RECOGNITION OF FOREIGN PERSONAL AND FAMILY STATUS:
A RIGHTS BASED PERSPECTIVE


1. International human rights law has been developing in many directions, including family law. The close tie between the law and the global society in which it operates (1) means that family law has to be in harmony with the prevailing set of international legal standards. Yet, respect for human rights as defined by international conventions, courts and practices, challenges legislative choices in family law, (2) insofar as family law enshrines the basic ethical principles of the national community. Delicate problems of harmonization, if not moments of tension, between national

(*) This article was subject to independent external peer review.
(2) There is a clear incidence of human rights on national models of family law, as well as on the underlying ethical values, if one looks at the European Court of human rights case law. The Court has affirmed the equality between children born in and children born out of wedlock as regards their civil rights (Marecks v. Belgium, Application No 6833/74, judgment of 13 June 1979; Mazurek v. France, Application No 34406/97, judgment of 1 May 2000). Weighty reasons have to be advanced before a difference of treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention (see, mutatis mutandis, Abdulaziz, Cabales and Balkandali v. the United Kingdom, Application Nos 9214/80; 9473/81; 9474/81, judgment of 28 May 1985, § 78, and the Inze v. Austria, Application No 8695/79, judgment of 28 October 1987, § 38 and 41). The European Court has also upheld the right of a transsexual person to get the indication of her sex to be corrected in the civil status register and on her official identity documents – B. v. France, Application No 13343/87, judgment of 25 March 1992 – as well as his/her right to marry according to Art. 12 ECHR – C. Goodwin v. the United Kingdom, Application No 28957/95, judgment of 11 July 2002, § 71 ff.
and international standards can arise. This disharmony may even call into question the values underlying national and international laws. (3)

The out-of-wedlock or same-sex family models present in some States particular antinomies. The European system for the protection of human rights, based in the European Convention on Human Rights (ECHR) enlarged the scope of the family concept so as to also embrace stable relationships between unmarried persons. (4) The same holds true under the EU integration process. (5) Thus, the family out of wedlock falls nowadays within the scope of international human rights. Yet, at the time of writing, its implications are still challenging the political and social life of some States in an unexpected way, unforeseeable up to a few decades ago. (6)

In any case, international human rights law, though not precluding the extension of marriage to same-sex relationships, (7) does not impose such an obligation on States. (8) It is hardly a surprise. International human

(3) This paper utilizes the term State to define a legal order. The Author is aware that the notion of a State in public international law may or may not coincide with a single law district in the sense of the conflict of laws, such as a federal State in which territorial units have different systems of law in respect of family law. However, that simplified language is here preferred given that international obligations are usually addressed to a State entity as a whole, including the composite one having different systems of law for the purpose of family law.

(4) Baratta, Verso la “comunitarizzazione” dei principi fondamentali del diritto di famiglia, this Rivista, 2005, pp. 597-599.

(5) See however Mengozzi, I problemi giuridici della famiglia a fronte del processo di integrazione europea, in Fam. dir., 2004, p. 643 ff., at 645.

(6) As regards the Italian legal order, see Oliari and Others v. Italy, Applications Nos 18766/11 and 36030/11, judgment of 21 July 2015, whereby the ECtHR held that Italy has violated Art. 8 ECHR because in essence the Italian legislature was unable to enact a civil union legislation, either for homosexual couples or for heterosexual ones. Moreover, due to a recent evolution of the Italian Constitutional Court, Italian legislation is even inconsistent with its own Constitutional normative values (see infra, footnote 7).

(7) That happens in some legal orders, e.g. in Spain, France and Belgium, some American States and Canada (Attorney General for Ontario v. M., Supreme Court of Canada (1999) 4 LRC, 351): for a brief comparative perspective see Olivetti, I diritti fondamentali. Lezioni, Foggia, 2015, p. 489 ff.

(8) Baratta, Verso la “comunitarizzazione” cit., This approach has been confirmed in Schalk and Kopf (Application No. 30141/04), judgment of 21 November 2010, § 101. Jayawickrama, The Judicial Application of Human Rights Law: National, regional and International Jurisprudence, Cambridge 2002, p. 766 includes in the notion of family also de facto ties. In Italy the institution of marriage is restricted to persons having different sex, though the Italian Constitutional Court held that the legislature must set forth a law to govern same-sex relationships, since they are “formazioni sociali” protected under Art. 2 Constitution (Constitutional Court, 14 April 2010 No 138, this Rivista, 2010, p. 979 ff.; and 11 July No 170, § 5.5).
rights do not purport to create a uniform law, but rather a minimum standard above which national legal orders may choose different normative approaches. (9) Therefore, under international law, the notion of family is not necessarily tied with the institution of marriage. (10) Reflecting this trend, the Human Rights Committee acknowledges the existence of various forms of family. (11)

Against this background, which does not exclude normative conflicts between domestic and international orders, family private international law (PIL or conflict of laws) is no exception. (12) It would be controversial to argue that fundamental rights do not concern it, and namely conflict of laws rules because they do not deal with the substance of disputes. Certainly, in the past, a well-established opinion argued that conflict of laws rules, built upon Savignian natural-law conception of center of gravity (sitz), were neutral per se, being inherently value impartial provisions due to their mechanical and formal way of functioning. Such provisions, it was assumed, limited themselves to ensure a mere allocation of jurisdiction to prescribe (and the power to adjudicate) to sovereign States without purporting to determine the concrete issue between the parties, which was (and is) finally devolved to the applicable law. Mirroring this leap in the dark or blind conception underlying conflict of laws disciplines, a traditional formalistic reasoning

---


also featured in the debate over the internationalprivatrechtliche Gerechtigkeit, as if PIL justice were essentially distributive in kind.\(^{(13)}\)

These approaches, based in essence on a sort of PIL ideological neutrality, do not seem to fit the current trend of modern law anymore. Law is not blind. Quite the contrary, it is capable of and is expected to pursue normative values and ethical objectives, however imperfectly and belatedly.\(^{(14)}\) Otherwise it would lose its necessary component of moral legitimacy.\(^{(15)}\) Any internal legislative choice – and family PIL is hardly an exception – may not be viewed as a mere logical axiom deprived of underlying normative values, as it were structurally incapable of conflicting with individuals’ fundamental rights.\(^{(16)}\) The primary role of law, including the discipline of conflict of laws, is to achieve a fair regulation of the needs of human society.

This is not to say that the double dimension, i.e. ethical and legal, of the philosophic debate on law and justice, is incorrect.\(^{(17)}\) The problem is rather to enhance the debate on family PIL justice under a perspective based on rights. Arguably, this discipline should be shaped and understood


\(^{(15)}\) Theoretically, as argued by HABERMAS, Fatti e norme. Contributi a una teoria discorsiva del diritto e della democrazia, Milano, 1996, p. 130, “un ordinamento giuridico può essere legittimo solo se non contraddice principi morali. Tramite la componente di legittimità della validità giuridica, il diritto positivo porta sempre con sé un incancellabile riferimento alla morale”.

\(^{(16)}\) Similarly, even jurisdictional rules may violate fundamental rights. For instance, matrimonial proceedings may tilt the scale of jurisdictional bases (i.e. personal connecting factors) in favor of the husband so as to prefer his domicile or habitual residence. It would be hardly convincing to argue that this treatment of proceedings for divorce and judicial separation is sound, and does not imply discrimination against the wife, because it does not purport to determine the litigation between the parties.

as a means to pursue the fundamental rights of the individual persons concerned. (18) It should ensure, in family matters, the continuity of personal and family status, i.e. the possession d’état beyond a purely national dimension. As we will tentatively explain infra, this is the main purpose of this paper. In that perspective, the so-called PIL distributive justice cannot but have a secondary and indirect role since the ‘law’ could and should pursue and positively protect ethical values as enshrined in international human rights instruments. (19)

Against this background, the present paper seeks to sketch a human rights perspective in family PIL (section 4). However, as necessary points of departure, it focuses first on the individual rights that are relevant in such a field (section 2); secondly, while considering international cases and practice, it addresses the impact of fundamental rights on national provisions relating to recognition of foreign judgments and public acts (section 3). Some conclusions will be then drawn (section 5).

2. As we will see in the next section, it is a fact that family conflict of laws as a whole can indeed collide with the protection for fundamental rights as guaranteed by international conventions. (20) What are the relevant rights in this regard? As is known, respect for individual rights to both private and family life is at the core of this analysis. (21)

These rights date back to 1948 in Articles 12 and 29(2) of the Universal Declaration of Human Rights, (22) which is a milestone in human

(18) The Greek philosopher Plato thought that “il problema del giusto è… problema dello Stato giusto, e lo Stato giusto non è tale se non in quanto sia vivente nella coscienza di ciascuno come valore super individuale” (ABBAGNANO, Introduzione, in PLATONE, Dialoghi Politici. Lettere, I, Repubblica, Timeo, Crizia, Politico, Torino, 1988, p. 28).


