FAMILY STATUS, IDENTITIES AND PRIVATE INTERNATIONAL LAW

A CRITICAL ASSESSMENT IN THE LIGHT OF FUNDAMENTAL RIGHTS

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We are very proud to publish the papers presented on the occasion of three events promoted by the European Law Institute's Family and Succession Law Special Interest Group (SIG) under the heading "Family Status, Identities and Private International Law. A Critical Assessment in the Light of Fundamental Rights". The events were co-organised by both the Swiss Institute of Comparative Law, in the framework of its 33rd and 34th *Journées de droit international privé*, and the University of Pisa. Whereas the first two events took place online on 5 and 22 May 2022,[1] the third was held in person in 2023 and was hosted by the Swiss Institute of Comparative law in Lausanne.[2]

The underlying idea we shared in conceiving the three sessions of the Conference was that of focusing on the areas of family law where no specific EU regulation had intervened and detecting the impact of cross-border cases on national substantive family laws.

In particular, parentage and filiation, same-sex marriages and, finally, gender and personal identity were identified as the most challenging fields of family law today.

This area of investigation is typically at the intersection of three different disciplines – private international law, comparative law and the fundamental rights legal discourse. These three disciplines are, moreover, challenged by the heterogenous sources of law influencing their content, since they have international, EU and national dimensions.

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[1] See https://www.isdc.ch/media/2198/flyer-final_dip.pdf. All websites cited were last checked on 4 August 2024.

[2] The Conference materials are available here: https://www.isdc.ch/en/events/past-events. The programme, with the abstract of each paper, is available here: https://www.isdc.ch/media/2354/programme-avec-abstracts-et-introduction.pdf.

The basic idea of the Conference was to highlight the role played by cross-border cases in increasing the level of protection of fundamental rights around Europe and to show how private international law is likely to create a cultural clash within the EU, which collectively may constitute the "subversive function of comparative law".[3]

These initiatives follow in the footsteps of a previous SIG book "The Interaction between Family Law, Succession Law and Private International Law",[4] which mostly dealt with areas of family and succession matters covered by EU secondary legislation and prepared the ongoing ELI's project proposing amendments to the European Commission's Proposal on the creation of a European Certificate on Parenthood.[5]

While in all the areas mentioned above, national laws remain extremely diverse, huge changes have been underway in single jurisdictions over the last twenty years. Against this background, the only firm European legal sources have been the European Convention of Human Rights (ECHR), enforced by its judicial armour (the European Court of Human Rights, (ECtHR) as well as the EU Charter of Fundamental Rights (EChFR) and the EU freedoms recognised by the Treaties as primary EU legislation, with the right to move and reside freely within the EU (Art. 21 TFEU) being at the core of any cross-border controversy in these matters.

It is not surprising that the driving force behind the current developments has been the fundamental rights legal reasoning as a general feature of the current phase of globalisation, combined with the judicial activism at both the European and national levels. In fact, specialists in national and comparative family law have been well aware that the emphasis on certain fundamental rights – identity rights, right to respect for one's family life and private life – has challenged traditional family status in an unprecedented way since the beginning of this century.

This explains why investigating the extent to which the ECtHR has urged European harmonisation in family matters and, even if to a lesser extent, harmonisation at the Court of Justice of the EU (CJEEU) has a crucial importance in understanding the changes that are underway.

While legislative projects have been attempted in the area of filiation - such as the Surrogacy Project of the Hague Conference on Private International Law (HCCH) and the 2022 EU Commission's proposal for a Regulation aimed at harmonising at the EU level the rules of private international law relating to filiation- no positive integration is even imaginable in others. Therefore, the recognition of status is left to national private international law rules, gently pressed by both European Courts, which often assume the role of vessels for claims that could not be upheld on the basis of national law.

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[3] Reference is to the title of H. MUIR-WATT's Article in the *Revue internationale de droit comparé*, 2000, pp. 503-527.

[4] E. BARGELLI/ J. SCHERPE (eds.), Intersentia, 2019.

[5] See "Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695", by S. GÖSSL/ I. PRETELLI https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-enhancing-child-protection-private-international-law-on-filiation-and-the-european-commissions-proposal-com2022695/.

Claims for recognition of foreign decisions or authentic instruments on family and personal status filed in national courts are paradigmatic of this trend. The proclamation of biological filiation as a component of a child's identity[6] coupled with the recognition of a non-biological child's right to family life[7] by the ECtHR has reinforced the aim of granting certainty and continuity of legal filiation, whilst driving attention to other legal institutions capable of ensuring the best interests of the child.

As a consequence, there have been cascade effects on national case law as soon as the question whether a family bond should be established with the intentional parent has arisen, notwithstanding the refusal, or at least the resistance opposed, by States that claim a right to control the way in which a non-biological parent requests the establishment of a child-parent relationship.

In this way, judicial activism and incrementalism of fundamental rights fill gaps in EU law, yet they also produce spill-over effects on national laws and ease a slow, factual process of approximation pursued by a relentless and pressing dialogue between national and European courts.

Detecting and monitoring such dialogue and the developments it induces at both levels is one of the greatest tasks with which private international law and comparative law experts are simultaneously burdened and honoured at present.

[6] *Mennesson v France*, Application no. 65192/11, 26 September 2014 and, on the opposite front, Paradiso and Campanelli v. Italy, Application no. 25358/12, 24 January 2017.

[7] *Valdìs Fjölnisdòttir and Others v. Iceland*, Application no. 71552/17, 18 August 2021.

List of Contributions: