

EUROPEANIZATION OF PUBLIC POLICY IN INTERNATIONAL FAMILY LAW—OVERRIDING NATIONAL VALUES OR GRADUAL HARMONIZATION?

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ABSTRACT

The research paper examines European public policy in cross-border family law in Europe as established by the jurisprudence of the European Court of Human Rights and the Court of Justice of the EU. The goal is to identify recent case law and to review on which family matters the European public policy has already been created, on the one hand, and for which questions the development is slower and why, on the other hand. The normative and comparative methods are predominantly used in the paper to conduct a qualitative assessment. The analysis shows that the European public policy is at an advanced stage of development on same-sex communities and family name, in an early stage of development on surrogate motherhood and non-existing on private divorces conducted under Islamic law. The reasons confirm discussions in the literature on movement from status to contract law in family law matters except for same-sex communities, but also predict a slower development of the European public policy in times of the COVID-19 and economic crisis.

Keywords: Public Policy, EU Private International Law, Surrogate Motherhood, Private Divorce.

INTRODUCTION

The research paper examines the Europeanization of public policy in cross-border-family cases in European states. The creation of a “*European public policy*” in Europe is mainly conducted through the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU). Therefore, this research focuses on their jurisdiction on cross-border-family cases. The goal is to analyze in which areas of international family law in Europe the public policy has been invoked by national states taking in last decade. This means that EU legislation will not be analyzed, because the EU legislation focuses on jurisdiction, applicable law and recognition and enforcement of judgments in family matters, but does not address a unified European public policy. For each area of family law it shall be concluded if the two European courts have decided to create a European public policy on the family matter at hand or if they have decided to maintain the discretion of national states to invoke national public policy. Conclusions on the possible reasons why on certain matters the two European

courts have restrained from developing a uniform European public policy shall help establish a future recommendation and point to future developments.

LITERATURE REVIEW

Earlier literature on the topic of European public policy had the goal to prove that European public policy exists (Duraković, 2008). The idea was first expressed in the 50-ies by the German legal scholar Neuhaus (Neuhaus, 1962). It was revolutionary, because at that time the public policy had a purely national character, so it was considered that there are as many public policies as there are national states. Today under this term we understand the common legal principles which form an inseparable part of the legal orders of European states, including the EU Member States (Meškić & Đorđević, 2018). Therefore, this paper takes a starting point the premise that the existence of a European public policy as an additional public policy to national public policies in Europe is undisputed by now.

The more recent research was focused on more party autonomy in family law, calling it a shift from status to contract law (Swennen, 2017; Neidhardt, 2018). Building up on this discussion, in this paper we will analyze cases of the CJEU and ECHR in the area of the right to a family name, the same-sex partnerships and surrogate motherhood and make conclusions on the positioning between contract and status. With the migration crisis the analysis in the literature partly shifted to cross-border family disputes involving Islamic states (Sportel, 2016; Struycken, 2018; Stikāne, 2019). This will be reflected in this paper as well in the analysis of a case decided by the CJEU involving a recognition of private divorce from Syria in Germany. Finally, following the Brexit and the economic crisis the analysis of a general decrease of acceptance of CJEU and ECHR decisions by European states was conducted very recently (Walker, 2019; Breuer 2019). The analysis of the crisis of acceptance of ECHR judgments involves states such as Germany, Italy, Austria, Switzerland and Russia. The findings will be considered when analyzing the grounds for which ECHR and CJEU restrain from creating a uniform European public policy more effectively. This development is predicted to go even further after the economic crisis cause by COVID-19.

METHODOLOGY

The normative method was used to identify case law of the ECHR and CJEU on European public policy in cross-border family law and the content review to analyze it. The case law identified on this matter concerns the public policy of Germany, Denmark, Great Britain, Croatia, Austria, Spain, Belgium, Lithuania and Poland, so a comparative method is used to draw conclusions for the European public policy. The cases further involve decisions from U.S and Syria.

The dogmatic method will be used to understand the reasons why the European courts include certain aspects of international family law in the European public policy and leave some others to national public policy. Conclusions on future development will be based on this understanding.