(20) Family as a group unit of society is protected by virtue of several international instruments: e.g. Universal Declaration of human rights, Art. 16(1) and International Covenant on Civil and Political Rights, Art. 23(1).

(21) Even though directly stating that everyone enjoys a right to private and family life would have been simpler, it has been convincingly argued that the idea of respect is pivotal in the field of personal law (EEKELAAR, Family Law and Personal Life, Oxford, 2006, p. 77 ff.)

(22) Art. 12 reads: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”; and Art. 29(2): “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. 
rights history. (23) They are currently enshrined, as far as European instruments are concerned, in Article 7 of the Charter of Fundamental Rights of the European Union ("CFR"), (24) as well as in Article 8(1) of the ECHR. (25) Although they are formally divided, the distinction between the respect for the right to private life, on the one hand, and that to family life, on the other hand, is not clear-cut. (26) As regards family law, certain situations such as registration of marriages (27) and childbirth, (28) may be examined under both: while the right to know the origin of an adopted person has often been dealt with as regarding his private life alone, (29) others, such as the nullification of marriage, are conceived as having implications for both the applicant’s family and private status. (30) The European organs have explained that, although the right to adopt is not, as such, included among the rights guaranteed by the ECHR, the relationship between the adoptive and the adoptee is in principle of the same nature as the family relations protected by Article 8; for the adoption orders confer the same rights and obligations as those of a father or mother in respect of a child born in lawful wedlock. (31)

(23) The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly Resolution No 217 A, as a common standard of achievements for all peoples and all nations.

(24) “Everyone has the right to the protection for his or her private and family life, home and communications”.

(25) “Everyone has the right to respect for his private and family life”. On the drafting history of Art. 8 see SCHABAS, The European Convention on Human Rights. A Commentary, Oxford, 2015 p. 358 ff. As it is known, although concluded in multilateral treaties that are binding on the states parties, a set of human rights has acquired a customary status in international law. Human rights could also be considered to form part of the ‘general principles of law recognized by civilized nations’ within the meaning of Art. 38(1)(c) of the Statute of the International Court of Justice (MERON, Human Rights and Humanitarian Norms as Customary Law, Oxford, 1989, p. 79 ff.; SIMMA & ALSTON, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, in Aust. Yearb Int. Law, 1988/89, p. 102 ff.). Given the scope of this paper and that the different nature of the source of international law do not change in structural terms the reasoning of the approach here suggested, that issue has not been dealt with.


Although international instruments prevent States and public authorities from interfering with the rights for private and family life, these are not absolute rights, as they are subject to limitations and conditions. (32) In particular, Article 8(2) ECHR allows national restrictions on the protection of such rights provided that three cumulative conditions, which are usually examined in sequence, are fulfilled. First, public intervention must be made in accordance with the law (or prescribed by law). Secondly, national measures cannot but pursue predetermined legitimate aims, which in short encompass, insofar as family law is concerned, the protection of the community health and morals, the fundamental rights of other persons and, where relevant, the child’s rights and freedoms, including his best interests. (33) Thirdly, public authorities have to demonstrate that interference is necessary in a democratic society. In short, States may deviate from respecting private and family life rights insofar as their authorities prove that a limitation is necessary and proportionate to the pursuance of specific legitimate aims set by the European Convention.

It is also worth noting that, taking into account the most relevant judicial practice, fundamental rights interference with family PIL concerns mainly the methodologies for securing recognition of foreign judgments and public acts. Indeed, individuals can create a valid family or personal status abroad (the State of origin) in order to subsequently demand its recognition and enforcement in their national or habitual residential State (the requested State). By doing so, they sometimes aim to circumvent the prohibitions or restrictions of the lex fori that would have prevented them from acquiring the same civil or personal status through the application of the domestic law, including its conflict of law rules. (34) That occurs in particular when the law of the requested State does not provide for the


(33) See Art. 8(2) ECHR, as well as case law cited infra.

(34) In that regard the Wagner case is illustrative (ECtHR, case of Wagner and J.M.W.L. v. Luxembourg, Application No 76240/01, judgment of 28 June 2007; the case is partially reported also in Revue critique, with a comment by KINSCH). Ms Wagner could not adopt a child in Luxembourg, the State of her nationality, since, being not married, she could not fulfill the conditions to adopt set forth in the national civil code that was applicable under the Luxembourg system of PIL. Therefore, she chose to adopt a child in Peru because this country permitted adoptions by unmarried woman. Hence, she aimed to indirectly obtain abroad what was unable to achieve directly through an application to adopt in Luxembourg (see in particular the judgment of the Luxembourg District Court of 2 June 1999, quoted in the Wagner case, at p. 8).
examination of the merits of the application submitted to the foreign court, but restricts itself to verifying that the decision delivered abroad satisfies some international procedural requirements, such as the international jurisdiction of the foreign court (usually according to the national rules on jurisdiction) and respect for the fundamental public policies of the forum. (35)

As judicial practice shows, from the standpoint of the requested State, the issue is to assess whether it is possible not only to let a foreign decision produce effects in the domestic legal order, but also to declare it enforceable. For the ultimate objective quite often is to get an order for entering the civil status duly acquired in the State of origin into the public registry of the State in which the concerned individual is a national or has his domicile (or habitual residence). Enforcement of a foreign civil status seeks not only to establish the personal tie or to integrate an individual in a family group, but it is often sought in order to secure inheritance rights between the individuals concerned, and sometimes also to permit to one of them to acquire the nationality of the other so as to get inter alia a definitive leave to remain in the requested State.

Needless to say that, as a part of the legal system of the requested State, the normative approaches to the civil law effects accorded to foreign judgments or acts issued by an external authority, may vary from one country to another. As is known, they may be automatic or, as they often do, provide for judicial proceedings charged to assess whether some requirements for recognition and enforcement have been met. Under a conflict of laws perspective, procedures aimed at securing civil effects to foreign decisions ought to be conceived as alternative conflict techniques.

(35) One could attempt to reduce inconsistencies by virtue of a domestic Constitutional approach assuming that it is capable of embracing fundamental values and rights. This would be inadequate when the constitutional rights show inconsistencies with international human rights. In fact, the point of view of the requested State cannot be coordinated with a foreign personal and family status when its constitutional values collide with the respect for rights to private and family life as internationally guaranteed. For instance, in cases concerning the recognition and enforcement of adoption orders duly issued abroad, Luxembourg courts did also examine the conformity of the lex fori with the national Constitution and, in short, concluded that the right to family life was not adversely affected. They assumed, on the one hand, that adoption had its basis in positive law and not in natural law so as that the legislation rightly permitted full adoption to married people which is the most advantageous choice for the child; and on the other hand that a simple adoption was still available for the persons concerned under the lex fori (see Wagner case cit., p. 6-11). For the very same grounds, unconvincing would also be the approach advocating the safeguard of fundamental rights in methodological terms so that PIL could be capable of solving the problem by having recourse to a specific method of conflict of laws.
with respect to the traditional choice of law approach, which determine, first, the jurisdiction of the national court and, second, the law which it will apply. Such procedures do also seek to solve antinomies between different legal orders.\(^{(36)}\) It is self-evident that the failure to recognize e.g. a decree concerning a family status granted in another State, creates inevitably a limping family relationship, validly established in the State of origin but not existing in the forum, with all the related inconveniences for the persons concerned. Broadly speaking the overarching objective of PIL techniques, including recognition methods, is to address and solve such problems.

3. It is theoretically reasonable to advance a conflict of law rules analysis based on a human rights perspective, i.e. an approach to this discipline conceived in order to positively achieve the rights of the persons concerned.\(^{(37)}\) The basic assumption for this approach is to admit that, like any other area of domestic law, PIL is capable of adversely affecting the right to private life, the right to family life and even, in particular when either a status filii or an adoption is concerned, the best interests of the child, as they all are guaranteed by international human rights standards.

\(^{(36)}\) Its main objective is the coordination of “pointes de vues concurrentes exprimées par des ordres étatiques, par définition hétérogènes, sur la même situation” (BARATTA, La reconnaissance internationale des situations juridiques personnelles et familiales, in Recueil des cours, t. 348, 2010, p. 271), namely when recognitions techniques require the respect of the conflict of law rules of the required State (se also BUCHER, La famille en droit international privé, in Recueil des cours, t. 283, 2000, p. 51; QUINONES ESCÁMEZ, Proposition pour la formation, la reconnaissance et l’efficacité internationale des unions conjugales ou de couple, in Revue critique, 2007, p. 357 ff., at 365). It is all the more so if one considers that PIL, given its different methods of conflict solving, should be defined by taking into account its primary function, i.e. the solution of antinomies arising out from the functioning of different legal orders concerning the same case of private law.

