WOMEN LEGAL STATUS AND PRIVATE INTERNATIONAL LAW

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ABSTRACT: The paper addresses the issues of child marriage and of medical assisted motherhood in a conflict-of-laws perspective, identifying the legal mechanisms through which legal systems counter the phenomenon of early marriages celebrated abroad and address the latest challenges related to the so-called reproductive tourism. After analyzing the role played by public policy exceptions and by the principle of the best interest of the child, we will summarize the Court of justice's case-law on the recognition of family situations across borders. In fact, the recognition of the possession of an EU status is gaining ground. It is a personal identity merely functional to the exercise of EU citizens' freedom of movement (Art. 3 para 2 Treaty EU, Art. 21 Treaty FEU and Art. 45 EU Charter of Fundamental Rights). The result is the possession, by EU citizens, of a split personal identity - one functional to circulation, while the other one to its full extent - whose compatibility with the EU Charter of Fundamental Rights principles and with the ECHR may be called into question.

KEY WORDS: Early marriage; marital status early acquired abroad; reproductive freedom; recognition of parental status acquired abroad; right to continuity of legal status acquired abroad.

RESUMEN: *El documento aborda las cuestiones del matrimonio infantil y de la maternidad médicamente asistida desde la perspectiva del conflicto de leyes, identificando los mecanismos jurídicos a través de los cuales los ordenamientos jurídicos contrarrestan el fenómeno de los matrimonios precoces celebrados en el extranjero y abordan los últimos desafíos relacionados con el llamado turismo reproductivo. Tras analizar el papel desempeñado por las excepciones de orden público y por el principio del interés superior del menor, resumiremos la jurisprudencia del Tribunal de Justicia sobre el reconocimiento transfronterizo de las situaciones familiares. De hecho, el reconocimiento de la posesión de un estatuto comunitario está ganando terreno. Se trata de una identidad personal meramente funcional al ejercicio de la libertad de circulación de los ciudadanos de la UE (Art. 3 apartado 2 Tratado UE, Art. 21 Tratado FEU y Art. 45 Carta de los Derechos Fundamentales de la UE). El resultado es la posesión, por parte de los ciudadanos de la UE, de una identidad personal dividida -una funcional para la circulación y otra en toda su extensión- cuya compatibilidad con los principios de la Carta de los Derechos Fundamentales de la UE y con el CEDH puede ponerse en tela de juicio.*

PALABRAS CLAVE: *Matrimonio precoz; estado civil adquirido anticipadamente en el extranjero; libertad reproductiva; reconocimiento del estado parental adquirido en el extranjero; derecho a la continuidad del estado legal adquirido en el extranjero.*

SUMMARY.- I. EARLY MARRIAGE AND MOTHERHOOD THROUGH MEDICALLY ASSISTED REPRODUCTION FROM A CONFLICT-OF-LAWS PERSPECTIVE.- II. EARLY MARRIAGE AND WOMEN RIGHTS.- III. THE GERMAN EXPERIENCE ON MARITAL STATUS EARLY ACQUIRED ABROAD.- IV. REPRODUCTIVE FREEDOM OF WOMEN AND ACCESS TO ASSISTED REPRODUCTIVE TECHNOLOGY.- V. REPRODUCTIVE TOURISM OF ITALIAN WOMEN AND RECOGNITION OF PARENTAL STATUS ACQUIRED ABROAD.- VI. TOWARDS A EUROPEAN RIGHT TO CONTINUITY OF LEGAL STATUS ACQUIRED ABROAD.

I. EARLY MARRIAGE AND MOTHERHOOD THROUGH MEDICALLY ASSISTED REPRODUCTION FROM A CONFLICT-OF-LAWS PERSPECTIVE.

Among the 17 objectives of the 2030 Agenda, there is - in the social field - gender equality (Objective 5) which provides also the elimination of "all harmful practices, such as marriage of girls, forced and combined" (Target 3) and the protection of women's rights in the reproductive field (Target 6; the protection of sexual and reproductive health is also part of Objective no. 3, health and well-being, Target 7).

These problems can be approached from various perspectives, including the one - admittedly unusual - I propose here: the conflict-of-laws perspective. In other words, I will try to identify the legal mechanisms through which our legal system can contribute to countering the phenomenon of early marriages celebrated abroad and address the latest challenges related to women's reproductive health.

