Matters Involving Third Country Nationals: A Comparative Analysis Concerning Personal Status Changes of Third Country Nationals

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Abstract Migration across the EU borders, relationships involving third country nationals and recent trends, such as the so-called "refugee crisis", have emphasized the need for a predictable legal framework providing practicable solutions in matters involving third country nationals. In conjunction with the corresponding contribution by *Marlene Brosch* and *Cristina M. Mariottini* in this volume, this contribution is intended to assess these developments and to compare the approaches in different Member States. The focus of this contribution is placed on matters concerning the personal status

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of third country nationals and on the recognition of status changes having occurred in non-Member States.

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I. Introduction

In addition to the contribution on the procedural aspects of matters involving third country nationals[1], this contribution will address the most important questions concerning the treatment of changes in personal status of third country nationals that have occurred in non-Member States.

II. General remarks

In our modern globalized society, cross-border family life has become a more or less common phenomenon. Due to the creation of an internal market as an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties" in Art. 26 (2) TFEU in combination with the corresponding fundamental freedoms, and due to the establishment of a "Citizenship of the Union" in Art. 20 TFEU, granting, inter alia, "the right to move and reside freely within the territory of the Member States", travel amongst the Member States has been significantly simplified and actively encouraged, resulting in an increasing number of cases concerning cross-border family life.

In order to create a legal framework in which these rights and freedoms may be exercised without hindrance by inconsistent national legislation, the TEU and TFEU have established certain principles that ensure a closer degree of judicial cooperation. This development culminated in the creation of an "area of freedom, security and justice" (Art. 67 TFEU), characterized by, inter alia, respect for fundamental rights and the different legal systems and traditions of the Member States (Art. 67 (1) TFEU), the absence of internal border controls for persons, a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair

1 See *Brosch/Mariottini*, in this volume.

towards third country nationals (Art. 67 (2) TFEU) and judicial cooperation in criminal and in civil matters (Art. 67 (3) and (4) TFEU).

Cornerstones of this close judicial cooperation are the underlying principles of mutual trust and recognition[2] which, in the terms of CJEU case law, "are based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the European Union is founded".[3] These shared core values the Member States have agreed upon in Art. 2 TEU, as well as the mutual trust derived from this common understanding, are the common ground upon which a judicial cooperation may be based that forgoes the need to scrutinize the compatibility of each other's legal orders on a case to case basis. In the terms of CJEU case law, "the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU"[4]. Due to this general principle, the courts of a Member State may only in very extraordinary cases actually asses the conformity of particular legal institutes of other Member States and their application in a particular case with their substantive public policy.[5] This significantly increases the assuredness of individuals living in the EU that crossing an internal border will not significantly affect their personal status, especially in regard to delicate questions that otherwise might be subject to a manifestly different evaluation in other Member States.[6] Since these principles concern the relationship between Member States irrespective of the

2 Cf. Presidency Conclusions of the Tampere European Council (October 1999), note 1 and 33, https://www.europarl.europa.eu/summits/tam_en.htm (last consulted 06. 10. 2020), and The Stockholm Programme (2010/C 115/01), p. 5; see also *Kaufhold,* EuR 2012, 408 (430 et seq.); *von Danwitz*, EuR 2020, 61 (76).

3 CJEU, 18. 12. 2014, Opinion 2/13, note 168; cf. also CJEU, 15. 10. 2019, C-128/18 (*Dumitru-Tudor Dorobantu*), note 45.

4 CJEU, 18. 12. 2014, Opinion 2/13, note 192; critically *Meeusen et al.,* in: Meeusen et al., International Family Law for the European Union, p. 1 (19), concerning topics without a common European substantive approach.

5 Cf. *Vlas,* in: Essays in honour of Hans van Loon, p. 621 (625) with reference to the prohibition of *révision au fond* under Brussels I; *Kaufhold,* EuR 2012, 408 (415) in this regard speaks of „Pflicht zum Kontrollverzicht" (a duty to relinquish control).

