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Cross-border matrimonial rights in the EU: how the notion of the supranational citizen alters the conflict of family laws

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Family law remains to be a topic of utmost sensitivity for national legal traditions – that creates a hitch at a moment when the number of international couples in the EU is constantly rising. Two new EU regulations on matrimonial property aim at providing more coherent and predictable conflict laws for cross-border family law cases; yet, new legal provisions stay unwelcome for some EU countries.

Introduction

On 29 January 2019 two Regulations on matrimonial property rights[1] will join the EU framework for the International Private Law filling in the gaps largely existing within the field of family law. These gaps significantly weaken the idea of the EU citizenship and fragment the supranational civil and social rights that emerge due to the disappearance of the internal borders.

The notion of the EU citizen has been gradually strengthening through the evolution of the Four Freedoms and the Single Market, through the introduction of the EU elections, through the harmonisation of the consumer protection regimes and through the adoption of the Charter of Fundamental Rights. According to the findings of the European Commission, in 2011 there have already been more than 16 million international couples residing across the European Union. This statistic evidences for two facts at the same time: while the idea of the EU citizenship begins to be tangible, yet the EU family law framework requires more pillars to be able to secure the supranational citizens' rights and to guarantee the equality of the legal

[1] Council Regulation (EU) 2016/1103; Council Regulation (EU) 2016/1104.

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protection beyond the borders of the national legal regimes.

However, the idea of the European citizenship is unable to automatically separate the closely tied up notions of family law and domestic legal rules or family law and the national citizenship, which are traditionally considered to be interdependent and mutually explanatory. The process of 'reconciliation' of national family law regimes within the EU has so far shown that this legal branch remains to present one of the most sensitive topics for the EU Member States, thus, matrimonial issues remain within the list of national exclusive competences and the EU's action is excluded unless the issue has a cross-border element. Hence, being subjected to the special legislative procedure and requiring unanimous Council's decision, the EU family law is divided between numerous Regulations and remains fragmented by the differentiated national family law traditions, finally presenting a mere conflict of law regime rather than a substantial legal system.

The EU Family Law framework

In this way, the EU legal provisions on matrimonial issues present a system of principles that guides the choice of a competent court enabling it to exert the jurisdiction as well as to define the rules on a choice of applicable law and on a procedure of foreign judgement recognition and enforcement. Further, these principles strengthen the idea of the EU citizen, providing more legal certainty for the cross-border matrimonial cases as well as facilitating and accelerating the administration of justice where the conflict of laws takes place.

At the same time, the EU regulatory framework of matrimonial law can hardly be called comprehensive. Firstly, the existing regulations cover only selective areas of family law: the divorce and legal separation, wills and successions, maintenance, parental child abduction and parental responsibilities. Secondly, not all of those existing regulations apply uniformly across the EU: some of them have been adopted in the frames of the enhanced cooperation – for example, the regulation on the divorce and legal separation is applicable only in 16 EU countries today.

Two new regulations on matrimonial property regimes - one covering issues involving married couples and another one applicable to the registered partnerships - will also be operating within the enhanced cooperation scheme with 19 participating Member States and being blocked by some countries preferring to safeguard the national legal system. This brief will analyse to what extent the new regulations can affect the national traditions of family law and why some countries prefer to abstain from participating in the new regime in the light of the latest CJEU reasoning related to the EU citizens' rights.

The process

The idea of extending the judicial cooperation to the area of matrimonial property issues was already born in 2011, when the European

Commission submitted the legislative proposal for two Council regulations. While the Parliament had to be only consulted in the frames of the special legislative procedure, the progress has stuck at the Council being blocked by some countries fearing that the coordination of matrimonial property regimes and the property consequences for registered couples creates the risk of the unconscious recognition of same-sex marriages and the automatic introduction of the registered partnership institution. As the result, those Member States wishing to advance the judicial cooperation in the EU family law framework, communicated to the European Commission the intention to establish enhanced cooperation, making it possible to proceed with the initial 2011 proposal without those Member States blocking the regulations. Finally, the political agreement has reached Council in November 2015 closing a 4-year period of negotiations.[2]

Why do some Member States block the regulations?

At first glance, it might be unclear why some Member States suspect a risk of changing the essence of the marriage institution within national family law traditions: indeed, new regulations neither contain the definition of a spouse, nor provide any substantial legal provisions on marital status. In fact, the fear of blocking Member States, namely Bulgaria, Romania, Latvia, Lithuania and Poland, is caused by factors lying outside of the regulations' scope. The recent Coman-Hamilton ruling is the explanation: the CJEU holds that definition of the spouse is uniform for all Member States and neutral with regard to sex.[3] Coman and Hamilton – one being a Romanian citizen and another being an American. The latter got married in Belgium in 2011 and decided to move to Romania. However, the Romanian immigration office denied the right of Hamilton to reside with his spouse on Romanian territory – the right, which stems out of the Directive on citizens' and their family members' rights. Since Romanian family law does not recognise same-sex marriages, its immigration office did not treat Hamilton as an EU citizen's spouse and, thus, denied his right to freely move and reside in the EU within a period of three months.

However, after the CJEU's ruling this situation is no longer possible – a Member State cannot refuse Hamilton's right to free movement and residency even if it does not recognise same-sex marriages. This judgment means that the national definition of the marriage no longer plays a role in the context of supranational citizenship rights – those notions simply do not lie in the same plane anymore.

The Coman-Hamilton ruling delimits the value of national family law traditions, although the judgement does not directly alter the domestic

[2] David Hodson, EU Matrimonial Property Regime Regulation, in International Family Law Group LLP. Available at: https://www.familylaw.co.uk/news_and_comment/EU-Matrimonial-Property-Regime-Regulation

[3] The definition has been analysed within the scope of Directive 2004/38 on right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

definition of marriage, yet it restricts the application of the national legal definition of family to cross-border cases, thus safeguarding equal rights of EU citizens and their spouses regardless national family law traditions. Although family law remains to be an autonomous legal order belonging to an individual Member State, Coman-Hamilton ruling penetrates into this autonomy and, in a certain way, creates obligations for the Member States that alter the domestic matrimonial legal system.

Since new regulations on matrimonial property provide for the automatic recognition of foreign judgments, some Member States decide not to participate in the new regime fearing that it will indirectly lead to the recognition of the same-sex marriages.

Conclusion

Once again, it is important to underline that new regulations explicitly mention that they do not provide the substantial definitions of the notions of family, spouse or partner, neither have they obliged Member States to alter their national family law provisions. These safeguards expressly addressing the sensitivity of the topic for some Member States may still render the regulations more attractive for them in the future, when the newly established judicial cooperation in the field of matrimonial property can prove its efficiency by substantially facilitating the resolution of conflict of laws cases and creating more legal certainty and predictability for constantly raising number of international couples within the EU.

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