A Uniform European Public Policy?

The primary place in the creation of European public policy is taken by European convention for the protection of human rights and fundamental freedoms of 1950 (ECHR) which represents a correction mechanism for all European states, the Charter of fundamental rights of the EU of 2009 (CFR) as an integrated part of primary law of the EU for all EU Member States (Župan, 2016). ECHR represents a common European system of protection of fundamental rights, and the fundamental rights that it contains we may consider today to be the nucleus of fundamental rights (Looschelders, 2001) from which a European public policy is developing and eventually will be developed (Pfeiffer, 2004). In addition, EU market freedoms play an important role, not only in EU Member States, but also to a certain extent in other European states who signed an Association Agreement with the EU (Meškić & Samardžić, 2015).

The strive towards Europeanization of public policies is connected to the hope that the criteria for the application of the public policy in Europe will become more and more similar, and will at least on a regional level, bring the harmony in decision making process (Helms, 2017). It is a tense relationship between the goal of international harmony of private laws on the one side and the insisting on international sovereignty on the other (Oster, 2015). The European public policy should in the future become an instrument of unification of different substantive rules in European states, especially in EU Member States, it should contribute to the integration processes and ensure the implementation of EU law (Reichelt, 2007).

The influence of human rights over the institute of public policy is the strongest in the field of family law (Brosch, 2020). This is understandable, because this legal field was and still is, one of the fields in which the existing differences in its legal regulation are a result not only of different socio-economic conditions in particular states, but also a result of morals, traditions, religion, customs etc. This is the exact reason why there is no such strong interest of states for one global unification in this field, like we can find it in the field of commercial contracts. Some authors consider family law to be an „emotionally overloaded legal field (Bangemann, 1994), or a *“nucleus of national legal values”* (Luther, 1981).

The substantive law provisions of family law, which call for the involvement of public policy, because they endanger the national understanding of equality of men and women, the freedom to conclude a marriage, the protection of best interest of the children, the protection of private and family law, are related to the questions of polygamy, talaq-repudiation, children marriages, homosexual marriages (Krešić et al., 2017), and surrogate motherhood. In such cases it is important to find a compromise between the respect of cultural diversity, on the one hand, and the standards of protection of human rights, on the other hand. In the following lines it will be analyzed if the ECtHR and CJEU have found the right balance by creating a European public policy where appropriate and leaving certain matters to the national public policy.

Forming the European Legal Policy by Practice of the ECtHR

ECHR is the leading instrument for human rights protection in Europe. The most important provisions on international family law are art 8 ECHR-the right to respect for private and family life; art 12-the right to marry, and art 14-prohibition of discrimination, as well as art 5 of the Protocol 7 ECHR-right to equality between spouses. The most important body for protection of rights under the ECHR is the ECtHR which by its practice advanced the notion of

how a certain social relationship needs to be regulated. The decisions of ECtHR are obligatory and thereby contribute to the creation of general legal standards and principles, and consequently also on the content of the European legal policy. The foreign applicable law will not be applied, or a foreign decision will not be recognized if it has as a consequence of endangering of fundamental rights.

The analysis of the jurisprudence of ECtHR shows that the European public policy has been formed in the area of same-sex communities and surrogate motherhood. However, the results in the two matters are quite opposite- while in the area of same-sex communities the jurisprudence is striving towards granting family status, in the field of surrogate motherhood the development aims towards party autonomy and contracts. In addition, for same-sex communities ECtHR developed a firm position and almost completely lifted this matter to the level of a European public policy with a very narrow discretion by national states. On the other hand, surrogate motherhood is slowly developing and is still under strong influence of a national understanding.

