2017/06/1987_caire_01_fr.pdf).

⁹⁴ G. GOLDSTEIN/H. MUIR WATT, *op. cit.*, p. 1085.

⁹⁵ O. CACHARD, *Droit international privé*, Larcier, Bruxelles, 2018, p. 145.

⁹⁶ P. LAGARDE, "Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures", *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 68, no. 2, 2004, p. 227.

⁹⁷ M.-P. WELLER, "Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der „klassischen“ IPR-Dogmatik?", *IPRax*, vol. 31, no. 5, 2011, p. 429.

⁹⁸ J. CARRASCOSA GONZÁLEZ, "Principio de eficiencia y estatuto personal", in AA.VV., *Relaciones transfronterizas, globalización y derecho. Homenaje al Profesor Doctor José Carlos Fernández Rozas*, 66 estudios, 2020, pp. 179-194.

⁹⁹ L.D. WARDLE, "International Marriage Recognition: A World Dilemma", in N. LOWE/G. DOUGLAS (eds.), *Families Across Frontiers*, Martinus Nijhoff, The Hague, Boston, London, 1996, p. 75.

¹⁰⁰ A. ADINOLFI, "Il diritto alla vita familiare nella giurisprudenza della Corte di giustizia dell'Unione Europea", *Rivista di diritto internazionale*, vol. 94, no. 1, 2011, p. 5.

subjective right in EU Law, as well as with the rights and freedoms guaranteed by the ECHR. Furthermore, the recognition of the status created abroad leaves the exclusive competence on family law to the States, thus not requiring any harmonization or unification, that risks being at least partly unsuccessful - as demonstrated by the establishment of the enhanced cooperation in cross-border family law matters¹⁰¹.

56. The recognition of marriages in other States is subject to certain limits. Firstly, the marriage must present actual connections with the State where it has been celebrated. Otherwise, the authorities of the State of origin will not be able to intervene. This also prevents “bad forum shopping”. Secondly, international public policy allows the rejection of the recognition of marriages celebrated abroad by public authorities if such recognition violates the basic and fundamental legal principles of the State of destination. Thus, in the field of the name of a natural person, the CJEU admitted the refusal of recognition in Austria of a name that contained some particles that are “signs of nobility” even though the part of the name had been legally imposed in Germany. The reason was that such recognition would have violated Austrian public policy¹⁰². It is thus clear that private international law is not a perfect machine, limiting the uniformity of outcome on exceptional case, thus impairing EU freedom of movement¹⁰³.

VIII. The Middle Way: the CJEU’s *Coman* Judgment

57. The *Coman* judgment¹⁰⁴ - and the following *Panchearevo* case on parenthood¹⁰⁵ - might appear at first sight the final solution for the issue of the circulation of the status within the EU and a good compromise between the classic conflict of laws method and the mutual recognition. Nevertheless, the decisions as such are quite limited.

58. Focusing on the cross-border recognition of marriage, the *Coman* judgment does not tackle the validity of the status acquired abroad, thus leaving to Member States the regulation of the requisites of the marriage, on the side of the State of origin, and of the conditions for its recognition, on the side of the State of destination. Furthermore, the CJEU does not reason on the whole range of personal and patrimonial effects of the marriage, to establish that these must be granted in the State of destination, too. In fact, the preliminary question refers only to the residence permit, which is a tool to grant only one of the side-effects of the marriage, the cohabitation. The CJEU correctly limited itself to giving the proper answer to the referred question¹⁰⁶.

59. The CJEU does not even apply any of the methods traditionally considered suitable for the recognition, or for the acceptance, or for the circulation of the personal status, described above. The grounds of the judgment rest on the restrictive interpretation of the limits to free movement, to be read in conjunction with human rights, such as the right to family life.

¹⁰¹ L. PAILLER/A. PANET-MARRE, “Européanisation du droit de la famille: pour un changement de méthode”, in *La famille dans l’ordre juridique*, cit., p. 423. See also other perspectives in A. DURÁN AYAGO, *Derechos humanos y método de reconocimiento de situaciones jurídicas: hacia la libre circulación de personas y familias. Perspectiva internacional y europea*, Aranzadi, Madrid, 2023.

¹⁰² CJEU 22 December 2010, *Wittgenstein*, C-208/09.