6 Cf. *Meeusen et al.,* in: Meeusen et al., International Family Law for the European Union, p. 239 (275) with critical remarks regarding the lack of common substantive principles and rules of family law.

nationality of the persons in question, they also apply to status changes of third country nationals that have taken place in a Member State according to that Member State's law.

Further continuity in cross-border family relations involving citizens of the EU is provided by the abovementioned rights and fundamental freedoms that, in principle, prevent Member States from placing nationals of other Member States at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State.[7] In modern CJEU case law, the rights which nationals of Member States enjoy under these provisions, have been deemed to "include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State".[8] This being the case, any serious disadvantage with an impact on normal family life resulting from the non-recognition of a Member State national's personal status may, unless justified by objective public interest considerations, be deemed to violate the freedoms granted by EU citizenship. Since the right of citizens of the EU to lead a normal family life includes the right to lead such a family life irrespective of the nationality of the other persons involved[9], other Member States may be required to recognize (at least to a certain degree) the material effects of status changes[10] which have occurred during the period of genuine residence in another Member State in accordance with the law of that State, even if some of the persons concerned are third country nationals.[11]

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7 Cf. CJEU, 18.07.2006, C-406/04 (*De Cuyper/Office national de l'emploi*), note 39; CJEU, 14.10.2008, C-353/06 (*Grunkin/Paul*), note 21; for an extensive analysis on the effects of fundamental freedoms on national conflict of laws rules see also *Fallon,* in: Meeusen et al., International Family Law for the European Union, p. 149 and *Schilling,* Binnenmarktkollisionsrecht, p. 159.

8 CJEU, 05.06.2018, C-673/16 (*Coman*), note 32 and the case law cited there.

9 Cf. *Fallon,* in: Meeusen et al., International Family Law for the European Union, p. 149 (153).

10 For a comprehensive overview of the method of recognition of legal status in European private international law see *Jayme,* IPRax 2001, 501; *Coester-Waltjen,* IPRax 2006, 392; for the application in matters of family law see also *Gärtner,* Die Privatscheidung im deutschen und gemeinschaftsrechtlichen Internationalen Privat- und Verfahrensrecht, p. 364–426.

11 Cf. CJEU, 05.06.2018, C-673/16 (*Coman*), note 40 in which "the refusal by the authorities of a Member State to recognize, for the sole purpose of granting a derived right of residence to a third country national, the marriage of that national to an EU citizen of the same sex concluded during the period of their genuine residence in another Member State, in accordance with the law of that State", was deemed to "interfere with the exercise of the right conferred on that citizen by Art. 21(1) TFEU to move and reside freely in the territory of the Member States".

In addition to these principles, the instruments created on the basis of Art. 81 (2) TFEU in order to ensure, inter alia, the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases, the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction, the effective access to justice, and the elimination of obstacles to the proper functioning of civil proceedings, ensure further judicial cooperation in civil matters amongst the Member States insofar as they are applicable.

Most noteworthy amongst these instruments in regard to the assessment of one's personal status is the Public Documents Regulation, which significantly simplifies the administrative formalities for the circulation of certain public documents and their certified copies, where those public documents and the certified copies thereof are issued by a Member State authority for presentation in another Member State.[12] This instrument further reduces possible hindrances to the recognition of certain status changes documented by another Member State regardless of the nationality of the person concerned, but does not apply to public documents issued by the authorities of a third country (Art. 2 (3) (a) Public Documents Regulation).

Since the particular problems of matters concerning the personal status of third country nationals surface most clearly where none of these special regimes are applicable, the following observations concern cases in which the personal status of a third country national needs to be assessed by the authorities of a Member State in regard to changes that have neither occurred in another Member State, nor have previously been publicly documented by the authorities of another Member State.