II. EARLY MARRIAGE AND WOMEN RIGHTS.

Early marriage is a global and ancient phenomenon, prevalent mainly in South Asia and sub-Saharan Africa (where almost one in two marriages is under the age of eighteen). In European countries, marriages of under-eighteen-year-olds are not very numerous: however, there are also marriages of under-sixteen-year-olds within marginalized ethnic groups such as Roma and Sinti.

The reasons that lead to early marriage are purely cultural and linked to the role of women in the family and in society. It is estimated that at least 12 million girls marry before the age of 18 each year[1]. As a result of climate change and the

1 U.N. Human Rights Council, Resolution 11 July 2019, *Consequences of child, early and forced marriage*, A/HRC/RES/41/8.

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desertification of previously cultivated areas, UNICEF estimates child brides to be around 1.2 billion in 2050.

The practice has been at the attention of international organizations for some time. In 2014, the UN High Commissioner for Human Rights defined marriage in which at least one of the parties is under the age of 18 as child or early. Child or early marriage is considered forced marriage, given that the minor is presumed not to have expressed his / her full and free consent to the marriage[2].

The UN Human Rights Committee is pressing for States to remove any derogation from the legal age of marriage. However, many States - including Italy[3] - currently seem willing to maintain the possibility of granting ex ante exemptions and ex post amnesties (upon reaching the age of 18).

In the European context, the Council of Europe has taken on the problem since the early 2000s. I will limit myself to mentioning the signature in 2011 in Istanbul of the European Convention on preventing and combating violence against women and domestic violence, which also applies to "girls under the age of 18" (art. 3). The Convention imposes on States the obligation to adopt the necessary legislative or other measures "to ensure that marriages contracted by force can be invalidated, annulled or dissolved" (art. 32), and to provide for all necessary measures " to penalize the intentional act of forcing… a child to contract marriage" (art. 37), extending their jurisdiction in this regard (art. 44). Finally, in 2018, the Parliamentary Assembly reiterated the invitation not to recognize forced marriages except in the case in which recognition responds to the best interests of the person concerned or is invoked ""as a ground for international protection"[4].

As for the EU, particularly significant, for our purposes, is the appeal made in 2018 by the European Parliament to national legislators to uniformly setting the minimum age for marriage at 18, "to align the ... legislation on the treatment of all third-country nationals present in the EU, including migrants married before the age of 18, and introduce a child-oriented case management system to determine

2 Report of the Office of the United Nations High Commissioner for Human Rights, *Preventing and eliminating child, early and forced marriage*, 2 April 2014, UN Doc A/HRC/26/22, 5. See also UN Committee on the Elimination of Discrimination against Women/Committee on the Rights of the Child, *Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices* (2014), UN Doc CEDAW/C/GC/31-CRC/C/GC/18, 7.

3 «The Committee recommends that the State party amend its Civil Code to remove all exceptions that allow marriage under the age of 18 years»: Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Italy*, 28 February 2019.

4 Resolution 2233(2018), points 7.8 e 7.9. The Resolution comes shortly after the *Guide to good and promising practices aimed at preventing and combating female genital mutilation and forced marriage*, adopted by the Steering Committee of the Council of Europe in June 2017.

the best interest of the child and, based on it, what decision to take regarding the legal recognition of the marriage"[5].

III. THE GERMAN EXPERIENCE ON MARITAL STATUS EARLY ACQUIRED ABROAD.

In reality, already before 2018, some European States had passed legislative reforms both on a substantial (criminal, administrative and civil) level and a conflicts of law level[6], also in light of the objectives of the 2030 Agenda. As will be seen, however, it proved very difficult to identify a regulatory solution capable of reconciling the fundamental rights at stake: from equality to self-determination, from respect for private and family life to the best interests of the child, from the freedom of movement of EU citizens to the protection of personal status of the refugee.

As for Italy, the only intervention by the legislator (in the adaptation to the 2011 Istanbul Convention) was the introduction - with the law of 19 July 2019 n. 69 (so-called Red Code) - of the crime of coercion or induction to marriage: art. 558 bis cod. pen. paragraphs 3 and 4, specify, respectively, that the edictal penalty (imprisonment from one to five years) is increased where the offenses committed concern persons under the age of eighteen, and that imprisonment from two to seven years is envisaged in the case of victims under fourteen[7].

From a Private International Law standpoint[8], there is no legislative or jurisprudential intervention in Italy. After all, usually the problem of the recognition of early marriage celebrated abroad arises as a preliminary step (mainly in the case of family reunification[9]) and is mostly cleared up hastily.

