EUROPEAN CITIZENSHIP: OPPORTUNITIES AND ABUSES IN PRIVATE INTERNATIONAL FAMILY LAW

CIUDADANÍA EUROPEA: OPORTUNIDADES Y ABUSOS EN EL DERECHO DE FAMILIA INTERNACIONAL PRIVADO

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ABSTRACT: The essay focuses on the role of legal autonomy in the regulation of family status and family relations between members of the typical or atypical family unit. Indeed, the role of legal autonomy has also been expanded by European citizenship understood by the European Court of Justice as an autonomous source of rights. This citizenship, which is added to the national one, has allowed the "static" couple, even in the absence of the transnational character of the family situation, to choose the law and the instruments of foreign legal systems to be applied to the patrimonial and existential relations of the community of life. The essay aims to demonstrate how the EU family regulations can also apply to "static" European citizens, allowing the choice of foreign laws with solutions unrelated to national law, in compliance with the constitutional public order limit of each member country.

KEY WORDS: Status family; family relations; legal autonomy; "static" European citizens.

RESUMEN: *El ensayo se centra en el papel de la autonomía jurídica en la regulación del estado familiar y las relaciones familiares entre los miembros de la unidad familiar típica o atípica. De hecho, el papel de la autonomía jurídica también ha sido ampliado con la ciudadanía europea, entendida por el Tribunal de Justicia de la Unión Europea como una fuente autónoma de derechos. Esta ciudadanía, que se suma a la nacional, ha permitido a la pareja "estática", aún en ausencia del carácter transnacional de la situación familiar, elegir la ley y los instrumentos de los ordenamientos jurídicos extranjeros a aplicar al ámbito patrimonial y a las relaciones existenciales de la comunidad de vida. El ensayo tiene como objetivo demostrar cómo las regulaciones familiares de la UE también pueden aplicarse a los ciudadanos europeos "estáticos", permitiendo la elección de leyes extranjeras con soluciones no relacionadas con la ley nacional, de conformidad con el límite constitucional de orden público de cada país miembro.*

PALABRAS CLAVE: *Estado familiar; relaciones familiares; autonomía jurídica; ciudadanos europeos "estáticos".*

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I. PRELIMINARY CONSIDERATIONS.

The paper examines the role of legal autonomy in the regulation of family status and relationships in light of the fact that the European Court of Justice, on the basis of European citizenship, has allowed the application of European Private International Law to situations without a cross-border character.

So, the core question is: to what extent can European citizenship allow the use of instruments provided for in legal systems other than those of national citizenship?

II. INTRODUCTION.

Article 3, Paragraph 2, of the Treaty of Lisbon (TEU) clarified some of the relevant aspects related to European citizenship, including "offering" to "its citizens an area of freedom, security and justice without internal borders".

The main rights linked to the status of a European citizen are listed in Article 20 of the Treaty on the Functioning of the European Union.

This article states:

"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States […]".

The European Court of Justice has endowed the status of the European citizenship with superior and autonomous rights when compared to national

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citizenship. Over time, it has transformed citizenship "from a merely symbolical gesture to an independent source of rights for Member State nationals"[1].

European jurisprudence has identified an autonomous set of rights linked to European citizenship, independent of, and sometimes prevailing over, national citizenship.

II. LEGAL AUTONOMY IN EUROPEAN PRIVATE INTERNATIONAL LAW.

In order to guarantee and facilitate the free movement of persons within the territories of its member States, the European Union has regulated matters, traditionally not associated with citizenship, such as divorce, parental responsibility[2], maintenance claims[3] and patrimonial family relations[4].

Important new principles about applicable law stem from Private International Law and European legislation[5].

In European international law the *pactum de lege utenda* has been transformed into the priority criterion of general application to identify the applicable law in many areas, including within family relationships.

1 Van Elsuwege, P.: "Shifting the Boundaries? European Union and the Scope of Application of EU Law", Legal Issue of Economic Integration, 2011, p. 263 ss.