III. The Assessment of Personal Status before Member State authorities

Nearly all partner countries have reported that the problems in determining the personal status of third country nationals are most often experienced before the actual proceedings take place. In the most problematic scenario, in which a third country national has entered the EU for the first time without being able to provide any reliable public documents, the initial assessment of their personal status already takes place during the administrative proceedings before the immigration or public registration authorities.[13] In civil

12 Cf. Public Documents Regulation, recital 3.

13 For an overview of the general proceedings under the Dublin III Regulation and accord-

proceedings taking place at a later stage, the court often relies on the assessment made during these administrative proceedings, unless one of the parties contests the respective facts.[14] Due to this *de facto* presumption of the recorded information being correct, there are only a few decisions in which the difficulties in assessing the respective information are expressly addressed. The Swedish Supreme Court, for example, has expressly confirmed that the information recorded in the public records, though presumed to be correct, may be refuted during the civil proceedings based on other evidence.[15] The Croatian Constitutional Court addressed further problems resulting from the inability to provide reliable documents in a case where a third country national could not provide the birth certificate required for marriage under Croatian law.[16] These difficulties ultimately resulted in the amendment of the respective national provisions in order to allow other means of proof that no other marriages existed (namely a statement given under civil and criminal liability before a notary public).

1. Access to information

The reported difficulties concerning the access to information on a third country national's personal status range from missing, unintelligible, and unreliable documents to unclear legal sources in the State concerned. Particular problems arise when assessing the age of unaccompanied minors in order to determine whether or not they need to be taken charge of by the youth welfare authorities and be granted special protection.[17] This concerns both the determination of the actual age of the person concerned and the question of whether or not the respective legal system considers a person of that age to be still a child. German private international law, for example, refers both the creation, modification, and termination of guardianship, as well as the legal capacity and the capacity to contract to the law of the State the person concerned is a national of, cf. Art. 7 (1) and 24 (1) of the German

ing to the corresponding instruments see *Bergmann,* in: Bergmann/Dienelt, Ausländerrecht, § 29 Asylgesetz note 23.

14 This was explicitly reported for France, Luxembourg, and Sweden.

15 Swedish Supreme Court (Högsta domstolen), 08. 06. 2017, NJA 2017, 430, SET20170608.

16 Ustavni sud, 18. 10. 2016, RH U-III-5172/2013, HRC20161018.

17 For a detailed overview about the corresponding proceedings in Germany and the practical problems they entail see *Dürbeck,* in: Budzikiewicz et al., Migration und IPR, p. 65 (68 et seq.).

Introductory Act to the Civil Code[18]. Therefore, there have been many cases in which the German courts needed to determine whether or not children come of age under Gambian, Guinean or Liberian law at the age of 18 or of 21. Due to conflicting statements of the respective authorities and unclear legal sources, different courts have come to conflicting results in this regard.[19]

There does not seem to be a common principle of how to deal with such difficulties during civil proceedings. Practitioners in Italy, for example, have reported that the judges sometimes rely primarily on the respective counsels to gather the required information, while German courts are explicitly authorized by § 293 of the German Code of Civil Procedure[20] to use other sources of reference, such as expert opinion, in addition to the proof produced by the parties when making inquiries as regards the laws applicable in another state.[21]

2. Legal concepts unknown to the applicable law

Most partner countries have encountered cases in which preliminary questions concerning the personal status were governed by a foreign law, which contained legal concepts not known to the respective Member State law governing the rest of the case. Under these circumstances, the respective authority needs to assess to what extent the status created under the foreign provisions may be given effect under the applicable Member State law without risking the non-recognition of that decision in the State concerned.[22]

One of the more problematic concepts, often encountered in Spain and sometimes in Italy, is the so-called *kafāla* under certain Islamic laws, such as Moroccan law, in the course of which a so-called *kāfil* is entrusted with the protection and care for a child (*makfūl*) without establishing any actual

18 Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB).

19 See OLG Karlsruhe, 07. 09. 2017, 18 WF 62/17, DES20170907; OLG Hamm, 03. 05. 2017, II-10 UF 6/17, DES20170503; OLG Koblenz, 14. 02. 2017, 13 UF 32/17, DES20170214; OLG Bremen, 07. 02. 2017, 5 UF 99/16, DES20170207.