The same-sex communities represent a very dynamic field in the practice of the ECHR, within the context of art 8 ECHR. A same-sex couple that lives in a stable relationship is encompassed by the notion of private and family life in the same manner as a heterosexual couple. This principle was firstly established in the case “*Schalk and Kopf vs. Austria*” from 2010 (Cases) in which the ECtHR found it artificial to insist on the opinion that a same-sex couple could not enjoy family life, differently than a heterosexual couple within the meaning of art 8 ECHR. Consequently, the cohabitation of a same-sex couple which lives in a stable *de facto* partnership is covered by the term family life, the same way the different-sex relationship is in the same situation (Krešić et al., 2017). ECHR therefore concluded that there has been a violation of art 14 in conjunction with art 8 ECHR. In the case “*Pajić vs. Croatia*” from 2016 (Cases, 2016) the applicant (a national of Bosnia and Herzegovina) asked in December 2011. the permission for temporary residence with the purpose of family reunion, considering that for several years she has a stable relationship with a same-sex partner from Croatia. The police rejected the application with reference to the Law on foreigners which does not consider such a relationship a family relationship. ECtHR has put such stable relationships within the scope of application of the term „family“ and did not find any justification for the discriminatory terms of the Law on foreigners. Thus, ECtHR concluded that art 14 in conjunction with art 8 ECHR was violated. A very recent opinion was adopted by ECtHR in the case *Oliari et al. vs Italy* (Cases, 2015) where it concluded that same-sex couples are equally capable of entering into a stable and continues relationship, and thereby confirmed the fundamental right of same-sex couples for legal recognition, by concluding that art 14 in conjunction with art 8 ECHR was violated. In addition, ECtHR requested that a law needed to be adopted on same-sex partnerships which was then later adopted in Italy on 10 June 2015. Soon after that a decision of the ECtHR was adopted in the case “*Orlandi et al. vs Italy of 2017*” (Cases, 2017) that was about a refusal of registration of same-sex marriages in foreign countries. ECHR firstly emphasized that national states are still free to limit the marriage only to different-sex couples, but that same-sex couples have the right to ask for recognition and protection of their relationship. The decisions which refuse recognition of such relationships in any form, deprive the applicants from any recognition and protection, and there is no public policy to justify such reasoning. Until the adoption of the new law the applicants did not have a legislative framework to rely on, that would secure the recognition and

protection of the same-sex relationships. Thereby, the state has violated their right to family life guaranteed by art 8 ECHR. Considering that in states that do not regulate the same-sex relationships it will not be possible to establish them despite the personal right of a partner which gives such possibility, the basic problem remains the recognition of such relationship. The decisions of ECtHR make it clear that the application of public policy in order to refuse recognition of foreign same-sex relationships is considerably narrowed. It would not be justified to refuse recognition of foreign judgments only because the domestic law does not regulate same-sex marriages without taking into consideration of all circumstances of the case, the intensity of the relationship and the effects of the foreign law or decision (Duraković, 2014). It will be interesting to see how a foreign judge, meaning to fight the effect of such decisions on the domestic territory, would explain his refusal of recognition of recognition of the foreign decision (Knežević & Pavić, 2005). The same-sex communities are now a firm part of the European public policy.

On the other hand, the notion of crossborder surrogate motherhood within the scope of the respect for private and family life under art 8 ECHR is only slowly developing towards a European public policy. The decision in “*Menesson vs. France* (Cases, 2014) and *Labassee vs. France*” of 2014 (Cases, 2014), influenced the content of the public policy, and consequently the decisions of national courts. The German Federal Court relied on these decisions when deciding on the parenthood of the intended parents six months later. In both cases it was about a married couple, French nationals, who have concluded agreements with a surrogate in California/Minnesota, according to which she will carry and give birth to child/children after in vitro fertilization, by using the sperm of the intended father and donated eggs. U.S. courts have adopted a decision by which the parents of the children to which the surrogate gives birth will be the intended parents-in this case the French nationals. After birth, children are registered in the U.S. register of births. The French court denied registration of the children in the French register of births based on the U.S. birth certificates, by relying on the public policy. Such behavior, especially with regards to the intended father who is also a biological father of the children, is a violation of the private and family life under Art. 8 ECHR (Cases, 2017). ECHR considers that

“Regard to the consequences of this serious restriction on the identity and right to respect for private life of the applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation (Cases, 2014)”.

