HARMONIZATION OF FAMILY LAW IN THE EU WITH SPECIAL REFERENCE TO THE MARRIAGE CONTRACT[*]

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Abstract

Family law is not uniformly regulated in the European Union. There are numerous reasons for the absence of uniform regulation (family law regulation is strongly influenced by the culture and traditions of a nation, and as such is not easily subject to change; great complexity of issues family law deals with; nonexistent uniform positive attitude of legal theorists regarding the necessity and usefulness of harmonization, etc.).
The increased movement of people and goods within the Union conditioned an increasing number of cases where problems arose precisely because of non-existing uniform rules in this area.
In this paper, we analyze the development of views on the harmonization of marital matters in the EU in general. Special attention is paid to the steps taken in the EU to harmonize property-related family matters. In the process of harmonization, property law issues proved to be a more suitable ground for harmonization, considering their lesser attachment to certain characteristics of the community. In addition, harmonization is easier to imagine in contractual matrimonial matters (compared to legally prescribed property models), and the marriage contract is considered to be a very suitable instrument for the potential harmonization of this legal area. For this reason, the paper analyzes in more detail the acts passed in connection with the marriage contract. Based on the analysis of the mentioned questions we give our proposal of possibilities for further harmonization in this legal area.

Keywords: *marital property law; unification; TFEU; Council Regulation (EU) 2016/1103; Council Regulation (EU) 2016/1104; Council Decision (EU) 2016/954.*

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[*] This paper is a result of the research conducted at the Institute of Comparative Law financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia under the Contract on realisation and financing of scientific research of SRO in 2024 registered under no. 451-03-66/2024-03/200049.
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Introduction

A high degree of harmonization has been achieved in certain legal areas in the European Union,[1] but this is not the case with family law.[2] Family law has rarely been the object of extensive comparative legal studies and attempts at unification have met with little success in this field. Family law has a great diversity, which is caused by the fact that it is a field of law that is rather particularistic, and where the mixture of Roman law, customary law, and canon law has led to diverse regulations (Pintens, 2008, p. 161).

The Union does not leave out family law issues in its acts, but it does so in the context of European human rights, fundamental rights in the EU, or private international law. The absence of more detailed regulation in this matter is a consequence of the fact that the EU was created as an economic community and that the focus is on the harmonization of legislative regulations that are directly related to the exchange of goods. When it comes to unification focus is mainly on commercial law and the related domains of civil law, private international law, labor law, and intellectual property rights (Pintens, 2008, p. 161).

Increasing the movement of people within the community also led to all the economic consequences caused by family law issues. Family matters such as marital property relationships between spouses directly impact the functioning of the internal market in the EU. As a result, the opinions about the necessity of

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[1] In modern legal theory, a large number of expressions of related meaning are used to denote the process of approximation and harmonization of rights, each of which, again, has its special legal definition. We encounter the terms: unification, uniformization, harmonization, codification, regionalization, Americanization, westernization, Europeanization, convergence, rapprochement, internationalization, etc. (Mijatović, 2019, p. 91).

[2] A few decades ago, the term "European family law" sounded a bit artificial or even strange. Today, there is a growing awareness that these two terms have something in common. Family law is not yet seen as a stumbling block to the development of European civil law. It is often discussed only in the context of European human rights, EU fundamental rights, or private international law. However, today the problems arising from the diversity of family law in Europe and the methods needed to improve the current situation have become increasingly clear. However, skepticism toward unnecessary attempts to unify legislation still overpowers the issue (Martiny, 2010).

About two views on the harmonization of Family Law (harmonization of Family Law itself and harmonization of Family Law with EU law) see Panov, 2013. Harmonization of Serbian family law with EU law: political reasons, social and legal consequences. *Sociological review*, vol. XLVII (2013), no. 1, pp. 53–74.

On the aspiration to create a unified European family law, see: Cvejić-Jančić, O. 2004, The uniform family law of Europe. *Legal life*, no. 9/2004, pp. 865-887.

On the state of family law at the European level see in more detail: Antokolskaia, M. 2006. *Harmonisation of Family Law in Europe: A Historical Perspective*. Antwerpen – Oxford: Intersentia; Boele Woelki, K. 1997. The road towards European family law, *Electronic Journal of Comparative Law*, Vol. 1., pp. 1-15.