5 European Parliament, *Towards an EU external strategy against early and forced marriages – next steps*<TitreType></TitreType> "<Titre>, A8-0187/2018, 24 May 2018. See also European Parliament Resolution of 4 October 2017 on ending child marriage (P8_TA (2017) 0379).</Titre>

6 Campiglio, C.: *Il matrimonio in età precoce nel diritto internazionale* privato, in *Riv. dir. int. priv. proc.*, 2020, p. 767, at p. 779 ff.

7 Provisions of art. 558-bis of the penal code «also apply when the offense is committed abroad by an Italian citizen or a foreigner residing in Italy or to the detriment of an Italian citizen or a foreigner residing in Italy».

8 On the role of private international law in the fight against forced marriages see the document by the EU Agency for Fundamental Rights, *Addressing forced marriage in the EU: legal provisions and promising practices*, 2014, p. 22.

9 Corte di Cassazione, order 5 March 2021 n. 6228, in *Riv. dir. int. priv. proc.*, 2021, p. 1022: the case involved a woman whom an uncle wanted to force into marriage with her deceased husband's brother under Nigerian customary law. See also Corte di Cassazione, order 21 May 2021, n. 31801 (italgiure.giustizia.it), concerning the case of a woman from Gambia who, declaring herself at risk of forced marriage, applied for international protection. Also, it is worth mentioning that, with the implementation of Directive 2003/86/EC concerning the right to family reunification (legislative decree no. 5 of 8 January 2007), no modifications were made to art. 29 of legislative decree 25 July 1998 n. 286 on immigration, according to which alien can request reunification for the «spouse who is not legally separated and who is not younger than 18 years of age». However, a few States resolved to take advantage of the possibility of raising the age level up to the maximum allowed by Directive 2003/86/EC (21 years: art. 4 para 5). After the Netherlands (2004), the United Kingdom (2008) raised the age to 21: the age limit has been brought back to 18 following a decision

Not so in other European countries: Sweden, Norway, Netherlands, Switzerland and Germany.

And it is on Germany that I would like to dwell, as German experience clearly testifies to the complexity of the problem.

Until 2017, in Germany the discipline of the celebration of marriage was found in art. 13 of the Introductory Act to the Civil Code (EGBGB), which referred to the national law of married couples (paragraph 1), without prejudice to the possibility of invoking the general clause of public order (article 6 EGBGB).

In 2017, the law on the fight against early marriages was promulgated (law of 17 July 2017), which introduces in art. 13 EGBGB a new paragraph. Para. 3 establishes that, if the matrimonial capacity is governed by a foreign law, the marriage is - according to German law (and precisely according to the new articles 1303 and 1314 BGB) - ineffective ("unwirksam") if a spouse at the time of the wedding was infra-sixteen-years-old; voidable ("aufhebbar") if she/he had turned 16 but was still under 18.

During the reform works, the German judges found themselves faced with the case of a very young Syrian couple, that also attracted the attention of public opinion. At the outbreak of the war in Syria, two young cousins, H born in 1994 and B born in 2001, decided to flee and, through the so-called Balkan route, in 2015 arrived at a German reception center. The Youth Assistance Office (Jugendamt) decides to take charge of H and instead direct B to a center for unaccompanied minors: the girl is in fact only 14 years old. However, H produces a document certifying the marriage celebrated according to the Sunni rite with B, with whom he asks for reunification. The Jugendamt rejects the request, deeming the marriage to be ineffective (unwirksam). The district court (Amtsgericht Aschaffenburg) authorizes the boy to spend the weekends with her (7 March 2016). However, the decision is annulled by the Higher Regional Court (OLG Bamberg)[10], according to which the Syrian marriage is likely to produce effects in Germany, at least until an annulment decision (the marriage would not be "unwirksam" but only voidable, "aufhebbar": 12 May 2016). The wedding was in fact validly based on Syrian law, applicable pursuant to art. 13 para. 1 EGBGB, a law that sets the marriage age for women at 17 but allows the judge to authorize the marriage of infra-seventeen-years-olds of ascertained physical and sexual maturity: maturity that at the time had actually been ascertained.

of the Supreme Court, who recognized a violation of art. 8 ECHR (R(Quila and other) v. Secretary of State for the Home Department [2011]; R (Bibi and another) v. Secretary of State for the Home Department [2011], UKSC 45).

10 The decision OLG Bamberg, 12 May 2016, is published in *Zeitschr. ges. Familienrecht*, 2016, p. 1270 ff., note Mankowski, P. at p. 1274, and in *Standesamt*, 2016, p. 270 ff., note Coester, M. (*Die rechtliche Behandlung von im Ausland geschlossenen Kinderehen*), at p. 257 ff.