In these decisions ECtHR for the first time took a view on a fundamental question of the content of the public policy with regards to surrogate motherhood. The decision is adopted at the time when in many member states of the Council of Europe there are still ongoing serious discussions on the question of cross-border surrogate motherhood and its effects in the domestic law. The surrogate motherhood usually comprises a genetic link between one or both intended parents with the child, while the surrogate gave birth to the child and the close relationship between the intended parents and the child is established after the child is handed over to the parents. On the other hand, the pregnancy and giving birth to a child cannot establish a link between the surrogate mother and the child which does not have a genetic link with her within the meaning of the scope of Art. 8 ECHR, if the surrogate did not want to take over the role of the mother of that child and the child was, according to the agreement, handed over to the intended parents. The situation would be different if the surrogate mother does not want to hand

over the child to the intended parents, because she developed a close relationship to the child during the pregnancy and wants to take her of the child as if it were her own. In the factual sense Art. 8 ECHR guarantees to the intended parents the right to respect the decision to become a parent of a child that does have a genetic link to them (Cases, 2011), and on the other hand, the right of family members to live together. This creates a positive obligation of the state to take all measures necessary to enable both rights, with the goal of securing their private and family life. The non-recognition of a foreign decision on the personal status represents an endangering of the right to respect of family life, because it impedes or even hinders the family members to live together and therefore calls for a positive measure to be adopted by the state in line with Art. 8 (2) ECHR (Cases, 2000).

The ECtHR is putting a strong effort to take a lead in creating a European public policy on surrogate motherhood in a time when national states in Europe have very diverging views on the matter. However, the low level of legislative development in European states does not allow for a strong position such as the ECtHR has taken on the same-sex communities. It is indisputable that any attempt of further development of a European approach to surrogacy arrangements must strike an appropriate balance between the interests of the various participants in such arrangements. However, such interests and rights are often in direct conflict with the democratic choices made by national legislators that prohibit the recognition of such arrangements, by invoking the protection of their own public order, namely the protection of the rights of the child, that is, to achieve the standard of his or her best interest (Alihodžić & Duraković, 2020; Thomale, 2017).

Practice of the CJEU and Public Policy in Family Matters

European public policy in addition to the ECHR, comprises values which arise from the EU Law, foremost out of the CFR, which reaffirms rights under the ECHR but also goes beyond them (Wolff, 2005): art 7-right to respect of private and family life, art 9-Right to marry and right to found a family and art 21-prohibition of discrimination. In the context of prohibition of discrimination several provisions from TFEU are also of importance (OJEU, C 202/1, 7.6), especially art 18 TFEU, which relates to the prohibition of any form of discrimination based on nationality, art 20 TFEU which provides that every person who is a national of some member state is a citizen of the EU and art 21 TFEU which provides that any national of the EU has the right to move and reside freely on the territory of the EU. The right to move and reside freely for EU citizens is also given by art 45 of the CFR and exists independent of economic or market goals (Meškić & Samardžić, 2012).

In its early decisions the CJEU took the position that the determination of limits of the application of public policy needs to be left to the EU Member States. (CJEU, 145/86)¹. With further developments within the EU, it became generally accepted that the use of the public policy when restraining from the application of foreign law or non-recognizing a decision from another EU Member State needs to be under the revision of the CJEU in order to prevent abuse (Rakić-Vodinelić & Knežević, 1998; Ramos, 2000; Fumagalli, 2004). The practice of the CJEU, in which it more recently gave concrete shape to the content and limits of the institute of European public policy in cross-border family law is in the field of family name and the private divorce under Islamic law. Comparable to the decisions of ECHR on same-sex communities, CJEU on the right to family name created a firm European public policy with little space for

application of national public policy. On the other hand, on the recognition of private divorce under Islamic law, the CJEU did not want to take the lead and harmonize on a European level. Considering the migration crisis with a potential of a huge number of families distorted and the study published how diverse the approach of EU States towards Islamic private divorces is (European Parliament, 2017) a European public policy on the matter would have been very effective.