20 Zivilprozessordnung (ZPO).

21 For more information about the proceedings under § 293 of the German Code of Civil Procedure and possible sources of reference see *Pfeiffer,* in: Festschrift Leipold, p. 283; *Becker,* in: Festschrift Martiny, p. 619.

22 *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (20) explicitly warns that too strict limitations to recognition conflict with the general goal of private international law to prevent limping legal relationships.

kinship and without affecting the child's bond with the family of origin.[23] In previous years, this concept has often been interpreted by authorities of Member States as being similar to the national concept of adoption, although many Islamic laws have expressly forbidden or restricted any or certain forms of actual adoption (*tabannī*).[24] The previous practice of Spanish courts to authorize the adoption of Moroccan children by their respective Spanish *kāfil*[25] has intermittently resulted in a diplomatic conflict with Morocco that was ultimately resolved, after the Spanish Law on Adoption was amended in 2015 in order to end this practice.

Most often, partner countries have encountered other concepts based on Islamic law, such as unilateral divorces by repudiation (*talaq*)[26] or corresponding agreements in marriage contracts[27], such as the Lebanese *mahr*[28].

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23 In regard to different concepts of *kafāla* and their corresponding legal effects see *Yassari,* AJCL 63 (2015), 927 (950) who lists Morocco, Algeria and Tunisia as the only Muslim countries using this term in the context of the placement of children; cf. also *Menhofer,* IPRax 1997, 252 (253).

24 *Yassari,* AJCL 63 (2015), 927 (943 et seq.) distinguishes between three categories of legislation in regard to *tabannī:* (1) Muslim countries expressly allowing *tabannī* in general (Tunisia; Somalia) or depending on the faith of the persons involved (India; Sri Lanka; Indonesia; Malaysia), (2) Muslim countries expressly prohibiting *tabannī* (Morocco; Algeria; Egypt; Yemen; Kuwait; Jordan; Bahrain), (3) Muslim countries without explicit legislation on *tabannī* (Qatar; Oman; United Arab Emirates; Iran; Iraq; Syria; Pakistan; Afghanistan); cf. *Borrás,* in: Essays in honour of Hans van Loon, p. 77 (78, 83–86).

25 Cf. *Borrás,* in: Essays in honour of Hans van Loon, p. 77 (83–86).

26 Cf. the collected case law in the EUFams II database, namely: OLG Düsseldorf, 15. 02. 2018, I 13 VA 6/16, DES20180215; OLG München, 14. 03. 2018, 34 Wx 146/14, DES20180314; Cour d'appel de Paris, 20. 11. 2008, 04/05258, FRS20081120a; Cour d'appel de Paris, 17. 12. 2009, 09/19369, FRS20091217; Cour de cassation, 23. 02. 2011, 10-14101, FRT20110223; Tribunal d'arrondissement de Luxembourg, 06. 12. 2007, 359/2007, LUF20071206; Swedish Supreme Court (Högsta domstolen), 05. 03. 2013, NJA 2013 N 9, SET20130305; further cases without reference to instruments of European private international law were reported for France, Germany, Italy, Luxembourg, and Spain.

27 E.g. in OLG Hamm, 22. 04. 2016, II 3 UF 262/15, DES20160422, a provision in a marriage contract only referring to the event of a unilateral divorce by repudiation was applied during judicial divorce proceedings initiated by the wife, since the husband had brought about the conditions for the divorce and since the limitation of the right to repudiate was deemed to be in breach of German public policy.

28 The *mahr* under Lebanese Sunni-islamic law consists of both a morning gift and an evening gift, of which the former is to be paid at the beginning of the marriage and the latter in case of divorce; in Germany, the former is considered as belonging to the law of engagement or to the general effects of the marriage, while the latter is considered to be an agreement about postmarital maintenance, cf. OLG Hamm, 22. 04. 2016, II 3 UF 262/15, DES20160422; in Sweden, it is deemed to be part of the marital property regime, cf. Swedish Supreme Court (Högsta domstolen), 29. 03. 2017, NJA 2017, 168, SET 20170329.