Although substantially in line with the jurisprudential orientation aimed at restrictively interpreting the public order clause (art. 6 EGBGB), limiting its intervention to cases of proven forced marriage or contracted by infra-fourteen, the decision is harshly criticized in legal literature[11], and, as was to be expected, it faces an appeal.

The Federal Court (Bundesgerichtshof) rules on November 14, 2018, confirming the non-contrary to public order of the Syrian marriage, of which in the meantime the cancellation had not been requested. The Court also notes that, pending the judgment, the new art. 13 para 3 EGBGB has entered into force, that goes alongside the general public order clause of art. 6 EGBGB and dismantles its effects relatively to marital age: it is in fact the legislator himself who resolves the conflict with the German rules on matrimonial capacity, replacing the discretionary evaluation of the interpreter. (This seems to be neither the time nor place to discuss whether it represents a special clause of public order or a rule of material private international law).

The Court therefore examines the case on the basis of art. 13 para 3 n. 1 EGBGB going so far as to raise the question of constitutional legitimacy in relation to arts. 1 (human dignity), 2 paragraph 1 (right to the free development of personality), 3 paragraph 1 (equality) and 6 paragraph 1 (protection of marriage) of the Constitution.

Thus, just over one year after its entry into force, the law on the fight against early marriages - introduced to protect the rights of the child - arrives at the Constitutional Court (Bundesverfassungsgericht) for alleged violation of fundamental rights. The Court, after having commissioned the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg to carry out a comparative law study on early marriage, ruled on 1 February 2023. This is a very unusual delay for the judges in Karlsruhe, demonstrating the difficulty of balancing the values at stake. The outcome is a declaration of unconstitutionality for unjustified reduction of marriage protection. The reduction made by the legislature is in fact doubly disproportionate with respect to the objective pursued, i.e. the interests of the child. On the one hand, in fact, the legislature has not regulated the consequences of the nullity of the marriage; on the other, it does not allow the couple to continue the conjugal relationship once they have reached the age of majority (unless they remarry)[12].

11 Looschelders, D.: *Einleitung zum IPR*, in *Staudinger Kommentar zum BGB*, Zürich, 2018, Rn. 667; Von Hein, J.: *Art. 6 EGBGB*, in *Münchener Kommentar zum BGB*, Band 11, München, 2018, Rn. 52; Makowski, M.: Die "*Minderjährigenehe" im deutschen IPR*, in *Rabels Zeitschr.*, 2019, p. 577 ff.

12 The Study has been published in *BVerfG, Beschluss des Ersten Senats* vom 01. Februar 2023 - 1 BvL 7/18 -, Rn. 1-194., 2020, p. 705 under the title *Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht.*

IV. REPRODUCTIVE FREEDOM OF WOMEN AND ACCESS TO ASSISTED REPRODUCTIVE TECHNOLOGY.

To sum up the above, one could say that external factors (the increasing migratory pressure and the consequent transplantation of the early marriage issue in European countries) have prompted EU and national legislators and courts to find a difficult balance between the protection of general principles and that of the concrete interests of individuals.

A similar framework also applies to difficulties faced with the complexities of medically assisted reproduction, surrogacy and reproductive tourism, the external factors being, in this case, the alarm of declining human fertility worldwide and, again, the increased transnational mobility.

As we have seen, Target 6 of Objective 5 on gender equality alludes to universal access to sexual and reproductive health and reproductive rights. In this regard, it should be noted that the reproductive freedom principle has its roots in the context of family planning (in turn initially understood as the freedom to decide the number and interval of births), subsequently transformed - starting with the Conference on Population and Development of the 1994 - in reproductive rights, in turn related to sexual rights[13]. Given that today there is a tendency to connect sexual orientation and gender identity to sexual rights, the issues of reproduction also concern homoaffective couples.

In an article that appeared in March 2021 in the general science journal "Scientific American", a really worrying fact is denounced: the 1% annual reduction in reproductive health, that is the 1% increase in infertility problems[14]. This progression is even faster than global warming and just as upsetting.

In the twenty-year period 2000-2020 the female fertility rate, that is the number of children per woman, has dropped from 2.7 to 2.4 globally: in Western countries the rate is below 1.8 and in Italy it is 1.2, among the lowest in the world. If we consider that replacement level fertility is 2.1 children per woman, it is apparent that in industrialized countries we are heading towards a dramatic demographic decline.