One of the important competences of the CJEU under art 267 TFEU is the interpretation of the European primary and secondary law in the preliminary reference procedure, with the aim of preventing diverging application of the same EU provision in different Member States. For the first time in 2013, the CJEU was asked to interpret the Rome III Regulation (Regulation, 2010), about a recognition of a private decision to divorce the marriage. The question was asked by the High regional Court in Munich and was is related to the Syrian private decision to divorce a marriage. The German court found that the EU Regulation does not apply to a private divorce and therefore German conflict rules should be applicable (Kohler & Pintens. 2014). The husband declared his intention to dissolve his marriage by having his representative pronounce the divorce formula before the sharia court in Latakia (Syria), the marriage was also concluded in Syria. On 20 May 2013, that court declared the couple divorced. On 12 September 2013, Ms. Sahyouni signed a declaration that she was to receive from Mr. Mamisch, under Sharia law, a total of USD 20000 (approximately EUR 16945), that declaration being worded as follows:

“...I have received all payments due to me under the marriage contract and on the basis of the unilateral divorce and hereby release him from all obligations towards me under the marriage contract and the divorce decree...issued by the Latakia sharia court on 20 May 2013...”

The married couple possesses both Syrian and German nationality and lived at the time of the CJEU decisions separately at different address in Germany. The president of the German Court recognized the Syrian private decision on divorce, stating that it does fulfill the conditions and specially emphasizing that German public policy is not endangered, because the wife was involved in the process and accepted the consequences of the divorce by taking the amount of 22,000 US dollars. The wife appealed, because she was of the opinion that the conditions to divorce are not met according to the German applicable law. Because of several doubts raised with regards to the application of the Rome III Regulation, the German court decided to ask the CJEU several questions (Sahyouni, C-281/15)², including whether the Rome III Regulation applies to a private divorce, pronounced by unilateral declaration of a spouse before a religious court in Syria on the basis of Sharia and does the fact that the spouse discriminated against consents to the divorce, including by duly accepting compensation-itself constitute a ground for not applying the prohibition of discrimination. The CJEU decided on 2 June 2015 that it does not have jurisdiction for the question asked by the High regional court in Munich, because the question on recognition and enforcement is not part of the Rome III Regulation, but the Regulation 2201/2003, which does not apply to decisions adopted outside of the EU. The CJEU therefore decided that the question falls outside of the EU law, unless the German court provides a more detailed explanation about its concern with EU law.

Thus, the High regional court in Germany filed a new request to the CJEU (Sahyouni, C-372/16)³ with the same question, but supplementing it with the explanation that with regards to private divorces the German courts do firstly apply Rome III Regulation in order to establish the applicable law to establish if the conditions for the divorce are met and in case that the CJEU

decided that Rome III Regulation does not cover private divorces, the German courts would apply German conflict rules to the issue. The CJEU restricted itself to the answer that the Rome III Regulation does not apply to private divorces, but solely divorces pronounced either by a national court or by, or under the supervision of, a public authority. It supported its decision by relying on the Opinion of Advocate General, that the references made to the involvement of a ‘court’ and to the existence of a proceeding in a number of provisions of that regulation, such as Article 1(2), Article 5(2) and (3), Article 8, Article 13 and Article 18(2) thereof, show that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority. Finally, according to recital 10 of Regulation No 1259/2010, the substantive scope and enacting terms of that regulation should be consistent with Regulation No 2201/2003, which shall apply to divorce pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision. Finally, the Higher regional court in Munich refused recognition of a Syrian decision on the private divorce by relying on German public policy under German conflict rules (OLG Münchenu, Beschluss v. 13. 3. 2018)⁴. The *Sahyouni* decision is a missed opportunity for the CJEU to contribute to the creation of uniform EU standard towards private divorces under Islamic law. The recognition of private divorces is a common problem for all EU Member States and the purpose of having uniform conflict rules for the EU is for such issues to be solved uniformly and not individually by each Member State. The authors of this paper consider the two decisions in *Sahyouni* taken by the CJEU confirm that in times of crisis the European courts are more reluctant to take the lead and create a uniform European public policy.