Boele-Woelki, K., Dethloff, N. & Gephart, W. 2014. *Family law and culture in Europe: developments, challenges and opportunities*. Intersentia.

taking the necessary measures to avoid the mentioned problem are heard more often. But, when it comes to legal theorists there is no general agreement among about the intention to bring family law systems closer together (Majstorović, 2003, pp. 759-782; Šimović & Ćurić, 2015, pp. 163-189)[3]. Disagreement in this area is caused by the nature of family law as a branch of law that is greatly influenced by the culture and traditions of a particular nation. Family law legislation contains the basic values of a society, which is why it is very difficult to change, and the question is whether changing them would be desirable and useful. For these and some other reasons, family law issues are still not directly regulated by European legislation.

To overcome the difficulties encountered in practice, the European Union noticed the need for a more detailed regulation of family law matters. In the process of harmonization, property law issues are, considering their lesser attachment and coloring to certain characteristics of the community, i.e., state, proved to be a more suitable ground for harmonization.

In a large number of legal systems in the territory of the European Union, two-property regimes are accepted: legal and contractual (Bubić, 2010, p. 25). In the Study on matrimonial property regimes and the property of unmarried couples in private international law and internal law[4], it was sad that the harmonization of family law is easier to imagine in the contractual area than in the area of the legal property regime. In the aforementioned study, the European Commission said that it is not reasonable to expect an agreement between EU member states on the adoption of a matrimonial property regime that would be unique and common to all member states. It is stated that the establishment of a European subsidiary property regime, contractual in nature, would be acceptable. Furthermore, it is pointed out that allowing married partners to accept the marriage regime themselves, which would be common to all European citizens, and which would uniquely regulate their property relations, would contribute to mutual approximation of national regulations. The study envisages the establishment of a public register of the marriage regime and the possibility of voluntary changes to this regime within the framework of the European contractual regime, all to inform third parties about the existence of a marriage contract and deviation from the legal property regime. Based on the above, it follows that the marital property contract could be a factor in the

[3] Some legal theorists even consider unification of civil law in general, as a form of cultural imperialism (see Legrand, 1996. p. 811).
Mostowik declared that the motto of the European Union: *In varietate concordia* (United in diversity) is also worth recalling. Its essence should generally argue for a more cautious approach by the EU institutions and groups of scientists interfering with substantial family law matters. (Mostowik, 2018, p. 49)

[4] Study on matrimonial property regimes and the property of unmarried couples in private international law and internal law. Available at: https://www.econbiz.de/Record/study-on-matrimonial-property-regimes-and-the-property-of-unmarried-couples-in-private-international-law-and-internal-law-rooij-michiel/10009637705 (1.3.2024.)

convergence and potential harmonization of the legislation of the member states.[5]

The idea of „European family law“ and existing uniform provisions

The idea of a unification of family law is not new. Some indications for 'European Family Law' can be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] (Martiny, 2010). Some resolutions of the EU Parliament deal with certain issues of family law. The Resolution on the Protection of Families and Children demands the creation of a 'coordinated mechanism among our European countries in the area of family law'.[7] The Resolution on Women and Parental Co-responsibility[8] recommend to 'search for possibilities to harmonize family law at the European level'. The Resolution on measures to protect minors in the European Union[9] urges “harmonization of policy on the children whose parents are not nationals of a Member State but are legally resident in the territory of the Union at the level of the highest Community standard and by European and international treaty obligations”.

Uniform legal provisions are found in some EU acts. In 1950 Council of Europe enacted the ECHR. Two very important articles when it comes to family law matters in this act are Art. 8 which demands respect for private and family life and Art. 12 which protects the right to marry. The ECHR is binding on all member states, but its status varies from status varies from state to state. In monistic legal systems such as the ECHR prevails over national law including the constitution. In dualistic systems, the ECHR has a higher status than an internal law, but the constitution prevails over the ECHR. In Germany, the ECHR has the status of a federal law. The application of the ECHR is guaranteed by the member states through the Committee of Ministers that can exclude a member state, but also by the European Court of Human Rights (ECtHR), whose judgments are legally binding on the member states (Pintens, 2008, p. 163). Another very important act that contains uniform regulation is the UN Convention on the Rights of the Child. This act has 54 articles that contain substantive family law provisions:[10] prohibition on discrimination (art. 2), a guarantee of the best interest of a child (art. 3), recording in register (art.