\(^{(37)}\) A clear example of this is, under the EU provisions inspired by international instruments, the Regulation No 2201/2003 whose provisions determine the power to adjudicate in matters of parental responsibility on the best interests of the child, showing inter alia that this formula – sometimes considered of little or no actual legal value – is able to assume substantial contours, since it imposes the related obligation on national authorities (see Art. 15 Regulation). One may even recall, under the same Regulation, the discipline concerning the rights of access which concerns the rights (and duties) of the parent that does not enjoy the right of custody to have a personal relationship with the child on a regular basis. It is conversely also a corresponding right of the child, his supreme interest ending up to be a legal criterion for deciding cases. It follows that the EU, through these provisions, has truly become a bearer of fundamental rights as the ECJ case law shows (judgment of 11 July 2008, case C-195/08 PPU, Rinau; and 23 December 2009, case C-403/09 PPU, Deticek v. Sgueglia).
Under any system of conflict of laws, a foreign judgment can be prevented from producing effects if its recognition would be contrary to some predetermined requirements. However, dismissing the enforcement of a foreign judgment can represent an interference with the rights to private and family life since it is a conduct that directly impairs the enjoyment of the rights in question. (38) Let’s recall in passing that, as the Pellegrini case shows, even enforcing a foreign decision can amount to a violation of due process guarantees if the proceedings before the foreign court that delivered the same decision did not comply with due process according to Article 6 of the ECHR. (39)


(39) See Pellegrini v. Italy, Application No 30882/96, judgment of 20 October 2001. In this case the applicant’s marriage was annulled by a decision of the Vatican courts, which Italian judges declared enforceable in Italy. The European Court’s task consisted in examining whether the Italian judges, before authorizing enforcement of the decision annulling the marriage, were duly satisfied that the relevant proceedings fulfilled the guarantees of Art. 6 ECHR. According to the ECtHR, such a review is required when a foreign decision is delivered from a judge of a non-Conventional country. In order to ascertain whether the State party violates Art. 6 by enforcing a third State decision when the related proceedings infringed the right to a fair hearing, reference has to be made to Art. 1 ECHR. This provision points out that the Contracting States are bound to secure to everyone within their jurisdiction the rights and freedoms set forth in Section I of the ECHR. It seems a truism to say that in Pellegrini the canon (or foreign) proceedings violating Art. 6 may not be attributed to Italian courts. Actually, Italian courts, while recognizing foreign judgments, exercise their own judicial functions, acting as autonomous organs. However, the responsibility of Italy was at stake when its authorities took action having contributed, as a direct consequence, to the exposure of an individual to a situation in breach of Art. 6, albeit it occurred by a non-Conventional Party. This is a clear inference from Soering v. The United Kingdom, Application No 14038/88, judgment of 7 July 1989, § 91. Similarly, the European Court adopted the “co-operation criterion” in Drozd and Janousek, according to which “The Contracting States are obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice” (Drozd and Janousek v. France and Spain, Application No 12747/87, judgment of 26 June 1992, § 110). In short, Italian courts should not have contributed to such a violation by enforcing a canonical judgment whose proceedings violated the right to a fair hearing under the meaning of Art. 6 § 1. Pellegrini clearly entails this conclusion (Baratta, Sciolgimento e invalidità del matrimonio nel diritto internazionale privato, Milano, 2004, p. 204 ff.). The Strasbourg Court held that Italian courts breached their duty of satisfying themselves, before authorizing enforcement of the Roman Rota’s judgment, that the applicant had had a fair trial in the proceedings under canon law. As a matter of fact, the adversarial principle was undermined before the ecclesiastical court. Arguably, ensuring the right to a fair trial is a matter of application of international conventions on human rights and, therefore, of Art. 6, these treaties having been enacted in the Italian legal order. When ascertaining the applicability of Art. 6, it is at first necessary to assess the full meaning of this result. Clearly, one may assume that according to Pellegrini, Art. 6 § 1 establishes legal criteria applicable when a Convention Party enforces a decision...
Usually, recognition or enforcement is subject to the double condition that the foreign court should have exerted jurisdiction according to the same criteria adopted by the national system of PIL, and that the foreign authority delivering the judgment complied with the conflict of law rules of the forum. Most of all, PIL systems concerning recognition (and enforcement) of foreign judgments lay out that national authorities retain an overriding power to rely on the doctrine of *ordre public*, a manifest and serious harm to the fundamental national principles of justice or morals characterizing the national legal order, to block recognition of foreign decisions (and other public acts). For instance, such an attitude exists towards surrogacy practices: some European countries are contrary to couples travelling abroad with the purpose of entering a surrogacy arrangement and returning home with a child, deeming surrogacy as incompatible with national public policy. (40) In fact, the need to respect the conflict of laws rules of the forum prevents the recognition of the related coming from a non-Conventional State (as well as, I would add incidentally, a decision coming from a Convention State). Moreover, the European Court did state that Italian courts should have been ‘duly satisfied’ that the foreign proceeding ‘fulfilled the guarantees of article 6’ (§ 40 of *Pellegrini*). Consequently, the Italian courts must not enforce foreign civil judgments when the relevant proceedings did not satisfy the right to a fair trial within the scope of Art. 6. Yet *Pellegrini* yields only unclear, or at least partial, answers on that respect, since it does not add indications about the nature and extent of the obligations arising out Art. 6 when giving effect to a canonical judgment in Italy. A distinguished scholar construed the last mentioned sentence of *Pellegrini* as an overcoming of *Soering* and *Drozd* and Janousek cases (COSTA, *Osservazioni sulla sentenza della Corte europea dei diritti dell’uomo nel caso Pellegrini c. Italia*, in Riv. int. dir. dell’uomo, 2002, p. 435 ff., at 437). Before saying that the European Court case law shows inconsistencies, or concluding that Italian courts should adopt the “all requirements of Article 6” test, one might look at the same issue from a different perspective. Indeed, it may be submitted that in *Pellegrini* the European Court did not mention the “flagrant denial of justice” test adopted in *Soering*, *Drozd* as well as in *Iribarne Perez* simply because in *Pellegrini* the canon proceedings implied such a serious infringement of the right to a fair trial that recognizing the Ecclesiastical decision doubtless amounted to a clear and flagrant denial of justice. In the instant case of *Pellegrini* there was no doubt that the applicant had not had the possibility of examining the evidence produced by her husband and by the witnesses (§ 44). Further, the applicant was not in a position enabling her to secure the assistance of a lawyer and was summoned to appear before the Ecclesiastical Court without knowing what the case was about (§ 46). (40) National attitudes towards surrogacy arrangements are different. These are prohibited, sometimes even via criminal sanctions (France, Switzerland and Italy). In other countries surrogacy practices are lawful under strict legal conditions, even imposing altruistic purpose (The Netherlands and United Kingdom). Sometimes they are tolerated (Poland and Belgium). In some legal orders surrogacy arrangements are exploited for commercial goals (Georgia, Ukraine and Russia): cf. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Preliminary Report on the Issues Arising from International Surrogacy*, No. 10 of March 2012, p. 9 ff.; TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Oxford, 2012, passim.
civil status established in the country of origin. Indeed, such a course of action is considered as a means to circumvent the national rules on international adoptions. Likewise, it may also turn out to be inconsistent with a number of legal requirements, were the application downgraded as one of recognition of a foreign adoption. (41)

These PIL provisions fall squarely under the scrutiny of international human rights bodies. States are not free to rely on national provisions when enacting proceedings on whether to confer effects to a family status duly acquired abroad. A survey of international case law shows that it is relatively easy to demonstrate the lawfulness of a given restriction (prescribed by law) and its pursuance of legitimate aims. (42) Yet, as discussed, respect for the rights to private and family life, as internationally guaranteed, protect individuals claiming the existence of a family tie legally acquired abroad unless a restriction is necessary in a democratic society and proportionate to the pursuance of a legitimate interest.