As regards the methods for the proper characterization of these unknown concepts and their treatment under Member State law, there still appear to be some uncertainties[29], especially in Member States that have only recently started to encounter these concepts.

3. Recognition of foreign status changes and substantive public policy

Since the relationship between the Member States and most third States is not based on mutually assured core values, there is, in principle, no sufficient basis for mutual trust. Where no other international instruments apply, the Member States are usually at liberty to decide whether or not, and according to which criteria, they allow the recognition of foreign status changes that have occurred in non-Member States under non-Member State law.

The reports of the project partners have confirmed the general assumption that the national concepts being applied in this regard vary immensely among the different Member States. Some partner countries, such as Germany and Spain, deny the recognition of the respective status changes based on a violation of substantive public policy only if the recognition in the particular case[30] would lead to a result which is manifestly incompatible with the fundamental principles of the respective legal system (e.g. fundamental rights). The underlying reason for this more liberal approach is the notion that even the application of provisions containing discriminating elements may in particular cases benefit the affected person.[31] Since the public policy exception is understood as a corrective of last resort, there is no need to reject the application of the foreign law, unless this application in the particular case would actually lead to unbearable consequences. In particular, in regard to unilateral divorces by repudiation under Islamic law, the respective

29 For a list of possible solutions see *Meeusen et. al.,* in: Meeusen et al., International Family Law for the European Union, p. 1 (21 et seq.).

30 Cf. *Koch,* Die Anwendung islamischen Scheidungs- und Scheidungsfolgenrechts, p. 80 (for Germany), p. 101 et seq. (for Spain); *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (432 et seq.); cf. also *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (13 et seq.), who argues that the primary purpose of the family law provisions concerned is the protection of the individual persons affected by such relationships, thus requiring a more concrete assessment when determining whether or not the *ordre public* needs to be invoked in order to grant this protection.

31 Cf. *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (18 et seq.) regarding unilateral divorces by repudiation, polygamous, and under-age marriages.

court has to inquire whether the affected wife may have actually wanted to be divorced in such manner and whether or not the requirements for a divorce according to the *lex fori* would have been met as well.[32]

Italy, having previously rejected the recognition of divorces by repudiation in general, has in recent years adopted a more lenient approach according to which the divorce may be recognized depending on whether or not certain requirements were met.[33]

France and Luxembourg, on the contrary, seem to apply their respective public policy exception strictly by referring to discrimination on an abstract level.[34]

Cases in which the substantive *ordre public* was discussed, apart from unilateral divorces under Islamic law, involve surrogacy and surrogate motherhood[35], under-age marriage[36], and polygamy[37].[38]

Each of these topics is still subject to ongoing discussions, both in regard to substantive public policy as well as in regard to the creation of mandatory requirements that need to be abided by, if there are certain connecting-factors to the respective State. Even in Member States which had more liberal

32 Cf. *Koch,* Die Anwendung islamischen Scheidungs- und Scheidungsfolgenrechts, p. 83 et seq. (for Germany), p. 101 et seq. (for Spain); for an extensive list of German case law see *Hausmann,* Internationales und Europäisches Familienrecht, Chapter A, note 490 et seq.

33 Cf. Cass., 01.03.2019, No. 6161; App Cagliari, 16.05.2008, No. 198.

34 Cf. for France: Cour d'appel de Paris, 20.11.2008, 04/05258, FRS20081120a; Cour d'appel de Paris, 17.12.2009, 09/19369, FRS20091217; for Luxembourg, Tribunal d'arrondissement de Luxembourg, 06.12.2007, 359/2007, LUF20071206.

35 For an extensive list of German and French judgments see *Duden,* Leihmutterschaft im Internationalen Privat- und Verfahrensrecht, p. 133 et seq.; see also for Germany Bundesgerichtshof, 10.12.2014, XII ZB 463/13, Neue Juristische Wochenschrift 2015, 479 note 33 et seq.; for case studies of prominent surrogacy cases and the practical problems they entail see *Boele-Woelki,* in: Essays in honour of Hans van Loon, p. 47–58.