¹⁰³ Anyway public policy is always an exception in the normal operation of the conflict-of-laws rule which intervenes only when the “community of nations” (in Savigny’s words) breaks... therefore in normal conditions, public policy should not be activated... From a Kant’s perspective (which was followed by Savigny) public policy can not be as universal as the conflict rule. Nevertheless, the complete elimination of public policy is not possible at present. The fact that the EU is formed by different jurisdictions prevents such approach (H.J. SONNENBERGER, “Grenzen der Verweisung durch europäisches internationales Privatrecht”, *IPRax*, vol. 31, no. 4, 2011, p. 529).

¹⁰⁴ CJEU 5 June 2018, *Coman*, C-673/16.

¹⁰⁵ CJEU 4 December 2021, *Stolichna obshtina, rayon «Panchearevo»*, C-490/20.

¹⁰⁶ M. GRASSI, “Sul riconoscimento dei matrimoni contratti all’estero tra persone dello stesso sesso: il caso *Coman*”, *Rivista di diritto internazionale privato e processuale*, vol. 55, no. 5, 2019, p. 739.

60. This reasoning allows the couple to enjoy the marriage living together, without fearing expulsions or criminal sanctions against the non-EU spouse. From the factual point of view, i.e. the concrete benefit in the daily life, this is a great result. However, the judgment leaves open some questions – as it had to, since these did not form part of the request for the preliminary ruling – on its impact on the application of the EU regulations on judicial cooperation and on national private international law. The main issue is whether same sex spouses shall be considered as engaged in a marriage, falling within the scope of application of the EU regulations, which are drafted as gender neutral. If the answer is negative, a new characterization issue arises, since the national private international law does most probably not regulate this institution, it being unknown in its civil law. The new characterization of the marriage as a partnership is a solution currently expressed in Italy¹⁰⁷, and some State practice(d) this characterization¹⁰⁸. In the patrimonial regimes, that would lead to the application of Regulation 2016/1104, instead of Regulation 2016/1103, in those EU participating Member States that do not admit and/or recognize same sex marriages. Thus, the *Coman Hamilton* situation challenges the applicability of EU regulations, too, thus potentially impairing the uniform application of EU Law even in those limited States taking part in the enhanced cooperation, and defying the harmonious characterization of national private international law.

61. Furthermore, the lack of assimilation with heterosexual spouses risks undermining other fundamental rights, such as the right to private property (for example in case of dispute under the matrimonial regime, even with third parties), or to private life (in case of dissolution of the marriage). In that perspective, one can wonder whether the judgments have potentially extensive effects, insisting on the fundamental rights that risk being jeopardized if the couple was not treated in the same way as opposite-sex spouses¹⁰⁹.

62. Firstly, the *Coman* judgment appears to be sound, 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 maintenance, etc. In all these cases, other human rights are thereby protected (as, indeed, for example, private property or private life). Secondly, the ruling can be interpreted extensively into another direction, pursuant to the principle of non-discrimination, so that the citizenship of the parties does not play any role in the recognition of the marriage. Therefore, EU free movement law, initially a privilege for the EU citizens¹¹⁰, is beneficial to non-EU citizen, too. Moreover, the need to protect family life pursuant to Article 8 of the ECHR – mentioned in the judgment – and to preserve the effectiveness of directive 2003/86 can push to the acceptance of some – limited – effects to all same sex marriages celebrated abroad, even between non-EU citizens, whether only one spouse legally resides in an EU Member State.

63. The CJEU approach in this case appeared innovative, in order to balance the exclusive competence of Member States in family law and the right to free movement of the couple concerned. Nevertheless, some national jurisdictions had already concluded in the same sense for very similar cases. The

¹⁰⁷ Art. 32-bis, I c. l. 218/95 establishes the downgrade only for marriages celebrated abroad by Italian citizens. As for marriages celebrated abroad by foreigners, Italian scholars are divided, stressing, from one side, that the same sex marriages cannot be recognized as such and shall be in any case downgraded (G. MALGIERI, “L’unione civile alla prova del diritto internazionale privato: all’ombra di una delega legislativa», Schulthess, *GenIUS*, vol. 3, no. 2, 2016, p. 86); from the other, the possible full recognition of a status validly created abroad (C. CAMPIGLIO, “Legge di diritto internazionale privato e regolamenti europei: tecniche di integrazione”, *Rivista di diritto internazionale privato e processuale*, vol. 56, no. 2, 2018, p. 292; I. VIARENGO, “Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea”, *Rivista di diritto internazionale privato e processuale*, vol. 56, no. 1, 2018, p. 39).