This very third standard is challenging to prove: international judges, and namely in Europe the ECtHR, scrutinize it rigorously, interprets it narrowly and admits it only if convincingly established. (43) The notion of necessity (in a democratic society) implies that the interference, i.e. the refusal to recognize a family status acquired abroad, has to be grounded on a qualified national social need, which must be vital and proportionate to the legitimate aim pursued by the public authority. (44) In that respect, ECtHR has construed the “margin of appreciation” doctrine: mirroring the subsidiary nature of the international protection of human rights, it is usually conceived as an interpretative instrument deferring to areas of national self-determination. (45)

(42) This can be explained by the fact that domestic systems of PIL are often enshrined in statutes or have a long case law tradition reflecting a legal order that is committed to democratic principles and rule of law standards.
(43) Generally, ARAI, The System of Restrictions cit., p. 335.
All in all, in the field of family PIL, States are allowed to have recourse to their own requirements in order to preserve some legitimate public aims, such as, in particular, rights and freedoms of the concerned persons, health and morals, public policy. However, according to a well-established case law of the ECtHR, the sphere of appreciation left to public authorities in shaping their own limitations to fundamental rights varies in relation to the circumstances, the matter and the background of the case. Moreover, the presence or absence of a common denominator among the laws of the Member States is a relevant factor in this regard. Broadly speaking, that margin is relatively wide if there is no common ground (or consensus) between the national laws. That is all the more true when the case raises delicate ethical issues.

Therefore, international fundamental rights impacts on the national systems that makes the recognition of foreign judgments (or public acts) conditional on compliance with the conflict of laws rule of the forum. In Wagner the European Court held that the national decision dismissing enforcement of a Peruvian order of full adoption had not demonstrated that such a result was necessary in a democratic society. (46) Highlighting that the margin of appreciation was limited by the fact that adoption by unmarried persons was permitted without restriction in most of the Contracting States, (47) the European Court held that relying on the application of the Luxembourg rules on the conflict of laws and, on that very basis, refusing enforcement, was inconsistent with the right to family life of the persons concerned. In the Court’s eyes, that typical PIL approach failed “to take account of the social reality of the situation”; therefore, the applicants’ right to a family life encountered “obstacles in their daily life and the child is not afforded legal protection” making it impossible to be fully integrated into the adoptive family. (48) In addition, it disregarded the best interests of the child and unduly let the conflict rules take pre-


(46) In this case Luxembourg authorities dismissed an application for enforcement of a Peruvian decree of full adoption because it was rendered contrary to the lex fori, which was the applicable law according to the rule on the conflict of laws set forth in the Civil Code as interpreted by Luxembourg courts. Although the Peruvian court was internationally competent according to the rules of Luxembourg Civil Code, the application was rejected since the adoptive mother, being an unmarried person, could not obtain a full adoption in Luxembourg (see Wagner cit., p. 3 ff.).

(47) Ivi, § 129.

(48) Ivi, § 132.
cedence over the social reality and the situation of the persons concerned. (49)

Another perhaps even more illuminating example is the impact of fundamental rights on the classic public policy exception. (50) International case law shows that ensuring respect for individual rights implies that such exception is limited at least by two factors. Consequently, a truly international notion of public policy seems to emerge. (51)

i) Guaranteeing the identity of the individuals concerned

If denying recognition of a civil status duly acquired abroad affects an important facet of individual identity, fundamental rights as internationally guaranteed are deemed to have primacy over national normative policies. As a result, States cannot claim their own ordre public as a bar to recognition. Respect for the right to private life requires that persons should be able to establish details of their identity as individual human beings, which includes filiation, (52) as well as a person’s name. (53) Similarly, respect for

(49) Ivi, § 133. BUREAU, MUIR WATT, Droit international privé. t. II. Partie Spéciale, Paris, 2007, p. 171, admits that respect for national conflict rules cannot impeach the recognition of a family status concerning a child.


(52) Mennesson v. France, Application No 65192/11, judgment of 26 September 2014, § 80; Labassée cit., § 38, 59. Further in Mikulić the ECtHR acknowledged the child’s right to have an identity. In this case a man evaded court proceedings by a mother and a child who alleged his paternity. Although the European Court held that there was no family tie between the child and the alleged father, it went on to decide that the child’s ‘private life’ includes to a certain degree the right to establish relationships with other human beings. So the facts fell within Art. 8 and the Croatian procedural deficiencies were a violation of that provision (Mikulić v. Croatia, Application No 53176/99, judgment of 7 February 2002, § 52).

(53) A person’s name is usually considered as a constituent element of his identity and of his private life, the protection of which is enshrined in Art. 7 of the Charter of Fundamental Rights of the European Union and in Art. 8 ECHR. Certainly, the latter does not
the right to family life entails that national authorities cannot either reason-
ably disregard the adoptive legal status validly created abroad and corre-
sponding to a family life under Article 8 of the Convention, or refuse
recognition of such a family tie existing de facto so as to dispense them-
selves from a concrete examination of the situation.

In Negrepontis-Giannisis, while stressing “la réalité” of the relationship
between “le requérant et son père adoptif”, the Strasbourg Court held that
the grounds for invoking the ordre public exception, claimed by the Greek
Cassation Court in order to reject the recognition of an American adop-
tion, “ne répondent pas à un besoin social impérieux. Ils ne sont donc pas
proportionnés au but légitime poursuivi en ce qu’ils ont eu pour effet la
négligence du statut de fils adoptif du requérant”. (54)

ECtHR case law on the rights of children born through (international)
surrogacy arrangements is another telling example of this. (55) Admittedly,
States enjoy in principle a broad discretion since there is no consensus in
Europe on the lawfulness of this controversial practice. (56) Yet, it is worth
recalling that the ECtHR was not asked to dwell on that issue. The right
claimed before it concerned a child and its relationship with the biological
father, as well as with his intended mother.

For instance, in Mennesson the ECtHR pointed out that “regard
should also be had to the fact that an essential aspect of the identity of

refer to it explicitly, and to a person’s name, as a means of personal identification and a link
to a family either. However a person’s name concerns his or her private and family life (see
cases Burghartz v. Switzerland, Application No 16213/90, judgment of 22 February 1994, §
24; and Stjerna v. Finland, Application No 18131/91, judgment of 25 November 1994,
§ 37).

(54) Negrepontis-Giannisis v. Grèce cit., §§ 72-76.
(55) International surrogacy arrangements have been increasingly challenging PIL sys-
tems with respect, in particular, to the recognition of the civil status of the surrogate child
within the State of origin of the intended parents. Indeed, in many countries surrogacy
arrangements are prohibited (e.g. France, Spain and Italy), while in a more limited number
of States (such as for instance Ukraine and Russia) this practice is permitted. As a result, the
number of cross-border arrangements concluded in surrogacy-friendly jurisdictions, has
been increasing.

(56) In Mennesson cit., the ECtHR held that “States must in principle be afforded a
wide margin of appreciation regarding the decision not only whether or not to authorize this
method of assisted reproduction but also whether or not to recognise a legal parent-child
relationship between children legally conceived as a result of a surrogacy arrangement
abroad and the intended parents” (§ 79; see also § 78). See Fulchiron, Bidaud-Garon,
Reconnaissance ou reconstruction? A propos de la filiation des enfants nés par GPA, au
landemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne
des droits de l’homme, in Revue critique, 2015, p. 1 ff.; Baratta, Diritti fondamentali e
riconoscimento dello status filii in casi di maternità surrogata: la primazia degli interessi del
minore, in Dir. umani dir. int., 2016, p. 309 ff.
individuals is at stake where the legal parent-child relationship is concerned. The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced. (57) As a consequence, the role of the \textit{ordre public} exception shrinks accordingly. In that case, French authorities claimed that under the \textit{lex fori} surrogacy agreements were null and void on grounds of public policy since that corresponds to the “French conception of international public policy”. (58) However, in the European Court’s vision, the margin of appreciation left to public authorities in order to construe their own specific \textit{ordre public} is restrained.

Indeed, that exception, which is specific to PIL, comes under the full scrutiny of the international judge. ECtHR held that domestic courts have to strike a fair balance between the public interests – \textit{i.e.} the legitimate aims indicated above – and the individual entitlement to respect for his private and family life. The point of equilibrium is shifted towards the need to guarantee the existence of the \textit{status filii}, considered as an \textit{inherent and crucial part of the individual personal identity}. In this perspective, the protection of national legitimate aims is downgraded. (59) In \textit{Mennesson} and \textit{Labassée} the ECtHR held that the genetic tie between the child that was conceived through the means of artificial insemination and the father who gave his biological material for that purpose, could not be denied. Therefore, it went on to decide that the child’s true paternity and parenthood had to be enforced in French public registers.