A very dynamic field of law in the practice of the CJEU is the right to the family name in cross border disputes in which the CJEU followed the trend of moving family law away from status towards party autonomy and contract law. In the case “*Garcia Avello*” (C-148/02)⁵ a request was made that children of a Belgium father and a Spanish mother, who accordingly had dual nationality of Spain and Belgium, hold their last name in accordance with the Spanish tradition and law, namely by adding the last name of the mother to the last name of the father, which was refused by Belgium authorities insisting for the children to hold the last name of the father in accordance with Belgium law. The CJEU emphasized, in relying on the provisions of free movement of citizens and the prohibition of discrimination under arts 18, 20 and 21 TFEU, that national legislation even in cases where they have exclusive competence for the regulation of certain matters, such as the personal name, shall be in harmony with the needs of free movement and residence on the EU territory, and that authorities of one member state shall not refuse the request for a change of personal names for minors, which are nationals of more than one Member State, if such requests aims to accomplish that the children have a last name which they would have in accordance with the law and tradition of the other Member State whose nationals they are.

In another case “*Grunkin-Paul*” (C-353/06)⁶ a German child of German parents living in Denmark, Grunkin and Paul, was given the last name Grunkin-Paul in accordance with Danish law, but the German authorities refused to register this name in Germany because it would violate German law. CJEU again expressed its view on the need to harmonize national legislation with the needs of free movement and residence of EU citizens on the EU territory. Therefore, it decided that the refusal by German authorities to register the last name of its national in accordance with the law of another Member State where it was first registered and where the German minor has always been living and has built his identity, is violating art 21

TFEU considering that no reason was mentioned why it would be important for Germany to refuse such registration, e.g. if it were contrary to German public policy. Both decisions, Garcia Avello and Grunkin-Paul show that a name, once registered in a Member State, especially if the person in question has its residence in that Member State, has to be recognized in all other Member States. The refusal of recognition by relying on the public policy would be possible only if it could justify the restriction on the right to free movement and residence (Winker, 2013).

Such justification CJEU held to be sufficient in the case of *Sayn-Wittgenstein* (C-208/09)⁷ where an Austrian national after being adopted by a German with a title in his surname Fürst von Sayn-Wittgenstein (Prince of Sayn-Wittgenstein) and thereby acquired the same surname which she used in her real-estate business for castles in Germany. The entry of such surname was refused by Austrian courts due to the prohibition of titles of nobility, which is considered to be part of Austrian public policy. The CJEU supported the Austrian reliance on public policy, and held that Article 21 TFEU must be interpreted as not precluding the authorities of a Member State from refusing to recognize all the elements of the surname of a national of that State, as determined in another Member State at the time of her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law, provided that the measures adopted by those authorities in that context are justified on public policy grounds.

In the case “*Runevič-Vardyn*” (C-391/09)⁸, CJEU also supported the national view of Lithuanian government who refused to change the name and surname of Ms. Runevič-Vardyn, who is a Lithuanian national belonging to a Polish minority, but without a Polish nationality and living in Belgium. Her forename and surname of Polish origin would be Małgorzata Runiewicz, but it was already in the birth certificate in Lithuania entered as Malgożata Runevič and Lithuanian authorities refused to change it later. The CJEU found that the refusal is justified under EU law unless it “does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels, this being a matter which it is for the national court to decide”.

In its so far last decision on the question or name recognition in the EU in the case “*Nabiel Peter Bogendorff von Wolffersdorff*” (C-438/14)⁹ the CJEU determined the borders of the use of public policy for future cases. A German citizen who based on adoption changes his last name into Nabiel Peter Bogendorff von Wolffersdorff, after three year residence in Great Britain and acquisition of additional British nationality, on his request by means of a so called *Deed Poll* he changed his name in Great Britain to Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff. After returning to Germany, the city of Karlsruhe refused to change his name in the register relying on German law to justify the refusal. The CJEU first made sure to distinguish this case from Sayn-Wittgenstein. Whereas the case is based on reasons of public policy similar to those on which the Austrian legislation referred to, the German legal system, unlike the Austrian legal system, does not contain a strict prohibition on maintaining titles of nobility. Although, since the date of entry into force of the Weimar Constitution, no new titles have been granted, the titles which existed at that date have been maintained as elements of names. In consequence, it is accepted that, despite the abolition of nobility, the names of German citizens, because of the origins of those citizens, include elements corresponding to ancient titles of nobility.