It is commonplace nowadays to mention the interest of future generations. But which and how many future generations are we talking about, if on the one hand more and more couples are giving up parenting for personal or forced choices

13 Reference is to the Action Program of the International Conference on Population and Development (Cairo, 5-13 September 1994), whose Chapter VII is indeed dedicated to «Reproductive Rights and Reproductive Health».

14 Swan, S.H., Colino, S.: *Reproductive Problems in Both Men and Women Are Rising at an Alarming Rate. A likely culprit is hormone-disrupting chemicals*.

(mainly economic problems), on the other hand many couples - even if they are eager to have children and able to support them - fail to get any?

From a public health point of view, it is now evident that a major cause of infertility is the widespread presence of the so-called endocrine disruptors, chemicals that alter the function of the hormone system. These are mainly substances such as phthalates that have started to be used since 1950 - a period from which there is a decline in the fertility rate - and are ubiquitous in modern life: they are found in water bottles, packaging, electronic devices, personal care and cleaning products.

In addition to the responsibility towards the new generations, there is, in short, a responsibility towards the continuity of generations, that is, a responsibility for reproductive continuity.

Thankfully, technological progress now offers a range of options for those unable to reproduce naturally. The bioethical profiles of assisted reproductive technology (ART), which is not the case to address here, have inevitably influenced the national legislators with regard to both the access criteria and the techniques that can be used. The most liberal countries soon turned into a sort of bioethical paradise for intended parents.

In the name of reproductive freedom, today new forms of maternity are configured: by conception without gestation (egg donation), by gestation without conception (so-called uterus for rent), by conception and gestation in the interest of others (when both one's uterus and one's ovum are made available), by mere intention (stipulation of a surrogacy motherhood contract and assumption of parental responsibility of the child).

V. REPRODUCTIVE TOURISM OF ITALIAN WOMEN AND RECOGNITION OF PARENTAL STATUS ACQUIRED ABROAD.

As is well known, in Italy the legislator intervened rather belatedly with a very restrictive law (No. 40 of 19 February 2004): the prohibitions imposed were only partially gradually eliminated by the Constitutional Court. Italy still denies both singles and same-sex couples access to ART, and prohibits post-mortem fertilization and surrogacy (which is even criminally sanctioned).

These limitations push an increasing number of Italians to go abroad and, once they have obtained what is forbidden at home, to ask for the recognition of their parenthood, placing our civil status officers, in the first instance, and judges, secondly, in the face of the "fait accompli".

In the last fifteen years we have witnessed the multiplication of cases for the recognition of parental status obtained abroad in violation of Italian prohibitions. The first case of recognition of surrogacy motherhood (ascription of maternity to the client) granted to a heterosexual couple dates back to 2009[15], the first case of transcription of birth certificates following heterologous fertilization with the indication of two mothers falls in 2014[16], while the first case of rectification of the birth certificate with the indication of two fathers dates 2017 (again surrogacy)[17].

This is not the place to fully analyze the cases. We will therefore limit ourselves to taking stock of Italian current situation.

The picture appears varied, due to the non-univocal reconstruction of the limit of public order (articles 64 and 65 of Law no. 218 of 31 May 1995 on "Reform of the Italian system of private international law")[18]. As for the internal/national environment, so to speak, this limit can be identified, in addition to the constitutional norms, in the norms of constitutionally bound content and/or constitutionally necessary. It all depends on the inclusion of the prohibitions set by law 40/2004 in these categories of rules[19].

However, the limit is also characterized by an external/international facet, represented by principles of international derivation and by the protection of fundamental rights (first of all - in the matter under consideration - by the right to respect for private and family life, sanctioned by art.8 ECHR and taken from art.7 of the EU Charter of Fundamental Rights). The real focus, however, is the principle of the best interest of the child, codified for the first time in the New York Convention on the rights of the child of 20 November 1989[20] and today

15 Court of Appeal Bari, 13 February 2009, in *Riv. dir. int. priv. proc.*, 2009, p. 699 ss. (note Campiglio, C.: *Lo stato di figlio nato da contratto internazionale di maternità*, p. 589 ff.): the ruling was not appealed. See also Corte di Cassazione, 11 November 2014 n. 24001, in *Nuova giur. civ. comm.*, 2015, p. 236 ss.; and Di Blase, A.: *Riconoscimento della filiazione da procreazione medicalmente assistita: problemi di diritto internazionale privato*, in *Riv. dir. int. priv. proc.*, 2018, p. 839.