[5] For more see: Majstorović, 2005, p. 126.
[6] European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No. 5
[7] Resolution on the Protection of Families and Children of 28 Jan. 1999, OJ 1999, C 128/79.
[8] Resolution on Women and Parental Co-responsibility of 29 October 1993, *OJ* 1993, C 315/652.
[9]Resolution on measures to protect minors in the European Union *OJ* C 020, 20/01/1997 P. 0170.
[10] Substantive law is the law which governs rights and obligations of those who are subject to it. It is the body of statutory or written law which creates, defines and regulates these rights. (Boele Woelki, 2010)

7), protection from interference in family relations (art. 8), the right of a child to express its views freely in all matters affecting them (art. 12).

Harmonization and TFEU

Primary objectives assigned by the Treaty on the Functioning of the European Union (TFEU)[11] to the Union are the creation of an economic and monetary union, but the Union is also given the task of promoting a high level of social protection, raising standards of living and the quality of life, and increasing solidarity among the Member States – all of which touch on the situation of families. (Martiny, 2010) The EU only possesses the authority to harmonize domestic laws 'for the functioning of the internal market', by which the power to issue regulations touching primarily on the economic sphere is meant (art. 2 and 144 TFEU). The only provisions in the TFEU which at present could conceivably form the basis for further unification of family law are those regarding cooperation in judicial and legal matters (art. 81 TFEU).

Even though family law itself is not mentioned in the TFEU, family matters are naturally linked to other policies of the EU and are indirectly impacted. The EU has to respect fundamental rights as guaranteed by the ECHR. These rights, including the protection of the family, now constitute a part of Community law (Martiny, 2010). Some of the provisions in the Charter of Fundamental Rights of the EU deals with the family issues: respect for private and family life (art. 7), right to marry and right to find a family (art. 9), rights of the child (art. 24) and protection of the family (art. 33). Taking into account the aforementioned acts, it can be concluded that there is currently no unified substantive family law at the EU level, but that there is established constitutional family law.[12]

Harmonization of Marital Property Law

All member states in the EU have their marital property regimes. Considering the increasing movement of people and goods, it is clear that it is a frequent occurrence that at least one of the spouses participates significantly in transborder transactions. This further leads to the possibility of impediment of commercial transactions within the internal market which is a core interest of Union and has to be solved. There are two solutions: unification of rules governing conflict of laws and harmonization of substantive family law regulations.

There is an increased unification of the rules governing conflicts of laws regarding family law matters in the EU. Private international law does not govern rights and obligations of individuals as it does substantial law, but is of

[11] Consolidated version of the Treaty on the functioning of the European Union, OJ, C326/49, 26.10.2012.
[12] For a more see: Pintens, 2005, pp. 1209.

‘technical’ nature. It addresses three kinds of problems which arise, in connection with legal relationships governed by private law (e.g., family law), where a factual situation is connected with more than one country. These are: jurisdiction; applicable law; and recognition and enforcement of foreign decisions (Wysocka-Bar, 2024, p. 318).

The act that most influenced the development of 'European International Family Law' was the Hague Conference on Private International Law.[13] The Hague Conference has standardized the rules of conflicts of laws under multilateral treaties. European international family law has been created with cooperation and approximation within the European ‘area of Freedom, Security and Justice’ (See Action Plan implementing the Hague Programme on strengthening freedom, security, and justice in the European Union[14]).

In the Hague Programme: Strengthening Freedom, security, and Justice in the European Union[15] the Chamber asked the Commission to present a Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the issue of jurisdiction and mutual recognition.[16] The Council and the Commission adopted the Action Plan that implements the Hague Program. The Action Plan calls on the Commission to propose a Green Paper on the conflict of laws in the area related to matrimonial property regimes. The Commission formed a team of experts who made a study, which was later accepted by the Commission. The study contains a proposal to harmonize the rules of international private law in the field of matrimonial property and to introduce new legal institutes, such as the "European matrimonial property system". Giacomo states that the "European matrimonial property system" would be regulated identically in the legal system of each member state and the spouses would be able to contract it.

Realizing that in the current circumstances, the harmonization of substantive legal regulations in matrimonial property matters is impossible, the EU Commission recognized the need and benefit of harmonizing conflict-of-law issues related to family law property regimes, and in 2006 presented the Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition.

[13] Hague Conference on Private International Law is a global organization, whose purpose is ‘to work for the progressive unification of the rules of private international law’ and focusing on family law as one of its main points of interest. (Wysocka-Bar, 2024, p. 333)

[14] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, *OJ C 198, 12.8.2005.*

[15] The Hague Programme: strengthening freedom, security and justice in the European Union, *OJ*, C 53, 03 March 2005.

