FUNDAMENTAL RIGHTS AND BEST INTERESTS OF THE CHILD IN TRANSNATIONAL FAMILIES

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To Caterina, Costanza, Davide, Luca and Nicola, who not only give colour to our lives but have also given it to the cover of this book

PREFACE

The idea of devoting this book to the relationship between the fundamental rights of the child and European family law stems from the Jean Monnet Modules on European Family Law, funded by the European Commission, in the years 2013/2016 and 2014/2017 at our respective Universities (University of Milano and University of Udine).

During the lectures and seminars that we organised in the framework of these modules, as coordinators, we realised that even though family law is currently considered a hot topic and is subject to intensive research in the academic world, one of the most relevant issues in the European context, that still has not been thoroughly explored, was the one related to the need to protect the rights of children both in the framework of the free movement of citizens and migration law and in the context of international private law. Thirty years have passed since the UN Convention on the Rights of the Child was adopted: the aim of this book is also to assess how and to what extent its provisions have been implemented in family-related matters, with special regard to the European context.

Notwithstanding the lack of any EU competence on family matters that fall into the exclusive jurisdiction of national law, the protection of families and family ties within EU Member States should actually be guaranteed as a means of protecting fundamental rights, and this becomes even more relevant when dealing with minors. The right to family life is indeed included in the Charter of Fundamental Rights of the European Union (the EU Charter) and in the European Convention on Human Rights (ECHR), both of which, according to the EU Treaty, impose legal duties on Member States. Specific norms regarding the rights of children can be found both in the Charter (at Article 24), and in the case law of the ECtHR, which state, in accordance with the 1989 UN Convention on the Rights of the Child, that minors (being EU citizens or third country nationals) have the right to protection and care as is necessary for their well-being. In accordance with both international and European law, minors' views must be taken into account and their best interests must be a primary consideration when taking any action relating to them.

As the analysis of the jurisprudence of both the domestic and the European courts clearly suggests, the protection of minors' rights may prove to be a challenging issue when judges are called to strike a balance between fundamental public values and the individual rights specifically concerned,

or between the abstract and the particular dimension of the best interests of the child, in cases where different conclusions may be reached depending on the perspective adopted.

The impact of human rights on EU legislation dealing with matters which are strictly connected with children and family issues (like for example Directives on family reunification, or private international law rules on child abduction and on parental rights) has already been questioned before the Court of Justice of the European Union and the European Court of Human Rights; their case law confirms the need for interpretative tools aimed at coordinating and reconciling European rules with national public concerns and with the need for human rights protection.

Therefore, we decided to involve academics coming from different countries in the making of this book, in order to assess, *de iure condito* and *de iure condendo*, what legal options, among those suggested by both practitioners and scholars, seem to be most effective for the purpose of balancing the different interests that come into play, notably in situations related to migration (within the EU and from outside the EU), and in cross-border circumstances where private international law issues may arise.

The book addresses the matter from two perspectives: on the one hand it examines how the obligations deriving from Article 8 of the ECHR and from Article 7 of the EU Charter can be coordinated with migration policies and rules, especially in the case where these lead to results which are inconsistent with the protection of the children's family ties; on the other hand, it focuses on the impact of human rights values on the recognition of a parent-child relationship formed abroad, on the content of the public policy exception and finally on the implementation of some EU controversial conflict of law rules, such as those regarding child abduction.

Moreover, beyond the sectoral challenges in different areas of European family law, the book aims at offering a contribution to the definition of the content and of the nature of the general principle of the best interests of the child as related not only to the need to have his/her interests prevail over those of the other members of the family and, in some cases, over the public interest in strictly regulating migration flows, but also to the need to strike a balance between the different needs and interests of the single child whose case is being evaluated. These issues are in fact still controversial, as the practice and the existing literature on these matters confirm; this uncertainty has resulted in practical difficulties for those trying to apply it. Therefore, we wanted to offer academics and practitioners not only a solid reconstruction of the existing legal framework and evolution of the supranational and national case law on these issues, but also perspectives on their possible future evolution through a critical analysis of each connected aspect, taking into account all the possible dimensions of the best interests of the child (see General Comment no. 14/2003, where the

Committee on the Rights of the Child underlines that the best interests of the child should be understood as a right, a principle and a rule of procedure).

In the first part of the book, the introductory chapter (Elisabetta Bergamini) analyses the main supranational principles in the field of children's rights and assesses the global impact of such principles on domestic family law in EU Member States, notably on children, in cases related to EU free movement and migration law. The analysis mainly focuses on the CRC (UN Convention on the Rights of the Child of 1989), due to the specificity of its provisions on the best interests of the child, the ECHR and the Charter of Fundamental Rights of the EU, in order to evaluate whether cross-border situations (stemming from free movement of EU citizens and their families or from migration situations) affect the different national legal frameworks leading towards a higher-level of protection of children's rights as well as a more satisfying and comprehensive application of the international instruments meant to protect human (or more specifically children's) rights. The specific issues evaluated (the case of children born out of wedlock, the right of the child to maintain a relationship with an extended family, the right of the child to be heard and the prohibition of inhuman treatment) leads the author to remark that children's rights that are more closely linked to cross-border situations appear to be headed for a higher level of protection based on the international framework, while more general rights that are not strictly linked to free movement, such as the right of the child to be heard, still need to be fully implemented.

The following chapters deal with selective topics concerning the protection of children within EU Member States, mainly chosen due to their particular relevance, sensitiveness and timeliness. Sexual orientation (Alina Tryfonidou), integration of family patterns based on different religions (Alessandra Lang), protection of family identity as a fundamental right (Francesco Deana), derogation from State sovereignty on migration law (Maura Marchegiani and Peter Rodrigues), domestic violence (Sara De Vido), are those that we selected for the above-mentioned reasons.