36 Cf. *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (433 et seq.) with reference to the situation in Spain (recognition is possible, if both spouses have been at least 14 years of age) and Sweden (new legislation resulting in the non-recognition of under-age marriages, if at least one of the spouses was either of Swedish nationality or habitually resident in Sweden when the marriage took place); for the situation in Germany see *Antomo,* NZFam 2016, 1155.

37 For an extensive comparative analysis of polygamous marriages and their treatment under German private international law see *Coester/Coester-Waltjen,* FamRZ 2016, 1618; see also *Coester-Waltjen,* in: Budzikiewicz et al., Migration und IPR, p. 131; for the treatment of polygamous marriages in France and Spain (non-recognition of the marriage itself, but recognition of certain effects of the marriage), cf. *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (431 et seq.).

38 Cf. *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425.

approaches, new legislation tends to restrict the recognition of such relationships on an abstract level.[39]

In Germany, a special provision in Art. 13 (3) of the German Introductory Act to the Civil Code was adopted, which declares all marriages concluded with a minor of less than 16 years of age void and marriages with minors having already reached 16 years of age at the time of the wedding voidable.[40] This provision is currently subject to proceedings before the German Federal Constitutional Court, since it does not contain any restrictions that would allow its application to be limited to cases in which the minor was actually unable to make an autonomous decision.[41] Since declaring a marriage void interferes with the right to marry, the German Federal Supreme Court in its reference expresses the opinion that interference may only be justified in each individual case under the condition that it is indeed necessary to protect the minor concerned.[42]

Similar discussions are currently ongoing in Germany in regard to the fight against polygamy.[43]

These differences amongst the Member States are not limited to the specific goals and requirements of the public policy exception but also concern the question of which frame of reference is to be applied in order to assess whether or not the application of the provision in question is compatible with public policy.[44] While certain decisions suggest that this question is to be determined from a national perspective[45], others indicate a more inter-

39 Cf. *Bogdan,* IPRax 2004, 546 on the Swedish law on measures against child marriages and against forced marriages, and the previous practice of general recognition.

40 Cf. Art. 2 of the German Law against Child Marriages (Gesetz zur Bekämpfung von Kinderehen) of 17. 07. 2017, BGBl. I No. 48, p. 2429.

41 Bundesgerichtshof, 14. 11. 2018, XII ZB 292/16, DET20181114.

42 Cf. Bundesgerichtshof, 14. 11. 2018, XII ZB 292/16, DET20181114, note 45 et seq. with reference to the autonomy and best interests of the individual child concerned and to Art. 3 and 12 UN Child Convention.

43 Cf. the pending proposal of the Bavarian government for a Law against Polygamy, Bundesrats-Drucksache (legislative proposal) 249/18, which seeks to declare all additional marriages voidable according to German law, regardless of the law applicable to the marriage in question, provided that both spouses concerned are habitually resident in Germany; see also *Heiderhoff,* in: Budzikiewicz et al., Migration und IPR, p. 9 (18 et seq.) who criticizes that such an approach might have detrimental effects for the persons concerned and their kin.

44 Cf. the findings of *Hess/Pfeiffer,* Study on the Interpretation of the Public Policy Exception, p. 155 et seq. who analyzed to which extent the courts of different Member States refer to concepts of national or European law when dealing with public policy.