[16] Green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (presented by the Commission) (SEC (2006) 952), COM (2006) 400 final.

Following the adoption of the Green Paper on Conflict of Laws in Matters of Matrimonial Property Regimes, including Jurisdiction and Mutual Recognition, extensive consultations began on all aspects of the difficulties faced by couples in Europe when it comes to the liquidation of their joint property and the legal remedies available to them. At the meeting in Brussels in 2009, the European Council adopted a new multi-year program called the "Stockholm Program - an open and secure Europe in the service and protection of citizens". In that program, the European Council considered that mutual recognition should be extended to areas that are not yet covered, but are crucial for everyday life, such as marital property rights. In 2011, the Commission adopted the Proposal for a Council Regulation on Jurisdiction, Governing Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes[17] and the Proposal for a Council Regulation on Jurisdiction, Governing Law and the Recognition and Enforcement of Decisions Regarding Property Consequences of Registered Partnerships[18]. At the 2015 meeting, the Council concluded that it was not possible to reach unanimity for the adoption of regulations on matrimonial property regimes and the property consequences of registered partnerships and that the Union as a whole could not achieve the goals of cooperation in that area within a reasonable period. It is pointed out in the Paper that it is not possible to harmonize substantive law, and that is why it considers the basic issues of conflicting rules. To better organize this area, the Green Paper itself posed questions to which those interested were invited to answer. The received answers should improve the issues in this area, including the recognition and enforcement of marriage contracts (Bubić, 2010, p. 29).

As a result of considering the requirements of certain EU countries[19] on achieving enhanced cooperation[20] in the area of property regimes of international couples, in 2016 the council adopted Decision (EU) 2016/954 on

[17] Proposal for a Council regulation on the jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final - 2016/0190 (CNS)

[18] Proposal for a Council regulation on the jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships /* COM/2011/0127 final - CNS 2011/0060 */.

[19] By 2016, Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, and Sweden sent requests to the Commission stating that they wanted to establish enhanced cooperation between them in the area of property regimes of international couples, and especially in the area of jurisdiction, governing law and the recognition and enforcement of decisions in matters related to matrimonial property regimes and jurisdiction, governing law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, and in which they invite the Commission to submit a proposal to the Council in this regard.

[20] According to Art. 20 of the Treaty on European Union and Title III of the Treaty on the Functioning of the EU, enhanced cooperation is a procedure where a minimum of 9 EU Member States are allowed to set up advanced integration or cooperation in a particular field within the EU, when it has become clear that the EU as a whole cannot achieve the goals of such cooperation within a reasonable period. https://eur-lex.europa.eu/EN/legal-content/glossary/enhanced-cooperation.html

the approval of such enhanced cooperation. The field of application of this Decision would, by Art. 81 of the TFEU, and should be in the context of matrimonial property regimes with cross-border implications. To ensure legal certainty for married couples regarding their property and to ensure some predictability, all rules applicable to matrimonial property regimes should be included in a single instrument.

Another important regulation that deals with matrimonial matters and establishes uniform jurisdiction rules for divorce, legal separation and marriage annulment as well as for disputes about parental responsibility with an international element is Council Regulation (EU) 2019/1111.[21] This Regulation contributes to creating an area of freedom, security and justice in which the free movement of persons is guaranteed.[22] It facilitates the circulation of decisions, as well as of authentic instruments and certain agreements, in the Union by laying down provisions on their recognition and enforcement in other Member States.[23] The regulation puts forward the abolition of any form of procedure for the recognition of a decision rendered in the European Union to be enforced in another country of the European Union (Art. 34 et seq.), as is already the case in other European regulations, by means of the issue of a certificate served on the person against whom enforcement is sought prior to the first enforcement measure (Art. 55), in accordance with the provisions of Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 relating to the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.[24] Council Regulation (EU) 2019/1111 has numerous forums predicted in Art. 3. Forums are flexible and have an alternative nature. Considering also their objective and non-hierarchical scope, in a context where the possibility of exercising express or tacit free will is absent made us conclude that the aim of Council Regulation (EU) 2019/1111 is to adjust its rules to the reality of sensitive and highly conflictive matters it deals with.

[21] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), *OJ L 178, 2.7.2019* entered into force on 1st August 2022. This regulation replaces and recasts Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Regulation Brussels II bis), repealing Regulation (EC) 1347/2000 (Regulation Brussels II). It is now known as Brussels II ter.