All the chapters take into consideration EU substantive law and consider situations in which the still existing differences in domestic family law that are felt to be the expression of the States' social, cultural and legal identity, might deprive children from benefiting from their best interests and their family unity protections within the EU. However, the authors had to adopt different kind of approach to each specific topic. Thus, some authors (Tryfonidou and Lang, respectively dealing with rainbow families and *kafala*) consider the analysis of domestic praxis that could breach human rights principles where it rigidly implements EU legislation (thus suggesting a human-rights-oriented interpretation of EU law that advocates the necessity for the EU to clarify that *all* EU Member States are required by EU law to recognise the exact legal ties among the members of a family when EU law on free movement of persons

is applied). Consequently, this approach clearly takes into consideration the reforming pressure on Member States to establish new rules in order not to discriminate under national law in purely internal situations (in the case of rainbow families) and examines the difficult balance between the need to protect the child's best interests and to avoid circumvention of national and EU rules on migration (in the case of *kafala*).

Other authors, specifically Deana, Marchegiani and Rodrigues, start from a case law approach on transnational family situations and assess how best interests and human rights are/must be taken into account in order to grant children the highest level of protection through an expanded implementation of the existing EU rules of international protection of child migrants, even though it runs counter to the States' prerogatives in migration policies. In this framework they specifically analyse the centrality of EU citizenship as the key to protect the identity of children (Deana), the need to protect children through a human rights-oriented application of family reunification (Rodrigues) and the impact of the best interests principle in cases of peculiar vulnerability such as in the case of asylum-seeking and refugee children (Marchegiani). Even more detailed is the analysis set in the chapter in which Sara De Vido considers the need to protect children, especially girls, from child marriages and violence, suggesting the need to reform the Directive on family reunification in order to respect the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence.

What emerges from all the chapters included in the first part of this book is the clear need to grant a higher level of protection to children in cross-border situations. Furthermore, the development of an EU human rights-oriented approach to these situations – also thanks to the influence of ECtHR case-law – could grant an increased level of protection to children in internal situations too.

The second part of the book is devoted to the analysis of the impact of human rights law on conflict of laws rules. It is introduced by two chapters (Pietro Franzina and Marcella Di Stefano) that address this matter focusing both on the EU and on the domestic perspective. While in fact both national and European private international law rules should be read in the light of a human rights-oriented approach, the means of achieving this result may be different, according to the goals pursued.

In the context of the EU the harmonisation of conflict of law rules is aimed at creating an area of freedom, security and justice in order to promote the free movement of persons, and is also a means of ensuring the cross-border recognition of a person's rights and status. In addition, as far as family and child-related matters are concerned, the protection of the fundamental rights of the persons involved, with specific regard to the child's best interests, are among the considerations underlying how the rules are formulated and how the choice of the appropriate connecting factor is made.

If one considers for example the Brussels II *bis* Regulation, which is the main topic of the last four chapters of Part II, the choice of the habitual residence of the child as a connecting factor was properly guided by the idea that the court, identified on that ground, is presumably the one better placed to conduct a proper and reliable assessment of the child's actual situation and interests. At the same time, the Regulation includes norms on the return procedure in cases of abduction (Ruth Lamont), that are aimed on the one hand at ensuring the right of the child to maintain personal relations with both parents (which is prescribed by both the New York Convention, Article 9 and by the EU Charter, Article 24) and on the other, at granting the possibility of assessing whether the return corresponds to the best interests of the child. To this end the Regulation provides: specific exceptions to the return (in this respect it should be pointed out that one of the most debated issues – as shown in the chapter written by Costanza Honorati – specifically regards the possibility to conceive, also in the light of the 1980 Hague Convention, a general human rights exception to the return); the right of the child to be heard; and the power for the competent judicial authorities to order provisional measures aimed at ensuring protection of the returned child in cases where his/her well-being may be at risk (Lidia Sandrini). Since all these issues were discussed on the occasion of the Recast, chapters dealing with the matter broadly take into account not only the rules included in the Brussels II *bis* Regulation but also the changes introduced with the Recast, the latter mostly being the result of considerations related to the protection of the child's best interests (Laura Carpaneto).

As regards the impact of human rights on the functioning of domestic conflict of law rules in family matters, a question arises as to whether and to what extent the protection of the child's best interests binds states to recognise a parent-child relationship established abroad, notwithstanding that the strict application of private international law rules would lead to the opposite result. The second and third chapters (Marcella Distefano and Roberto Baratta), which adopt a comprehensive and inclusive perspective on the matter, both consider whether private international law could be interpreted and applied consistently with the rights to private and family life, the respect of which may entail the cross-border recognition of personal and family status. They explore different options at stake like the use of interpretative tools that for example allow the inclusion of considerations on human rights among public policy grounds or the adoption of rules that are aimed at achieving specific material results (for example rules that make a choice among different alternative connecting factors contingent upon the establishment of valid a parent-child relationship). The same questions are addressed in the fourth and fifth chapters, with regard to specific topics, namely the cross-border recognition of the status *filii* arising from the recourse to surrogacy agreements

(Katarina Trimmings) and the effects that foreign adoption are likely to produce in countries where, under recurring circumstances, the adoption of minors would not be allowed (Chiara Ragni). In all these situations, as clarified by the ECtHR, States are not under an obligation to automatically recognise the status acquired abroad, but rather to ensure that decisions in this regard are the result of a proper balancing of all the interests involved, with particular regard to those of the child (in this perspective see also the Advisory Opinion which the Court delivered in April 2019 upon the request of the French Court of Cassation). These interests shall prevail over any other consideration and should be taken into account both in the collective and in the individual dimension, especially in the case where these do not coincide.

Elisabetta Bergamini and Chiara Ragni
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