In cases regarding international surrogacy arrangements, the ECtHR has not stated that right of a couple to become \textit{intended} parents is a primary right, whereas the Grand Chamber, outside the practice of surrogacy, in some specific cases upheld the right of a couple to conceive a child by making use of medically assisted procreation. (60) Rather the

\begin{itemize}
\item (57) \textit{Mennesson} cit., § 80.
\item (58) \textit{Mennesson} cit., § 82.
\item (59) In the ECtHR’s reasoning, to define the margin of appreciation – as a notion instrumental to what it is necessary in a democratic society – State enjoy a discretion according to the circumstances, the subject matter, as well as the context. It also admits that in this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the States of the Council of Europe. Hence, it is wide when there is no consensus between them and the case raises sensitive moral or ethical issues. However, that margin is to be restricted when a basic facet of an individual’s existence or identity is at stake (\textit{Labassée} cit., § 56; \textit{Mennesson} cit., § 77). Denying recognition of a filiation tie affects the identity of the person’s involved and namely that of the child concerned. Consequently, the margin of appreciation is reduced (\textit{Labassée} cit., § 58; \textit{Mennesson} cit., § 80; see also, respectively, §§ 60 and 81).
\item (60) In some cases, the ECtHR held that States disproportionately refused access to artificial insemination facilities, when their policy fell outside any acceptable margin of
\end{itemize}
European Court, in surrogacy cases, focused on the *child primary right’s* to obtain respect for his private life: France infringed that right for having ruled that the relevant American decisions were inconsistent with national *ordre public*. The emphasis lies on the child’s *primary* need to have his *status filii* recognized with respect to the biological father. The possession of this *status civilis*, construed as a fundamental right of the child, seems to be core of the European Court’s reasoning. (61) However, it rejected the claims founded on the alleged violation of the right to respect of family life. Actually, in *Labassée* and *Mennesson*, it stated that France struck a sound balance between the individual rights and the interests of the State, since the refusal to recognize the status acquired in the USA had not denied the family the right to live in France as a group in some way protected by the law. (62)

appreciation so that a fair balance was not struck between the competing public and private interests involved. In such situations the Grand Chamber held that Art. 8 was violated, upholding in fact the right of a couple to respect for their decision to be genetic parents (*Dickson v. United Kingdom*, Application No 44362/04, judgment of 4 December 2007, § 66; *Evans v. United Kingdom*, Application No 6339/05, judgment of 10 April 2007, § 71-72. (61) See esp. *Labassée* cit., §§ 38 and 75-79; *Baratta, Diritti fondamentali* cit.

(62) See for instance *Labassée* cit., §§ 66 ff., namely §§ 71-73. Certainly, in *Labassée* and *Mennesson*, the ECtHR rejected the applicant’s claim to enforce in France the legal relationship between the intended parents and the children. Such an outcome would have probably fully ensured a family life in France: the child would have had, in essence, the status of a *filius familias* with respect to the couple. However, this part of the judgment in favor of the French Government, starts from a clear factual premise that helps to explain the outcome: a minimum level of protection of family life had been guaranteed in France, given that the national authorities, regardless of the denial of the transcription of the US certifications in the French public registers, had attached to the same certifications a set of legally significant consequences. Despite the absence of recognition in France of a legal parent-child relationship established abroad, in its defense the State argued that, first, it had not actually violated the right to family life since certificates of French nationalities to the children had been issued; secondly, the minors could not be removed from France; thirdly, the intended parents enjoyed full parental responsibility on the basis of foreign civil-status documents; fourthly, in case of divorce the family-affairs judge would determine their place of residence and the contact rights of the parents as named in the foreign civil status document; fifthly, inheritance rights would be ensured by French civil law (see *Mennesson* cit., § 71 and 74). Ultimately, French authorities considered the American certificates as being capable of producing some legal effects, even if their recognition and enforcement were denied as regard the *status filii* relationship between the child and the intended parents. Had the French authorities not accorded such minimal safeguards and had they deconstructed the core of the right to family life, namely preventing intentional parents and children from sharing a minimum of family life, the ECtHR would have likely ruled differently. It, in fact, seems to appreciate the sensitivity shown by the French authorities towards family life situations that are, socially and emotionally, quite delicate. The impression is that French judges and local government authorities made use of interpretative techniques and practices to surreptitiously ensure an intangible nucleus of protection, even
Finally, the functioning of national PIL systems is no doubt affected: the fair balance between different interests is focused on the need to preserve the individual’s existence or identity, which is paramount with respect to the legitimate aims of the State as a whole. (63) Arguably, the deference accorded to Member States in order to forge their own public policy principles cannot amount to a violation of the rights to family and private life. In a nutshell, in the ECtHR’s perspective, the more that conventional human rights are uniformly protected, the more the margin appreciation doctrine is limited, and the less national authorities are allowed to rely on their own national principles in shaping PIL systems.

**ii) Ensuring the best interests of the child**

States’ margin of appreciation in construing a national ordre public exception is further constrained by the need to ensure the best interests of the child. In fact the weight that this notion deserves is crucial whenever the situation of a child is at issue. Normative choices impeaching recognition of adoptions or filiations duly acquired abroad must not only strike a fair balance between state interests and those of individuals that would be affected by a refusal: in assessing the situation of

though they rejected the validity of the parent-child relationship; surreptitiously, because they come to a result, legally relevant in French law, that seems hard to reconcile with the general operation of the French PIL mechanisms. Be that as it may, the family group between the concerned persons (children and the relevant couples) had been effectively guaranteed in France. In terms of respect for the right to family life, the European Court considered it as sufficient.

(63) On the contrary, EU law justifies recourse to the concept of public policy to dismiss a recognition by a Member State of some elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of his or her adoption as an adult by a national of that other Member State. In Wittgenstein, the ECJ held that national authorities are allowed a margin of discretion, within the limits imposed by the treaties, to construe their own public policy exception if it necessary and proportionate. Given that in accordance with Art. 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic, the ECJ held that it is not disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank. “By refusing to recognize the noble elements of a name such as that of the applicant in the main proceedings, the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them” (judgment of 22 December 2010, case C-208/09, Honka Sayn-Wittgenstein, § 93).
a child, national authorities are also expected to let his best interests prevail. (64)

The ECtHR’s reference to the notion of the *best interests of the child*, contained in a number of international instruments, and primarily in the UN Convention on the Rights of the Child, does not come as a surprise. (65) Several cases provide a high-profile illustration of that. In *Wagner*, the European Court appreciated that a Luxembourg Court had recognized a Peruvian decision producing the effect of a full adoption in Luxembourg. Yet it did not seem to welcome the fact that another national Court, in the very *Wagner* case, had disregarded the same legal status, which – as the European Court highlighted – falls within the meaning of family life under Article 8. Indeed, it noticed that the best interests of the child ought to be taken into consideration, as well as the *need to give the child the most favourable status*. This conclusion, the ECtHR pointed out, would not have been “prejudicial to Luxembourg’s international public policy”. (66)

Moreover, in *Labassée*, the ECHR admitted, first, that the non-recognition in France of the *status filii* amounts to an ethical choice, which results in the use of the exception of international public policy and, second, that it is acceptable that France may wish to deter its nationals from going abroad so as to benefit from methods of assisted reproduction prohibited in its own territory. (67) Nonetheless, the implications of this approach concern also “the children themselves, whose right to respect for their private life… is substantially affected. Accordingly, a serious question arises as to the compatibility of that situa-

---

(64) *E.B. v. France*, Application No 43546/02, (Grand Chamber) judgment of 22 January 2008, §§ 76 and 95.

(65) Indeed, the Strasbourg Court has emphasized in its decisions that it has never considered the ECHR provisions as the only legal reference framework. On the contrary, it has focused on its obligation to also consider all available provisions and principles of international law applicable to the Contracting States. This approach is clear since it held that the ECHR should not be interpreted in isolation and must be applied in accordance with the principles of international law. Indeed, according to its case-law under Art. 31 § 3(c) of the Vienna Convention on the Law of Treaties of 1969, it points out the need to take into account any relevant rules of international law applicable in relations between the parties, including those relating to the international protection of human rights (see *Golder v. the United Kingdom*, Application No 4451/70, judgment of 21 February 1975, § 29; *Streletz, Kessler and Krenz v. Germany*, Application Nos 34044/96, 35532/97 and 44801/98, judgment (Grand Chamber) of 22 March 2001, § 90 ff.; and *Al-Adsani v. United Kingdom*, Application No 35763/97, judgment (Grand Chamber) of 21 November 2001, § 55).

(66) See *Wagner* case cit., § 134.

(67) See *Labassée* case cit., §§ 62 and 63.
tion with the children’s best interests, respect for which must guide any decision in that regard”.