2 Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Regulation that will be replaced starting from 1st Agust 2022, by Regulation 2019/1111 adopted on 25th June 2019. Council Regulation (EU) No 1259/2010 of 20th December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in *www.eur-lex.europa.eu*

3 Council Regulation (EC) No 4/2009 of 18th December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in *www.eur-lex.europa.eu*

4 Council Regulation (EU) 2016/1103 of 24th June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Council Regulation (EU) 2016/1104 of 24th June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. See all in *www.eur-lex.europa.eu*

5 The choice of law sometimes becomes the means to overcome the obstacles linked to the lack of equivalence between national rights and the election of the forum instrument for "*désactiver l'impérativité*" of national legislative prohibitions. Thus, Hammje, P.: "Ordre public et lois de police limites à l'autonomie de la volonté", in *L'autonomie de la volonté dans les relations familiales internationals* (ed. A. Panet, H. Fulchiron, P. Wautelet), 2017, p. 112 ff. which highlights how european discipline, in order to ensure certainty and predictability of the applicable law, strongly frames the use of defence mechanisms through which Member States or participants in enhanced cooperation can protect national public policy. All the European regulations in family law present the only reserve of the public policy exception not to safeguard the national conceptions of the Member States, but to promote a real *ordre public européen de la famille* which not only transcends, but can wipe out the diversity of national conceptions (p. 130). See, e.g., recital 54 of Regulation No. 1103 of 2016. In relation to public policy as a protection for the various national conceptions, regulations are generally expressed in this way "The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum" Art. 31 of Reg. 2016/1103. Only Council Regulation (EC) No 4/2009 of 18th December 2008 (concerning the regulation of maintenance and divorce obligations) provides for the instrument of compliance with the mandatory rules of the forum.

Recent indications by the European legislator point in the direction of mutual recognition of measures, decisions or acts perfected abroad[6].

In this regard, the Regulation (EU) n. 2019/1111 (which will come into force on 1st August 2022), provides in Article 65 for the automatic recognition, without the need of any *exequatur*, of "privileged decisions" also on parental responsibility and those on the so-called private divorces.

The choice as between several applicable laws or the choice of the mechanism of recognition opens the door wide to the phenomenon of forum or system shopping, and this even with regard to "static" European citizens married or living together (who are not transnational families)[7].

The condition of the cross-border element, once considered a dogma, is now, as a result of the use (or judicial interpretation) of European citizenship, assimilated to purely internal situations.

Pursuant to Article 31 of Regulation (UE) 2016/1104, a restriction may be applied in exceptional cases: for example, if Islamic law, which allows polygamous marriage, repudiation of marriage or the marriage of child brides, were to be applicable.

For example, Article 22 of (UE) Regulation 1104/2016 allows "static" couples to choose the place of registration of the union and so to choose the substantive law applicable to their property relations also in the eventuality of the break of the union.

Exactly as happened for Italian static couples married through the use of the so-called Regulation Brussels II-*bis* in order to be able to obtain immediate divorce.

Therefore, a *quaestio iuris* arises:

"Is it possible that through the abuse of the rights connected to European citizenship, the couple might evade the application of an unavailable national law?"

The answer is "no" if the application of foreign legislation is in compliance with the constitutional public order (*lex fori*).

6 Council Regulation (EU) 2016/1103 of 24th June 2016 cit.; Council Regulation (EU) 2016/1104 of 24th June 2016 cit.

7 The Court of Justice examined the rejection of applications for residence submitted by parents for the purposes of family reunification with their children as "static" european citizens. ECJ 5th May 2011, Case C-434/09, Shirley McCarthy; ECJ 15th November 2011, Case C-256/11, Murat Dereci; ECJ, 8th November 2012, Yoshikazu Iida; ECJ 6th December 2012, Cases C-356/11 and 357/11, O. and S.; ECJ 8th May 2013, Case C-87/12, Kreshnik Ymeraga; ECJ 10th October 2013, Case C-86/12, Adzo Domenyo Alokpa; ECJ, 13th September 2016 Case C-165/14, Redòn Marìn, para. 81, Case C-304/14, CS, para. 36 respectively.

In this way, the distinction between cross-border and purely internal situations is blurred[8].

III. CONCLUSIONS.

One still has to identify the potential limits imposed by public order concerning the choice of the applicable law provided by EU Regulations to static citizens. Not all situations of non-derogation derived from the Italian law are characterized by unlawfulness.

An infringement of the constitutional public order can be detected only if the effects of the foreign applicable law violate the fundamental rights and freedoms of the individuals.

In relation to the direct application of the fundamental principles of the human person, the European Court of Human Rights in Strasbourg espouses, in its judgments, the fundamental importance of the prohibition of discrimination on grounds of sex, gender or similar status[9].