16 Court of Appeal Torino, 29 October 2014 (in *Giurisprudenza italiana*, 2015, p. 1344; and in *Fam. dir.,* 2015, p. 822), confirmed by Corte di Cassazione, 30 September 2016, n. 19599 (in *Nuova giur. civ. comm.*, 2017, p. 372, note Palmeri, P., and in *Riv. dir. int. priv. proc.*, 2016, p. 813).

17 Court of Appeal Trento, 23 February 2017, in *Fam. dir.*, 2017, p. 669, note Baruffi, M.C.: The decision was appealed and the outcome was overturned: see Corte di Cassazione, Sez. un., 8 May 2019 n. 12193, in *Nuova giur. civ. comm.*, 2019, p. 741; in *Fam. dir.*, 2019, p. 653, and in *Riv. dir. int. priv. proc.*, 2020, p. 369.

18 The limit is also provided for by the decree of the President of the Republic 3 November 2000 n. 396 (Regulation for the revision and simplification of the civil status system), whose art. 18 reads: «Deeds drawn up abroad cannot be transcribed if they are contrary to public order»

19 The Court of Cassation has taken different positions over time in this regard: 11 November 2014 n. 24001, in *Nuova giur. civ. comm.*, 2015, p. 236; 30 September 2016 n. 19599, in *Nuova giur. civ. comm.*, 2017, p. 372; 15 June 2017 n. 14878, in *Nuova giur. civ. comm.*, 2017, p. 1718; (Sez. un.) 8 May 2019 n. 12193, in *Nuova giur. civ. comm.*, 2019, p. 741; 3 April 2020, n. 7668, in *Riv. dir. int. priv. proc.*, 2020, p. 466; 23 August 2021, n. 23319, in *Riv. dir. int. priv. proc.*, 2022, p. 331; 16 February 2022 n. 6383, in *Dir. giust.*, 2022, n. 40, p. 7; order 7 March 2022, n. 7413, in *Dir. giust.*, 2022, n. 47, p. 9.

20 UN Committee on the Elimination of Discrimination against Women/Committee on the Rights of the Child, *Joint General Comment* cit., *supra* note 2. According to art. 3, para 1, of the Convention on the Rights of the Child «(i)n all actions concerning children, whether undertaken by public or private social welfare

generally recognized and, for this reason, risen to constitutional status in Italy (pursuant to art. 10 of the Constitution).

The interpretative-systematic value of the principle in question[21] was enhanced by the ECHR which promoted a child-oriented interpretation of a text - the ECHR - that is markedly adultcentric. Leading case is undoubtedly the one addressed in 2007 (Wagner) concerning the (non) recognition in Luxembourg of the Peruvian adoption measure obtained by a Luxembourg woman in contrast with her national law which prohibits adoptions by individuals[22]. The Strasbourg Court goes so far as to "deactivate" the limit of Luxembourg public order precisely in the name of the child's best interest in the continuity of the de facto family relationship created in Peru following the adoption[23].

However, the fact that the interest of the child must be the subject of priority assessment does not imply that the State must mechanically recognize a status validly acquired abroad nor does it consequently determine the standardization of a given family model. The principle of the best interest of the child simply imposes on the State authorities a "standard-harmonizing approach" in family matters [24].

What has been said is confirmed in the recent position taken by Italian Constitutional Court, according to which the interest of the child cannot be considered "automatically prevailing over any other counter-interest at stake" (the best interest of the child is not tyrant!) but must be balanced with other fundamental rights: if this were not the case, its unlimited expansion would occur and that of the child "would become a tyrant against other juridical situations that are constitutionally recognized and protected, which together constitute an expression of dignity of persons"[25]. It is just the delicacy of the interests at stake that calls for a legislative intervention.

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration».

21 «The best interests of the child: a right, a principle and a rule of procedure»: *General Comment no. 4 (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3 para 1)*, CRC/C/GC/14, 29.05.2013, para 1 ff.

22 European Court of Human Rights, 28 June 2007, Wagner and J.M.W.L. v. Luxembourg, no. 76240/01 (https://hudoc.echr.coe.int/eng?i=001-81328).

23 The Court, on a subsequent occasion, observed that the limit of public order «the reference to public order could not, however, be considered as giving *carte blanche* for any measure, since the State had an obligation to take the child's best interests into account irrespective of the nature of the parental link, genetic or otherwise»: European Court of Human Rights, 27 January 2015, Paradiso and Campanelli v. Italy, no. 25358/12, in *Nuova giur. civ. comm.*, 2015, p. 828 (point 80). The Grand Chamber of the European Court also ruled on the case: judgment, 24 January 2017, in particular point 110.