Albeit within a different factual background, even the Paradiso and Campanelli judgment amounts to shrinking the scope of the public order exception. (68) In the European Court’s vision, ordre public cannot represent a carte blanche to justify, vis-à-vis the obligations imposed by Article 8 ECHR, any measure concerning a child without having first considered his concrete best interests. (69) The ECtHR found a violation of Article 8 because the Italian authorities had decided to remove the child from the host family. Indeed, such an order is, according to the Court, a measure of last resort that State authorities may adopt only to protect the child from an immediate danger. Tellingly, the Court highlighted the necessity “to ensure that a child is not disadvantaged on account of the fact that he or she was born to a surrogate mother, especially in terms of citizenship or identity, which are of crucial importance”. (70)

4. As discussed, the impact of international law standards on the national conflict of laws systems is substantial. Human rights law, as interpreted and applied by international jurisdictions, does affect and ultimately forges the functioning of PIL in a specific manner. It is here argued that fundamental rights prescribe an inherent and positive obligation of result to recognize and enforce a family relationship duly created abroad. This approach means, firstly a derogation from the proceedings for recognition and enforcement set forth in the national system of PIL, and secondly a positive obligation to be fulfilled by public authorities. The analysis is built upon three key conceptual foundations.

(68) Paradiso and Campanelli v. Italy, Application No 25358/12, judgment of 25 January 2015 (the case is still pending because it was referred to the Grand Chamber on 1 June 2015). The case concerned a violation of Art. 8 ECHR because Italian authorities first refused recognition of the Russian birth certificate establishing the legal parent-child relationship entered in the civil status registers, secondly, they suspended parental rights, and finally ordered the removal of the child from the applicant’s household. In that case, an Italian married couple had entered into a gestational surrogacy agreement with a Russian company, but no genetic link between the couple and the child was established.

(69) Ivi, § 80.

(70) Ivi, § 85.
Consequent implications of respecting rights to private and family life in PIL matters

The rights to effective respect for private and family life create a negative obligation on the part of States to refrain from unduly interfering with them. A waiver of the normal functioning of the PIL systems is the logical outcome, given that the denial of a foreign family or personal status resulting from the national PIL system is none other than an undue interference with family and private rights. (71) This is clear if, for instance, one looks at what happened in Luxembourg in Wagner, and in France as regards actions for recognition of status filii of a child born by virtue of international surrogacy arrangements. (72)

Effective respect for private and family rights produces a direct impact in the domestic legal order in the sense that individuals enjoy rights that national judges are expected to guarantee (unless, as seen above, a specific, necessary and proportionate limitation occurs). Once incorporated into domestic law, the respect for such rights entails for the national judges the obligation to secure full effect to human rights provisions. It ensues that they have primacy over incompatible rules of domestic law, without waiting for their explicit abrogation by the national legislature. (73) In other words, they are enforceable against the States responsible for the violation within their respective domestic legal order. (74) As such, inter-

(71) Bucher, La famille en droit international privé cit., p. 98 ff.; Baratta, La reconnaissance des situations personnelles et familiales cit., p. 408 ff.

(72) Deviations to the French PIL system are clearly implied if one looks at the conclusions reached by the French authorities in surrogacy cases: notwithstanding the absence of recognition in France of a legal parent-child relationship established abroad, in its defense the State argued that, first, it had not actually violated the right to family life since certificates of French nationalities to the children had been issued; secondly, the minors could not be removed from France; thirdly, the intended parents enjoyed full parental rights on the basis of foreign civil-status documents; fourthly, in case of divorce the family-affairs judge would determine their place of residence and the contact rights of the parents as named in the foreign civil status document; fifthly, inheritance rights would be ensured by French civil law.


(74) This approach is quite different to the phenomenon of Drittwirkung in the sense that human rights, as it is asserted, might be enforceable against another individual: see
national human rights standards demand States prescriptively ensure that they fulfill and protect such rights.

That is so in particular for any PIL proceedings undertaken by public institutions, courts of law, administrative authorities, concerning the family status of a child: they must ensure primary consideration to his best interests on a case by case basis. (75) It is a right internationally guaranteed by a quasi-universal instrument and embedded, as it is often advocated, in a self-executing provision, (76) though this assumption is debatable. In any case, where implemented into domestic law, ensuring the best interests of the child amounts to a right that is enforceable by individuals in the national courts since it produces effects in the legal relationship between States and their subjects. (77)

ii) The concept of positive obligation implies a result-oriented construction of the PIL systems

Effective enjoyment of fundamental rights in PIL matters may not be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be consistent with the object and purpose of international instruments, which compel States to secure a given human right in the sense that its enjoyment is to be effective. (78) Since the notion of respect implies – in a Kantian perspective – that individuals should actually be the center of society, as well as ends in themselves, and not
means for something else, (79) respect for the rights to private and family life leads to a positive obligation being imposed on the national authorities. Consequently, the required State should in principle recognize and enforce a personal status or a family tie, so as to protect it whenever it duly exists abroad. (80) In other words, the concept of positive obligation further entails a duty for the State to forge its PIL provisions so as to make them result-oriented: if a family tie or status is duly established in a foreign legal order, the national authority, seized for its recognition or enforcement, is bound to take the interpretative postures in its power to secure the internationally guaranteed rights to private and family life. (81) Where necessary, States also have to adopt the legislative, administrative and adjudicatory measures to preserve the effective enjoyment of such rights within their territory, (82) while considering that under international law

(79) The German philosopher Kant argued that persons are ends in themselves, with an absolute dignity to be respected (Kant, Stato di diritto e società civile (a cura di Merker), Roma, 1982, p. 144 ff.). See also Eekelaar, Family Law and Personal Life cit., advocating that the word “respect” gives to the notion of right to respect for private and family life “the character of a statement that family life has a timeless quality and is to be held to have value in and of itself” (at 81).

(80) Indeed, the Strasbourg Court held that a violation of positive obligations occurred when, in its judgment relating to a request for enforcement, a national court failed to take into account the social reality of the family, which existed between the applicants. While looking to strike a fair balance between the competing interests of the individuals who requested the enforcement of a foreign judgment and those of the State, which aims to set limits to preserve the society as a whole, the European Court emphasized the need to consider the social reality and the existence of family ties legally acquired abroad (see Wagner case cit., § 129 s.). The principle of “positive obligation” stemming from Conventional provision is well established in the ECtHR jurisprudence: see Airey v. Ireland, Application No 6289/73, judgment of 9 October 1979, esp. § 25; Marecks v. Belgium cit.; case of Plattaform “Arzte für das Leben” v. Austria, Application No 10126/82, judgment of 21 June 1988, §§ 31 and 32; Kroon and others v. The Netherlands, Application No 18357/91, judgment of 27 October 1994, § 30; X, Y and Z v. United Kingdom, Application No 21830/93, judgment of 22 April 1997, § 37. Heymann-Doat, Le respect des droits de l’homme dans les relations privées, in Teitgen-Colly (ed.), Cinquième anniversaire de la Convention européenne des droits de l’homme, Bruxelles, 2002, p. 219 ff.; Bartole, De Sena, Zagrebelsky, Commentario breve cit., p. 303 ff.; Heringa, Zwak, Right to respect for privacy, in van Diirk, van Hoof, van Rijn, Zwak (eds.), Theory and Practice cit., p. 739 ff.; Sudre, Droit européen cit., p. 370 ff.; Harris, O’Boyle & Warbrick, Law of the European Convention cit., p. 21, 504 ff.

(81) See however, Kinsch, Droits de l’homme, droits fondamentaux et droit international privé, in Recueil des cours, t. 318, 2006, p. 149 ff.

(82) In Ignaccolo-Zeni v. Romania, Application No 31679/96, judgment of 25 January 1996, § 108, the ECtHR held that: ‘It is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Art. 8 of the Convention’. 
the European Court’s judgments are usually not directly enforceable but must be implemented into the national legal order. \(^{(83)}\)

In this human rights based perspective, PIL requirements must then be re-shaped, where possible by interpretation, to safeguard the child’s fundamental rights, when the relevant case is about a child’s integration in his adoptive family or in the family of intended parents. \(^{(84)}\) Derogations to the usual functioning of PIL, and the subsequent positive obligation of result, appear of vital importance if fundamental rights are to be interpreted and applied in a manner that renders them practical and effective, and not just theoretical or illusory – to borrow a language frequently used in the ECtHR’s case law. Classic family PIL requirements for recognition and enforcement of foreign civil status should not necessarily be a legitimate