This was echoed by the Advocate General of the Court of Justice in relation to a case of repudiation under *Sharia* law, which does not give the wife equal conditions of access to divorce.

8 See Pagano, E.:, *La rilevanza della cittadinanza e dell'unità della famiglia nella recente prassi della Corte di giustizia in tema di ricongiungimento familiare*, *Il diritto dell'Unione Europea*, 2017, 279 ff.

9 Thus, Strasbourg Court 22th march 2012 Konstantin Markin v. Russia Para. 150 (in *www.echr.coe.int*). This statement is recalled in the judgment of the Grand Chamber, 19th December 2018, given for the case of Molla Sali v. Greece concerning the application of the sacred law of Islam (*sharia*) to a succession dispute, although the *de cujus* (a Greek of the Muslim minority) had made a will according to Greek civil law. However, in paragraph 160, the Court inexplicably refers to marriage and divorce "le 15 janvier 2018, la loi visant à abolir le régime spécifique imposant le recours à la charia pour le règlement des affaires familiales de la minorité musulmane est entrée en vigueur. Le recours au mufti en matière de mariages, de divorce ou d'héritage ne devient désormais possible qu'en cas d'accord de tous les intéressés (paragraphe 57 ci-dessus). Cela étant, les dispositions de la nouvelle loi n'ont aucune incidence sur la situation de la requérante, dont le cas a été tranché de manière définitive sous l'empire du régime antérieur à celui prévu par cette loi". The sentence reports the "contrary voices" to the repudiation. See e.g. para. 83 of the judgement, in which the Court points out that "Dans un autre État (Royaume-Uni), en Mai 2016, le gouvernement a commandé une étude indépendante en ce qui concerne l'application de la charia (en Angleterre et au pays de Galles) afin d'examiner «s'il était fait un mauvais usage de la charia et si celle-ci était appliquée de manière incompatible avec le droit interne de l'Angleterre et du pays de Galles et, en particulier, s'il y avait des pratiques discriminatoires contre les femmes qui avaient recours aux tribunaux islamiques affiliés à une mosquée locale (sharia councils). Dans son rapport de février 2018, l'étude indépendante a constaté que les sharia councils n'avaient pas de statut juridique, ni de pouvoir juridique contraignant en vertu du droit commun. Alors que la charia était une source de conduite pour nombre de musulmans, les sharia councils n'avaient pas de compétence juridictionnelle en Angleterre et au pays de Galles. Ainsi si les sharia councils prenaient de décisions ou faisaient de recommandations incompatibles avec le droit interne (y compris avec les politiques en matière d'égalité, telle que la Loi sur l'Égalité de 2010), le droit interne devait prévaloir. Les sharia councils agiraient illégalement s'ils tentaient d'écarter l'application du droit interne. Même s'ils ne revendiquent pas un pouvoir juridique contraignant, ils disposent en réalité d'une capacité décisionnelle dans le domaine du divorce islamique".

If the husband is granted a right to divorce unilaterally, this right is denied to the wife who may resort to a judicial divorce on the basis of specific conditions, namely a husband's illness or disease.

In his Opinion in Case C-372/16, finally decided by the Court on 20th December 2017[10], Advocate General Saumandsgaard Øe, points out that the wife's prior consent to repudiation cannot affect and cannot overcome the violation of the principle of non-discrimination on grounds of sex.

The ban on child brides (under the age of 16) laid down by the German law *Gesetz zur Bekämpfung von Kinderehen* moves in this direction.

So, to sum up, there is no blanket general prevalence of the European Private International family law over national law.

Grounds of public order based on the safeguarding of fundamental principles of national law may allow national authorities to refuse recognition, in whole or in part, of the effects deriving from law "abusively" chosen by family members.

The Italian Constitutional Court, with the judgment number 269 of 2017, postulated that the violation of human rights requires an *erga omnes* intervention placed above the decisions on the basis of the preliminary reference by the Court of Justice.

10 Thus, Strasbourg Court 22th march 2012 Konstantin Markin v. Russia Para. 150, recalled by the Advocate General in his Opinion delivered on 14th May 2017 in Case C-372/16 decided by the Court of Justice on 20th December 2017, cit. which claims the irrelevance of the consent expressed by the spouse discriminated against, given the breach of the fundamental principle of non-discrimination.

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