[22] Council Regulation (EU) 2019/1111 in Art. 2 (2)(3) recognizes a new type of instrument when it comes to divorce: the ‘agreement’ which, without being an authentic instrument, has been concluded ‘by the parties’ in the matters covered by the Regulation and ‘registered by a public authority’.

[23] Recital 2. Council Regulation (EU) 2019/1111.
To this end, in Chapters II and III, the Regulation lays down particular rules governing jurisdiction and the recognition and enforcement of judgments on the dissolution of marriage to ensure legal certainty. (Aguado, 2022, p. 67.)

[24]https://www.uihj.com/2022/09/28/entry-into-application-of-the-brussels-ii-ter-regulation/, (17.4.2024).

The unification of conflict of law regulations seems to be more suitable than the unification of substantive law as it involves only a relatively limited incision into domestic legal systems and respects differences among legal systems. Despite that, the unification of conflict of law norms cannot overcome some difficulties. The drawback that remains even if the unification of conflict of law norms is achieved is that domestic forums still have difficulties in understanding and properly applying unfamiliar foreign rules and principles. Because of that it is often claimed that the solutions of private international law will prove to be inadequate and that it can be only a temporary solution (Dethloff, 2003, p. 37).

Speaking about ways of harmonizing substantial family law matters, two basic ones stand out in theory. One is the prescription of basic types of property regimes. Each European legislator could declare one of these types to be the national marital legal property regime. Spouses would then be entitled to elect treatment under one of the other regimes and make alternative contractual arrangements (Henrich, 2002, p. 1521). The second proposal consists of the development of 'European marriage' (Dethloff, 2006) or the "European system of matrimonial property" (Martiny, 2005, p. 1189) which would be an integral part of the legal systems of the member states. At present even the advocates of a harmonization of European family law do not propose the drafting of a binding uniform law (Boele-Woelki, 2002, p. 179).

A possible harmonization of family law is mainly discussed within the framework of the Council of Europe[25]. Family law has always been one of its major fields of activity. The most important act that Council enacted was the ECHR. With greater mobility of European citizens and with the realization that existing private international law provisions, as well as the legislative and judicial activities of the Council of Europe and the European Union, are not sufficient to ensure further harmonization in 2001 the Commission on European Family Law (CEFL) was founded. This Commission is composed of experts in the field of family and comparative law from most of the European Union Member States and other European countries. The main goal of this body has been to further the harmonization of family law (Boele-Woelki, 2002, p. 178) more precisely it is to launch a pioneering theoretical and practical exercise about the harmonization of family law in Europe. The members of the CEFL hold the conviction that a certain harmonization of family law is needed to realize a true free movement of persons of law (Pintens, 2008, p.171). The idea beneath this CEFL is based on decades-long practice in the Nordic countries. The CEFL endeavors to survey the current state of comparative research and

[25] As stated by the Committee of Experts on Family Law which is part of the Council of Europe, the organization has been working for decades 'to harmonize policies and adopt common standards in its member states in the field of family law' and 'has contributed in a decisive manner to the strengthening of the legal protection of the family, in particular the protection of the interests of children'. See Council of Europe, 'Council of Europe Achievements in the Field of Law. Family Law and Protection of Children', CJ-FA (2008) 2, p. 11.

looks for a common core of European family law. The main goal of this search is the creation of a set of principles of European Family Law that are thought to be most suitable for the harmonization of family law within Europe. The CEFL consists of two groups: the Organizing Committee the Expert Group.[26] The CEFL has drafted five sets of Principles of European Family Law in the field of divorce, maintenance between former spouses, parental responsibilities, property relations between spouses, and *de facto* unions. They can be considered as model laws for national legislators in their quest to reform their family law systems.[27]

Marriage contract as a possible means to reaching a goal

The marriage contract is considered to be an instrument with great harmonization potential.[28]

Vienna Action Plan from 1998 was the first European regulation that recommended the adoption of an instrument concerning matrimonial property regimes. The marriage contract was the subject of Written Question P-1905/00, which was sent to the European Commission in 2000.[29] The Written Question contained two questions: whether the Commission can confirm that valid marriage contracts and signed by the laws of one EU member state are also valid before the courts of another member state and whether the Commission can guarantee the European Parliament that it will take measures to ensure legal protection of citizens in such situations? In its answer to the Written Question, the Commission stated that there are no Community rules applicable to marriage contracts and matrimonial property regimes. The Brussels and Rome Convention on Jurisdiction and Governing Law for Contractual Obligations in Civil and Commercial Matters excludes these agreements from its scope. In Green Paper, a marriage contract is defined as a contract concluded before marriage to regulate the property relations between the spouses. In this paper, the need to establish a register of marriage contracts was mentioned as an important item.
In Council Decision (EU) 2016/954[30], a marital property agreement is defined as a type of disposition of marital property, the admissibility and acceptance of