\(^{(84)}\) The Author has suggested a similar rationale as regards the construction of an implied principle of mutual recognition of personal and family status within the EU system, for it is necessary to respect the right to family and private life enshrined in Art. 7 (cfr. Baratta, Verso la “comunitarizzazione” cit.; Id., Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC, in IPRax, 2007, p. 4 ff.; Id., La reconnaissance internationale cit., p. 411 ff.; as regards the jurisprudence of the ECJ see judgment of 2 December 1997, case C-36/94, Dafeki, this Rivista, 1999, p. 340 ff.; 14 October 2008, case C-353/06, Grunkin and Paul, ibidem, 2009, p. 221 ff., both concerning recognition of public decrees on civil status and names of individuals). In Grunkin and Paul the ECJ held that obliging a person who has exercised his right to move and reside freely in the territory of another Member State to use a surname in the Member State of which he is a national, which is different from that already conferred and registered in the Member State of birth and residence, is liable to hamper the exercise of the right established in Art. 21 TFEU to move and reside freely within the territory of the Member States (Grunkin and Paul, §§ 21 and 22; see also judgment of 2 October 2003, case C-148/02, García Avello, ibidem, 2003, p. 1088 ff., § 36). Then, it held that such serious inconvenience may likewise arise where the child concerned holds the nationality of only one Member State, but that State of origin refuses to recognize the family name acquired by the child in the State of birth and residence (ivi, § 24). Arguably, in the EU – however fragmented its legislation in the field of civil justice may be – the erosion of national competences follows as a matter of course. The EU aims to set up a common space in which inter alia fundamental rights and mutual recognition play a major role. Thus, a supranational system of PIL is gradually being forged with the aim of ensuring the continuity of legal relationships duly created in a Member State. As a result, domestic systems of PIL are deemed to become complementary in character. Their conceptualization as a kind of inter-local rules, the application of which cannot raise obstacles to the continuity principle, appears logically conceivable. See Honorati, Free Circulation of Names for EU Citizens, in Dir. Un. eur., 2009, p. 379 ff.; Tsonolo, Il riconoscimento di atti e provvedimenti stranieri concernenti il diritto al nome nell’ordinamento italiano: problemi e prospettive, in Honorati (ed.), Diritto al nome e all’identità personale nell’ordinamento europeo, Milan, 2010, p. 151 ff.; Nascimbeni, Le traité de Lisbonne et l’espace judiciaire européen: le principe de confiance réciproque et de reconnaissance mutuelle, in Revue des Aff. Eur., n. 4, 2011, p. 787 ff.
Deference to State policies and in particular to their *ordre public* exception – implied in the margin of appreciation doctrine – do not allow normative results inconsistent with individual rights. That is regardless of whether there is a common trend amongst States or, on the contrary, whether different approaches feature States’ practice as regards a given social situation. The crucial point is likely not a contraction of the State margin of appreciation in determining its own fundamental values, as some indications of the ECtHR seem to point out. What matters is rather that the level of protection of fundamental rights be carried *around common international values as arising from international instruments*. As a result, the domestic jurisdiction must be open to judgments delivered abroad and more generally to foreign normative values. This leads to a concept of international public policy with strong *transnational* contours because it is founded not on the necessity to preserve the internal coherence of the forum, but rather on the need to make it permeable by human rights values as they are internationally shared and accepted.

### iii) The principle of continuity and the “best interests of the child”

If the required State is to act in a manner to enable a family tie or status to be developed in the forum as it stands abroad, the underlying rationale is that there should be, at least in principle, a line of *continuity* between the legal situation created in the State of origin and the domestic legal order, (85) irrespective of whether the requirements for recognition laid down in the latter point in an opposite direction. In that respect, international protection of human rights begins to emerge as a standard-unifying approach in family PIL. The room for legal relativism, which is typical of conflict of laws, is reduced insofar as international standards operate as a source of unity.

Whenever a status or a family tie duly created abroad is characterized by a solid element of effectiveness, PIL procedures must also take into account the *social reality of the situation* whose recognition (or enforce-

(85) According to the principles set out by the ECtHR in its case-law, where the existence of a family tie with a child has been established, the State is bound to allow that tie to be developed and to establish legal provisions that render possible the child’s integration in his family (see, *mutatis mutandis*, the *Marckx v. Belgium* cit., p. 15, § 31; *Kroon and Others v. The Netherlands* cit., § 32, 36-40).
ment) is sought. It is worth noting that international courts do not consider the fact that quite often the applicants do make recourse to recognition or enforcement techniques in order to circumvent domestic law prohibitions or restrictions. Criticisms in terms of fraude à la loi, though theoretically conceivable under a typical PIL reasoning, are downgraded vis-à-vis the obligation to preserve human rights as internationally guaranteed.

Further the principle of continuity is featured by another crucial element, which has been strongly emerging from international practice, i.e. the “best interests of the child”. It means his real and genuine interest in any specific situation, e.g. when interpreting the institutions of adoption and filiation in PIL. Actually, any decision on the care for a child must be based on a pragmatic assessment of the child’s concrete welfare, while taking into account every element of the case, as even some national case law indicates. It would be highly questionable, for instance, to reco-

(86) See Wagner cit., § 132.
(87) For instance, English judges have granted a parental order in favor of a British couple that had entered into a motherhood surrogacy contract with a Ukrainian woman. Two children were born and conceived by the husband’s gametes and the eggs of an anonymous donor. The English Court, despite the fact that the contract did not respond to the gratuity requirement imposed by UK legislation in such situations, focused on the welfare of children and on the negative consequences to which both would have been exposed in the event of a negative ruling. It held that “What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognized that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child’s welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order” ([2008] EWHC 3030 (Fam), Re: X & Y (Foreign Surrogacy), http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html). Further, “given the effect of a parental order is to confer status for life, it is difficult to see how applying any principle other than welfare with a ‘lifelong’ perspective would be apt in deciding the final discretionary stage of a Section 30 application. I am wholly satisfied on that approach that the welfare of these children will best be served by the making of the parental order sought by these applicants” (ivi, § 24). Even an Italian judge recognized English parental orders with which an Anglo - Italian couple had been assigned in England a parenting status of two children born in 1997 and 2000 through a surrogate motherhood practice. The intended parents had concluded contracts providing for no compensation, according to which a woman led the pregnancy of a fertilized embryo with the husband’s gametes of the same couple. The issue concerning recognition was raised many years after birth when the Italian woman returned to her home country following the dissolution of the marriage. The relationship between the children and the mother therefore presented, in this
gnize and enforce a biological parenthood relationship acquired abroad through surrogacy if the intended parents are elderly or had recourse to such practice for purely selfish motives. A genetic link per se may not establish a sufficient reason to comply with the best interests of the child criterion, unless it is accompanied by a serious commitment to advance the child’s welfare throughout his life. The parent’s interests alone, though based on a genetic link, seem weaker and secondary. These may be personal and human legitimate aspirations, yet they should be considered as a lesser element in relation to the beneficial effects for the child concerned.

In any case, in international commercial surrogacy, the fundamental rights of other persons may be affected, since these arrangements can imply, in particular, the sale of a child under Article 35 of the Convention on the Rights of the Child and the exploitation of surrogate mothers. (88) Moreover, the latter’s rights to be informed and to give the necessary consent for medical procedures (which may be freely withdrawn at any time) have to be respected. (89) Therefore, de iure condendo a large multilateral international convention should conveniently address these issues. (90)

---


(90) It should not only be capable of addressing the international market of surrogacy (which is growing: see Hague Conference on Private International Law, A Preliminary Report on the Issues Arising from International Surrogacy cit., p. 8, and Hausammann, Hitz Quenon, Maternité de substitution: la perspective des droits humains, in Centre suisse de compétence pour les droits humains, Newsletter CSDH of 11 May 2014) but it could also conveniently address the need to protect the fundamental rights of all the persons. It could possibly prohibit any forms of international commercial surrogacy so as to block “the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain” (Report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union’s policy on the matter (2015/2229(INI)), par. 114. Indeed, the European Parliament has condemned “the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial
Quite delicate is also the issue concerning the recognition of the *status filii* in favour of same-sex couples having become parents through international surrogacy arrangements, in particular for States that prevent access to parenthood in such situations, including though adoption. In this regard, so far there is no specific trend in international case law. A further elaboration on these matters will require assessments from the viewpoint of social dignity and the principle of non-discrimination based on sexual orientations. Yet national case law is varied and there is no clear trend that is emerging. (91)

As a rule, the principle of the best interests of the child should prevail and guide the administration of justice in national courts. Judiciary power is expected to value the *superior interests* of the child as a primary criterion for defining the child’s place in family PIL. If refusing the recognition of a family situation duly acquired abroad adversely affects the best interests of the child concerned, a national court, when applying its own system of PIL, should uphold the legal status validly created abroad, corresponding to family life within the meaning of Article 8 of the European Convention. (92) To summarize on this point, respect for family and private life, as

or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments”. See however, for a different approach, TRIMMINGS, BEAUMONT (eds.), *International Surrogacy Arrangements* cit., 647 (sustain the idea of regulating international commercial surrogacy, being it more pragmatic). See also WELLS-GRECO, *The status of Children Arising from Inter-Country Surrogacy Arrangements*, The Hague, 2015.