¹⁰⁸ As, for example, Austria, Germany and Switzerland. The solution has been naturally abandoned, once same sex marriages had been introduced into the national legislation.

¹⁰⁹ M. GRASSI, *op. cit.*, p. 739.

¹¹⁰ M. ROUY, “La citoyenneté européenne, étude d’une source paradoxale du droit européen de la famille”, in *La famille dans l’ordre juridique*, cit., p. 307.

Tribunal administratif du Grand-Duché de Luxembourg¹¹¹ recognized 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 Emilia¹¹² and the Tribunale di Pescara (Italy)¹¹³ reached the same conclusions with regard to respectively a Spanish and a Portuguese same sex marriage. The solution is known outside the EU, too¹¹⁴. It does not infer the recognition of the status, nor an evaluation of its validity: it simply allows the spouses to benefit from some of the rights dependent on the marriage.

64. Thus, the CJEU's solution is far from innovative. Its ground-breaking part does not lay on the establishment of methods of circulation of the status, nor on the definition of a broader notion of marriage, but on the interpretation of the right to family reunification. Moreover, this "partial recognition" solves only a small part of the problems related to the cross-border circulation of the family. It is a sort of "mutual recognition at the lowest level". Therefore, this cannot be the final solution for the treatment of foreign marriages, since the legal treatment of mutual duties, rights and obligations between spouses is far from clear. This solution can be maintained provided that it is only a step towards a more open-oriented approach to foreign status and to the protection of couples' human rights.

IX. Some Tentative Conclusions Towards the Future: the Civil and Social Constitution of the EU and the Free Movement of Marriages

65. The interconnections among private international law, family law and human rights lead us to some further considerations regarding the foundations of EU legal system.

66. It has always been said, -and thus it is generally admitted by specialized academic literature-, that the constitution of a country is made up of certain rules and institutions of public law. This is a political concept of "constitution". In this sense, the EU lacks, as it is known, a "formal Constitution", although the institutional aspects of its government and the rights of its citizens *vis-à-vis* the EU are well included in the Treaties. It is also true that attempts to produce a "Treaty establishing a Constitution for Europe" failed miserably years ago¹¹⁵, and that the newly reform process just started does not seem to touch upon the formal hierarchy of the law¹¹⁶. In this classic and political context, it is clear that EU Law, with particular regard to the civil judicial cooperation in family matters, must, in the first place, respect the provisions of primary EU Law but also the international or regional conventions on human rights, and the constitutional principles of the Member States that reflect human rights¹¹⁷.

67. Nevertheless, one can also speak of "Constitution" in a civil and social sense. In this perspective, a Constitution is composed of the supreme legal rules that guarantee and allow the correct and ordered functioning of the civil society, of the relationships between individuals, such as those incurring within a family. Some prestigious legal scholars have stressed that the French civil code of 1804 opera-

¹¹¹ Tribunal administratif du Grand-Duché de Luxembourg, 3 October 2005, https://www.stradalex.lu/fr/slu_src_publ_jur_lux/document/t_adm_lu_19509.

¹¹² Tribunale di Reggio Emilia, 1st Civil Section, decree 13 February 2012, <http://www.articolo29.it/decisioni/tribunale-di-reggio-emilia-prima-sezione-civile-decreto-del-13-febbraio-2012/>.

¹¹³ Tribunale di Pescara, ord. 15 January 2013, <http://www.articolo29.it/decisioni/tribunale-di-pescara-ordinanza-del-15-gennaio-2013/>.

¹¹⁴ The Israeli experience seems quite interesting under this perspective: 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*, vol. 36, no. 2, 2011, p. 509.

¹¹⁵ P. LALIVE, *op. cit.*, p. 31.

¹¹⁶ European Parliament Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

¹¹⁷ D. DÜSTERHAUS, "Wie konstitutionalisiert der EuGH das internationale Privat- und Verfahrensrecht der Europäischen Union?: Tendenzen und Konsequenzen", in S.L. GÖSSL (Hrsg.), *Politik und internationales Privatrecht*, Mohr Siebeck, Tübingen, 2017, p. 61; D. DÜSTERHAUS, "Konstitutionalisiert der EuGH das internationale Verfahrensrecht der EU?", *Zeitschrift für Europäisches Privatrecht*, vol. 26, no. 1, 2018, p. 10.

tes as the true ‘civil Constitution of France’¹¹⁸. Accordingly, the French Civil Code covers the fundamental legal rules that allow the harmonious functioning of French civil society. In this scenario, it can also be said that EU private international law operates as the real civil and social Constitution of the EU¹¹⁹. Indeed, these are the rules that allow EU citizens to move freely without legal obstacles within the EU, actualizing one of the EU system fundamental rights.