Following the CJEU, to establish if a recognition of such name would be justified, requires an analysis and weighing-up of various elements of law and fact peculiar to the Member

State concerned, which the referring German court is in a better position to carry out than the CJEU. Thus, firstly, the fact must be taken into account that the applicant exercised that right and holds double German and British nationality, that the elements of the name acquired in the United Kingdom which, according to the German authorities, undermine public policy, do not formally constitute titles of nobility either in Germany or in the United Kingdom and that the German court which ordered the competent authorities to make the entry of the name, which is made up of tokens of nobility, of the daughter of the applicant in the main proceedings, as registered by the United Kingdom authorities, did not take the view that that entry was contrary to public policy. Secondly, it is also necessary to take into account the fact that the change of name under consideration rests on a purely personal choice by the applicant in the main proceedings, that the difference in name which follows therefrom cannot be attributed either to the circumstances of his birth, to adoption, or to acquisition of British nationality and that the name chosen in the United Kingdom includes elements which, without formally constituting titles of nobility in Germany or the United Kingdom, give the impression of noble origins. In any event, it must be pointed out that, although the objective reason based on public policy and the principle that all German citizens are equal before the law, is capable of justifying the refusal to recognize the change of surname of the applicant in the main proceedings, it cannot justify the refusal to recognize his change of forenames. The German Court used the discretion given by the CJEU to refuse the registration of the new name of Nabel Peter in 2019 (Bundesgerichtshof Beschluss XII ZB 188/17)¹⁰.

CONCLUSION

The most recent decisions taken by the CJEU and ECtHR on public policy in cross-border family disputes concern matters of same-sex communities, surrogate motherhood, recognition of private divorce under Islamic law and the family name. A European public policy is established by ECtHR on same-sex communities and by the CJEU on family name. The European public policy on surrogate motherhood is in an early stage of development, whereas the CJEU decided against the creation of a European public policy on recognition of private divorces under Islamic law.

The decisions on same-sex communities are moving towards status law, while decisions on surrogate motherhood and family name are following the recent trend on more party autonomy in family law. The decisions on recognition of private divorces under Islamic law confirm the view expressed in the literature that in times of crisis national states will be less willing to follow the lead of the ECtHR. The trend shows that the COVID-19 and accompanying economic crisis, which occurred directly after the migration crisis, will further slowdown the developments on the European public policy by ECtHR and CJEU. The recommendation is, however, to go in the opposite direction. The European legislator because of its complex procedures cannot react unanimously and quickly in the time of crisis and a strong leadership by ECtHR and CJEU in such times is needed even more. In situation such as the migration crisis, when a huge number of cases with the same family matter occur, gradual harmonization is not fast enough.

ENDNOTE

1. CJEU, 145/86, 4. 2. 1988 - *Hoffmann/Krieg*.
2. CJEU, C-281/15, 12. 5. 2016–*Sahyouni*.
3. CJEU, C-372/16, 20. 12. 2017–*Sahyouni*.
4. OLG München, Beschluss, 13.3.2018–Wx 146/14. <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2018-N-3257?hl=true>
5. CJEU, C-148/02, 2. 10. 2003 - *Garcia Avello*.
6. CJEU, C-353/06, 14. 10. 2008 - *Grunkin-Paul*.
7. CJEU, C-208/09, 22. 12. 2010 - *Sayn-Wittgenstein*.
8. CJEU, C-391/09, 12. 5. 2011 - *Runević-Vardyn*.
9. CJEU, C-438/14, 2. 6. 2016 - *Nabiel Peter Bogendorff von Wolffersdorff*.
10. Bundesgerichtshof Beschluss XII ZB 188/17, 9.1.2019. <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=XII%20ZB%20188/17&nr=92451>

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