45 E.g. Art. 6 of the German Introductory Act to the Civil Code explicitly refers only to "the fundamental principles of German law", while including fundamental rights acknowledged in international conventions, common principles of European law, and other inter-

national approach, in which only certain core principles that require international protection are to be considered.[46]

These diverging approaches and the corresponding national legislation may result in conflicting assessments of these relationships in different Member States. Since third country nationals who are part of such relationships may very well subsequently obtain EU citizenship or the right to move to another Member State as long-term third State residents under Art. 14 of the Directive 2003/109/EC of 25. 11. 2003[47], these conflicting views may result in significant obstacles to exercising these freedoms granted by European law.[48]

An international perspective focusing on the common core values that the principle of mutual trust is based upon, would seem to be the best solution for preventing conflicting decisions in different Member States.[49] However, due to the lack of consistency in regard to the general nature of the public policy exception and the substantive family laws, the risk of conflicting decisions would either way remain to some degree.[50]

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national standards as being part of German law; cf. Bundestags-Drucksache (legislative proposal) 10/504, p. 43 et seq.; *Kropholler,* Internationales Privatrecht, p. 248–250; correspondingly, German courts have traditionally argued that the CJEU had no competence to determine the concept of public policy for the Member States, since it was deemed a question of national law, cf. Bundesgerichtshof, 26. 09. 1979, VIII ZB 10/79, Neue Juristische Wochenschrift 1980, 527.

46 The French "*ordre public international*" seems to tend in this direction; cf. *Loussouarm/Bourel/Vareilles-Sommières,* Droit international privé, note 249; *Colombi Ciacchi,* Internationales Privatrecht, *ordre public européen* und Europäische Grundrechte, p. 31–34.

47 Council Directive 2003/109/EC of 25. 11. 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23. 01. 2004, p. 44–53.

48 For examples of such problematic cases see *González Beilfuss,* in: Meeusen et al., International Family Law for the European Union, p. 425 (434 et seq.).

49 Cf. *Lenaerts,* The Principle of Mutual Recognition in the Area of Freedom, Security and Justice, p. 25 ("European public policy"); see also *von Danwitz*, EuR 2020, 61 (70), who refers to a „gemeineuropäischen *ordre public*" (common European *ordre public*) as a common frame of reference for all Member States under the principle of mutual trust; also in favor of creating a common European approach *Meeusen et. al.,* in: Meeusen et al., International Family Law for the European Union, p. 1 (20) and *Peruzetto,* in: Meeusen et al., International Family Law for the European Union, p. 279 (294 et seq.); cf. also *Antokolskaia,* in: Meeusen et al., International Family Law for the European Union, p. 49 (63 et seq.) with critical remarks regarding the level of shared values with regard to the subject of divorce.

50 Cf. *Meeusen,* in: International Family Law for the European Union, p. 239 (275); cf. also *Vlas,* in: Essays in honour of Hans van Loon, p. 621 (624), highlighting the interdependence between the differences amongst the legal orders of the Member States and the importance of their respective national public policy.

IV. Concluding remarks

Matters involving third country nationals and concerning changes in personal status that occurred in a third State not only provide many factual difficulties concerning the access to information, but also entail the risk of producing deviating results in different Member States due to different legal traditions involved.

Insofar as European law does not determine the recognition of status changes of third country nationals, these problems significantly complicate the matters at hand and require particular caution when more than one Member State is involved.

Especially in cases where status changes are based on concepts of Islamic law, such as the unilateral divorce by repudiation, the different goals of the respective public policy clauses may lead to inconsistent results depending on which Member State will exercise their jurisdiction in this regard.

Most of these inconsistencies could be avoided, if European law contained a general provision harmonizing the application of substantive public policy. Due to the shared core values all Member States recognize, such a common frame of reference serving as basis for the determination of the international *ordre public* could be seen in human rights of the ECHR and the Charta of Fundamental Rights of the EU in combination with the respective provisions in the Treaties (e.g. Art. 3 (5) and Art. 6 (3) TEU).

The factual difficulties arising from the need to assess status changes that have occurred under the law of a third State may be mitigated by making use of the current instruments of judicial cooperation in order to provide each Member State with shared information on the particular third State they need to deal with. Especially databases on foreign documents, such as those created for the Public Documents Regulation may be helpful in this regard.

Informal means, such as networks of liaison judges, may be used as well in order to provide the necessary information and to benefit from the experiences of other Member States.

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