68. The true freedom of movement within the EU only came about when two further steps were made: the consideration of the social and family ties of the individual and the enactment of EU regulations of private international law. Thus, the fundamental legal structure of EU civil society is formed by the three prongs: freedom of movement, family reunification and EU regulations of private international law. These pillars combined together are the true civil Constitution of the EU. Without this legal structure, there would be no free movement in the EU.

69. The creation of an area of Freedom, Security and Justice overcomes the classic negative integration through positive measures that facilitates the exercise of the free movement. The key role is attributed to the EU private international law regulations. The freedom of movement alone is not enough for the internal market to function properly. It has been necessary that EU private international law regulations complete such freedoms and establish EU rules on international jurisdiction, applicable law and extraterritorial validity of public decisions. With these private international law rules, EU citizens can, indeed, circulate with legal certainty within the EU. They can identify, *ex ante*, the competent courts to hear disputes arising from cross-border private law situations; they have the certainty of knowing what law is applicable to such situations irrespective of the competent court; and, finally, they have a set of rules guaranteeing the free circulation of judicial decisions within the EU.

70. The constitutional relevance of private international law on family matters can be derived from several elements. First, since 1968, the year in which the Brussels Convention was drawn up, EU private international law provides an element of its stability. Secondly, it provides the EU with an identity because it reflects its central idea: free movement. EU private international law regulations operate as the most powerful hallmark of the EU as a political and legal entity. These regulations are the most complete expression of the legal spirit of the EU. They are one of the strongest legal symbols in the EU. Thirdly, EU private international law works as a federative element of the EU. It is a set of rules that unite the different peoples within Member States integrated into the EU, be it by the citizenship, or by the habitual residence in the territory of a Member State. This allows a strengthened social integration among people, living and working in the EU, without losing the connection to their mother country. Fourthly, free movement of public documents regarding cross-border private law issues operates as an element connecting Member States based on mutual trust. The EU becomes more solid with the “mutual recognition method” covered by many private international law regulations and, above all, created by the CJEU case law¹²⁰. Fifthly, the EU private international law regulations enhance the recognition of legal situations, and establish with legal certainty the competent courts and the law applicable to cross-border private law situations.

71. At present, the EU private international law regulations and the CJEU case law based on the principle of mutual recognition do not cover all areas of private law. No legacy is as rich as honesty: one must admit that EU private international law is not a complete legal system, neither a perfect world.

¹¹⁸ J. CARBONNIER, “Le Code civil”, in P. NORA (Coord.), *Les lieux de mémoire*, Gallimard, Paris, 1986, p. 309; R. CABRILLAC, “Le Code Civil est-il la véritable Constitution de la France?”, *Revue Juridique Thémis*, vol. 39, n. 2, 2005, p. 245; L. FAVOREU, “La constitutionnalisation du droit”, in J.B. AUBY (Coord.) *L’Unité du droit: Mélanges en hommage à Roland Drago*, Économica, Paris, 1996, p.25.

¹¹⁹ J. CARRASCOSA GONZÁLEZ, „El Derecho Internacional Privado Europeo: La auténtica Constitución Civil de la Unión Europea“, *Actualidad Civil*, septiembre 2022, n. 9, Ed. La Ley, pp. 1-34.

¹²⁰ J. MEEUSEN, “Comparing Interstate and European Conflict of Laws from a Constitutional Perspective: Can the United States Inspire the European Union?”, *American Journal of Comparative Law*, vol. 67, no. 3, 2019, p. 637.

Much work is yet to be done. Specifically, in relation to marriages, there is no doubt that in order to enhance integration, it is necessary to promote a set of uniform legal standards to establish the international jurisdiction for the celebration of marriage, the law applicable to the formation of marriage, and the recognition of marriages validly celebrated in the Member States within the EU. With these legal standards, legal certainty would amount to a common standard for all the individuals and integration would also be greatly enhanced. Consequently, with these legal basis provided by modern European private international law, the world will be our oyster¹²¹.

¹²¹ P. ELEFThERiADiS, “The moral distinctiveness of the European Union”, *International Journal of Constitutional Law*, vol. 9, no. 3-4, 2011, p. 695.