(91) In Belgium, a male same-sex couple had twin babies through surrogacy in California and returned home with a birth certificate naming both of them as parents. The Belgian registry office refused to register the US birth certificates. In the first instance the Belgian Court determined that the recognition of the US birth certificates violated the national *ordre public*, focusing also on the fact that circumvention of Belgian parentage and adoption laws could not subsequently be legitimized. Non-recognition of the twins’ US birth certificates meant that in Belgium the US surrogate mother is regarded as the child’s legal parent, whereas in the US the Belgian fathers are regarded as the child’s legal parents. On appeal, the Liège Court of Appeal ordered that the birth certificates be recognized and registered at the civil registry, but only as far as the legal relationship with the biological father was concerned. The registration of the legal parenthood of the biological father’s husband was not possible, as he was not a biological parent (see VONK, BOELE-WOELEKI, *Surrogacy and Same-sex Couples in The Netherlands* cit., p. 137). Likewise, see Tribunal Supremo (Sala de lo Civil), 2 February 2015, No 245/2012, in http://www.poderjudicial.es, with interesting arguments concerning how to strike a right balance between the respect for fundamental rights and the prohibition of surrogacy in Spain and comments by DE MIGUEL ASSENSO, *El nuevo Auto del Tribunal Supremo sobre gestación por sustitución y la evolución de la jurisprudencia europea*, in http://pedrodemiguelasensio.blogspot.com.es/2015/03/el-nuevo-auto-del-tribunal-supremo.html#more.

(92) See Wagner cit., § 133. See also Italian case law mentioned by TUO, *The Italian
internationally guaranteed, requires the consideration of the social reality of the situation, having in mind the best interests of the child.

5. It is traditional to present conflict of laws as a system of national decision-making inherently linked to private law and ideologically neutral. Nowadays this picture is far too simplistic and inadequate for our modern era, which is producing another framework. International human rights are important factors for transforming family PIL, since the latter has to measure up to the standards set by the former, like any domestic field of law should. Therefore, respect for family and private life, as internationally guaranteed, shows that dealing with cases having a foreign element is less and less declinable in terms of a self-contained regime merely defined by reference to the classic definitional categories and techniques of national law. International instruments and practice require the departure from the normal functioning of domestic conflict of laws, namely of its recognition and enforcement techniques. It follows that family PIL, being subject to a compatibility test with the rights to private and family life, entails a positive obligation of result aimed at recognizing family status duly acquired abroad.

The influence of international human rights on the conflict of laws is evolving because it tends to bring family PIL systems in a context that is being progressively framed around common principles. Family PIL is not ontologically different from any other field of national law. It is subject to the inevitable oversight of international European standards on human rights. Rather than fearing the fragmentation of PIL, it would be appropriate to consider this ongoing process in terms of a natural evolution and harmonization of the legal systems. In other words, the classic concept according to which PIL assumes juridical relativism as a precondition of its almost unfailing pillar, is subjected to some erosion given the impact of fundamental rights.

The structural principles of PIL are affected. (93) To tackle this challenge, national recognition and enforcement of foreign decisions should be re-shaped around common principles to avoid clashes with the individual need to enjoy a sole family status throughout territories of different States.


(93) Jayme, Il diritto internazionale privato nel sistema comunitario e i suoi recenti sviluppi normativi nei rapporti con Stati terzi, this Rivista, 2006, p. 353 ff., is aware of this ongoing process, raising some critical observations.
The primary role of law, including the discipline of conflict of laws, is to achieve a fair regulation of human society and of its related needs. It goes without saying that the philosophic debate on law and justice contains a double dimension, i.e. ethical and legal. However, the question on PIL justice must be enhanced if this discipline is understood as a means to pursue the fundamental rights of the individual concerned so as to ensure, namely in the field of family, the continuity of personal and family status throughout the frontiers, i.e. the possession d’État beyond a pure national dimension. In that perspective, the distributive justice of PIL cannot but have a secondary and indirect importance since the law, and PIL is no exception, should as a rule pursue the realization of human rights as internationally guaranteed. In order to achieve this intrusion of international law in family PIL, its methodologies for securing the recognition of foreign judgments and public acts in the jurisdiction of the required State are appropriate instruments, capable of ensuring the continuity of personal and family status throughout national borders.

Moreover, the rights of children have acquired a relevant dimension. The UN Convention on the Rights of the Child has proclaimed the child’s right to preserve their identity, including their nationality, name and family relationships. Thus it is not a surprise that in filiation and adoption cases the leitmotiv is primarily set in the child’s interests, and not in the parent’s. A judicial policy of child first implying a primacy of child’s rights appears the ultimate point de repère given that he or she is the most vulnerable.

Enhancing the recognition of personal and family status legitimately acquired abroad enables the circulation of different family models. This is all the more true within the European Union. It follows that overall

(94) Arts 7 and 8 UNCRC.

(95) In the EU, is theoretically conceivable that the EU citizens moving to another Member State expect their personal status and family relationships to be recognized by that State, irrespective of the continued existence of divergences between both the family laws of the Member States and domestic conflict of laws solutions as to the existence or validity of a given personal status or family relationship. The principle of mutual recognition in civil matters assumes a particular value in a common judicial area. It is aimed at realizing not only the judicial protection of rights guaranteed by the treaties on free movement of persons, goods and services. It is also a principle intended to give thickness to the area of freedom, security and justice. In this perspective, the possibility of reconstructing an implied principle of continuity founded on mutual recognition appears all the more important. It could inter alia ensure, regardless of secondary rules that make it operational, the free movement people in a fundamental rights based perspective, able to insert by interpretation the necessary corrective measures to national conflict systems. It is worth adding that the
national legal orders may even have inconsistent determinations. While maintaining their punitive postures as regards, in particular, the commercial practices of surrogacy, or adoptions by unmarried persons, family PIL systems cannot bluntly dismiss the recognition and enforcement of a family status duly acquired abroad when it is founded on a biological tie. As discussed, under certain conditions, fundamental rights as internationally guaranteed prevent States from doing so.

Admittedly, that trend is not without contention in domestic legal orders, quite often mirroring the very different legal traditions within Europe. Personal and family laws are areas of high sensitivity and such processes can be opposed – as they often are – for fears of contamination and, ultimately, of fragmentation of national conflict systems, jeopardizing also their own internal and long-standing coherence. As it is inevitable and comprehensible, national fears are voiced due to interference with domestic ethical principles, as the issue of recognition of *status filii* related to surrogate motherhood dramatically demonstrates.

Yet the overall impact of fundamental rights on family PIL does not mean weakening of the discipline of the conflict of laws. Interestingly, it enriches PIL and its ways of functioning. Individuals and their fundamental rights come at the center of legal analysis. Under this approach, the related normative values and ideals may be and progressively become common to different PIL systems.

The principle of mutual recognition is also conditional to the right to effective access to justice (Art. 81(e) TFEU) which is directly tied to Art. 47 of the Charter of Fundamental Rights. As it seems increasingly clear that the analysis of family ties in a mere PIL perspective, especially if it focused in its technicalities, is insufficient to take into account a complex legal reality which is permeated by the need to ensure certain rights and individual freedoms, and namely the respect of family and private life. It has been correctly remarked that a sound approach to transnational households requires an interdisciplinary perspective (ISAILOVIC, *The ECtHR and the Regulation of Transnational Surrogacy Agreements*, in ejiltalk.org).

It is hardly a surprise that sometimes the evolution of case law raises severe critical comments. For instance, issues of deep ethical, moral, philosophical and religious concern loom large when a plurality of adult figures, conflicting at times with each other, aspires to the possession of the parenthood as regards the same child born by surrogacy. In point of law, in the absence of written rules, the interpreter is called upon to envisage appropriate conceptual constructions to respond to social and medical science that are dramatically dynamic and still evolving. A deep reflection is needed in that respect when foundational principles of family law are challenged by the new frontiers of medical science that tends to give access to parenthood without limits (see also GRUENBAUM, *Foreign Surrogate Motherhood: Mater Semper Certa Erat*, in *Am. Journ. Comp. Law*, 2012, p. 745 ff.).
ABSTRACT: International human rights are important factors in the shaping of private international law in family matters. In fact, the latter has to measure up to the standards set by the former, like any domestic field of law should. Accordingly, respect for family and private life, as internationally guaranteed, shows that a self-contained regime merely defined by reference to the classic definitional categories and techniques of national law is less and less suitable to deal with cross-border cases. In essence this paper, while considering cross-border cases and international practice, argues that fundamental rights prescribe an inherent and positive obligation of result to recognize and enforce a family relationship lawfully created abroad. This approach entails, firstly, a derogation from the proceedings for recognition and enforcement set forth in the national system of PIL, and, secondly, a positive obligation to be fulfilled by public authorities. In this human-rights-based perspective, PIL requirements must then be re-shaped, where possible by means of interpretation, to safeguard the fundamental rights of the individuals concerned.