24 See, among others, Baratta, R.: *Recognition of a foreign* status filii. *Pursuing the Best Interests Principle*, (edited by Bergamini E., Ragni, C.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge/Antwerp/Chicago, 2019, p. 171 ff., at p. 178.

25 «Tutti i diritti fondamentali tutelati dalla Costituzione si trovano in rapporto di integrazione reciproca e non è possibile, pertanto, individuare uno di essi che abbia la prevalenza assoluta sugli altri… La tutela deve essere sempre "sistemica e non frazionata in una serie di norme non coordinate ed in potenziale conflitto tra loro". Se così non fosse, si verificherebbe l'illimitata espansione di uno dei diritti, che diverrebbe

VI. TOWARDS A EUROPEAN RIGHT TO CONTINUITY OF LEGAL STATUS ACQUIRED ABROAD.

What conclusions to draw? The first conclusion is that it is not certain that the legislative path (advocated by the Constitutional Court for the surrogacy) be really the most suitable for addressing the issues raised by child brides and medically assisted mothers. Indeed, the legislator would hardly be able to provide a satisfactory solution through mandatory clauses: clauses that are certainly appreciable from a practical point of view - due to the mechanical nature of application and the predictability of the decision - but, just for this reason, potentially draconian. The traditional case by case approach - typical of the general public-order clause, often criticized precisely for its vagueness - is still the most suitable for reconciling the various interests at stake, through the assessment of the circumstances of the specific case (exemplary the German experience relating to early marriage). A more suitable approach, surely, but increasingly complex to manage. Alongside national identity values and international values, the need to also consider European values, and specifically the rights provided by the Treaties for EU citizens, is increasingly evident, starting with the right to move and reside freely in the territory of Member States (art. 3 para 2 TEU, art. 21 TFEU and art. 45 Charter of Fundamental Rights).

In the last twenty years, in fact, the Luxembourg judges have begun to employ the method of recognition[26] (also) in order to eliminate obstacles to the movement of persons: at first restricted to the right to continuity of the name[27], now the practice also concerns the right to continuity of family status. The reference is to the Coman case of 2018 (relating to the recognition in Romania of same-sex

"tiranno" nei confronti delle altre situazioni giuridiche costituzionalmente riconosciute e protette, che costituiscono, nel loro insieme, espressione della dignità della persona» (Constitutional Court, 9 May 2013 n. 85, in *Nuova giur. civ. comm.*, 2013, p. 867).

26 Mayer, P.: "Les méthodes de la reconnaissance en droit international privé", *in Le droit international privé: esprit et méthodes. Mélanges P. Lagarde*, Paris 2005, p. 547 ff.; Baratta, R.: *La reconnaissance internationale des situations juridiques personnelles et familiales*, in *Recueil des Cours*, t. 348, 2010, p. 253 ff.; Lagarde, P.: *La méthode de la reconnaissance est-elle l'avenir du droit international privé?*, in *Recueil des Cours*, t. 371, 2014, p. 9 ff.; Baratta, R.: *Recognition of Foreign Personal and Family Status: A Rights Based Perspective,* in *Riv. dir. int. priv. proc.*, 2016, p. 413; Davì, A.:, *Il riconoscimento delle situazioni giuridiche costituite all'estero nella prospettiva di una riforma del sistema italiano di diritto internazionale privato*, in *Riv. dir. int.*, 2019, p. 319.

27 Court of justice, 2 October 2003, c. 148/02, Garcia Avello v. Belgian State (https://curia.europa.eu); 14 October 2008, c. 353/06, Stefan Grunkin e Dorothee Regina Paul (https://curia.europa.eu); 22 December 2010, c. 208/09, Ilonka Sayn-Wittgenstein contro Landeshauptmann von Wien (https://curia.europa.eu); 12 May 2011, c. 391/09, Runevic-Vardyn and Wardyn (https://curia.europa.eu); 2 June 2016, c. 438/14, Nabiel Peter Bogendorff von Wolffersdorff (https://curia.europa.eu); 8 June 2017, c. 541/15, Mircea Florian Freitag (https://curia.europa.eu). According to settled case law, a restriction on the free movement of individuals can only be justified if it is proportionate to the general interest pursued by the national law (judgments 14 October 2008, Grunkin cit., point 29; 22 December 2010, Sayn-Wittgenstein cit., point 81; 2 June 2016, c. 438/14, Bogendorff von Wolffersdorff c. Standesamt der Stadt Karlsruhe, point 48, https://curia.europa.eu). In this perspective, the fight against early marriages could perhaps be considered as a legitimate aim on the part of the State (also in the light of art. 24 of the Charter of Fundamental Rights of the Union) and therefore as a cause for justifying the limitation on freedom of movement.

marriage celebrated in Belgium by a Romanian citizen)[28] and to the Stolichna Pancharevo case of 2021 relating to the recognition in Bulgaria of the Spanish birth certificate designating two mothers as parents (one Bulgarian and the other English)[29].

In short, EU citizens have the right to move while maintaining the status validly acquired in another Member State, even if in contrast with the national legislation / identity of the country of destination.

Therefore, the marriage celebrated in Estonia (where the marriage age is 15) between a fifteen- years-old Estonian and a twenty-years-old Italian should be recognized in Italy.

Similarly, for the purposes of free movement of EU citizens, the parental status of a) the two mothers (of which at least one EU citizen) of the child born in Spain, and – consistently - b) of the client mother, should be recognized.

The conclusion is, in short, that those who wish to have their marital and parental status recognized can follow two paths: the traditional path *vs* the high-speed path (to draw on a railway metaphor).

The traditional way makes use of a track that is slow, however able to reach all goals: it requires verification of compliance with public order but allows to exercise all the rights deriving from local legislation (rights of either personal or patrimonial nature) and therefore to obtain full recognition of family status. It is a path accessible to all, regardless of citizenship.

To this the Court of justice has added a high-speed track, which does not require any control: not everyone can use it as it is reserved for EU citizens, and it is limited in scope to the exercise of the freedom of movement and residence within the territory of the EU.

It follows that EU citizens, in addition to dual citizenship (national and European), have got a dual personal identity: the full one plus one merely functional to the exercise of rights related to EU citizenship. This situation, though,

28 Court of justice, 5 June 2018, c. 673/16, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne (https://curia.europa.eu), points 35, 37, 38, 45 e 46.

29 Court of justice, 14 December 2021, c. 490/20, V.M.A. v Stolichna obshtina, rayon „Pancharevo", specifically point 68 (https://curia.europa.eu): see also the Opinion of Advocate General Kokott, 15 April 2021, points 61, 108 e 154. See Kohler, C.: *Status und Mobilität in der Europäischen Union*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2022, p. 226; e Feraci, O.: *Il riconoscimento «funzionalmente orientato» dello* status *di un minore nato da due madri nello spazio giudiziario europeo: una lettura internazionalprivatistica della sentenza Pancharevo*, in *Riv. dir. int.*, 2022, p. 564. A few months later, the Court ruled in the same sense in a case originating from the refusal by the Polish authorities to transcribe a Spanish birth certificate bearing the indication of a Polish «mother A» and an Irish «mother B» (order 24 June 2022, c. 2/21, Rzecznik Praw Obywatelskich, https://curia.europa.eu).

is destined to produce distorting effects at the level of private international law. In fact, unprecedented "limping" relationships emerge: unprecedented as the limp manifests itself not – as could traditionally happen - at a transnational level (meaning that a person is considered married / parent in State A but not married / parent in State B) but at the national level (in the sense that a person is considered in State A married / parent for the purposes of movement and residence within the EU but not married / parent for private purposes). In short, it is not international harmony that is compromised but the very internal harmony of member States' legal systems.

Considering also that the possession of a double identity is probably contrary to the EU Charter of Fundamental Rights and to the ECHR (personal identity is the social projection of the individual's personality in its uniqueness), will the Court of justice go as far as to recognize the full effect of the status acquired abroad by EU citizens, reaching the point of disavowing the national identities of Member States?

The answer to this question (the scope of which is actually broader than the cases of early wives and medically assisted mothers) is closely linked - at least as regards parenthood - to the developments of the initiatives launched by the Hague Conference on Private International Law but above all by the European Union. The EU Commission recently presented a Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood[30]. Children (or their legal representatives) can request a European Certificate of Parenthood and use it to provide evidence of their parenthood in another Member State. The Proposal covers the recognition of the parenthood of a child irrespective of how the child was conceived or born and irrespective of the type of family of the child: at least for the purposes of free movement within the European Union, the recognition of the parenthood of a child with same-sex parents thus is included.

30 Brussels, 7.12.2022, COM (2022) 695 final.

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