[26] For more details about the functioning of these two groups read: Pintens, 2008, p. 171.
[27] First results of Commission work were present in 2004 in the field of divorce and maintenance between former spouses. (Boele Woelki, 2007)
[28] On unification in the EU area see: Ignjatović, 2009. Does the contractual regulation of matrimonial property relations testify to an attempt at unification within the European Union? In: Stojanović, N., Golubović, S. (eds.). *The law of Serbia and the law of the European Union - situation and perspectives.* Niš: Faculty of Law in Niš, pp. 263-281.
[29] Written question P-1905/00 by Michael Cashman (PSE) to the Commission. Marriage contracts. Official journal C72, 6. 3. 2001.
[30] Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, *OJ L 159, 16.6.2016, p. 16–18* (5.3.2024.)

which differ among member states. For member states to more easily accept matrimonial property rights acquired as a result of a matrimonial property agreement, rules on the formal validity of the matrimonial property agreement should be defined. The agreement should be drawn up at least in writing and should be dated and signed by both parties. However, the agreement should also meet the additional requirements for formal validity laid down in the law applicable to the matrimonial property regime, as determined by this Decision and the law of the Member State where the spouses have their habitual residence. This Decision should also determine the law that will regulate the material validity of such an agreement.[31] The law that has been established as authoritative for the matrimonial property regime should regulate the matrimonial property regime from the classification of the property of one or both spouses into different categories during the marriage and after its dissolution until the liquidation of the property.

The Council of the EU, taking into account the TFEU, especially its Art. 81, paragraph 3[32], Council Decision (EU) 2016/954, as well as the proposal of the European Commission, adopted in 2016 two Regulations. Those two acts aimed at adopting common rules on jurisdiction, applicable law, and the recognition and enforcement of decisions in the area of the property regimes of international couples, covering both marriages and registered partnerships: Council

[31] When no applicable law is chosen, and with the aim of harmonizing predictability and legal certainty with the real-life circumstances in which the couple finds themselves, this Regulation should introduce a harmonized conflict of law rules for determining the law applicable to all property of the spouses based on the ladder of links. The first common habitual residence of the spouses shortly after the marriage should be the first criterion, before the right of joint citizenship of the spouses during the marriage. If none of these criteria apply or if there is no first common habitual residence in cases where the spouses have dual common citizenship at the time of marriage, the third criterion should be the law of the country with which the spouses have the closest ties. When applying this criterion, all circumstances should be taken into account, and it should be clearly stated that these relationships should be considered as they were at the time of the marriage. Where this Regulation refers to citizenship as a link, the question of how a person with multiple citizenships is considered is a preliminary matter that is not covered by the scope of this Regulation and should be left to national law, including, where applicable, international conventions, respecting in the fullness of the general principles of the Union. That consideration should not affect the validity of the choice of law made by this Regulation. Regarding the determination of the law applicable to the matrimonial property regime if the law has not been chosen and there is no matrimonial property agreement, the judicial body of the member state should, at the request of either spouse, in certain cases - if the spouses have moved to the country of their habitual residence for a long time - be able to conclude that the law of that state can be applied if the spouses relied on it. In any case, the rights of third parties must not be violated. Council Decision (EU) 2016/954 of 9 June 2016 authorizing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships OJ L 159, 16.6.2016, p. 16–18. *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016D0954* (3. 4. 2024.).

[32] Art. 81, Par. 3: Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament”.

Regulation (EU) 2016/1103 on the implementation of enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (Council Regulation (EU) 2016/1103) and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (Council Regulation (EU) 2016/1104).[33] These two Regulations have introduced major changes in European Union's Private International Law (Sequeira, 2022, p. 233). Regulations are perceived as a first step towards harmonization of substantive family law in Member States by allowing certain family law concepts created under the law of certain Member States to be recognized in others. (Wysocka-Bar, 2024, p. 327) The approval of these two specific instruments can be considered a turning point in European family law. Still, the application of these Regulations, which are mainly unknown to many, causes difficulties due to the complexity of a subject that was traditionally linked to the national law of each country and that now goes beyond national borders in an area of freedom, security and justice in the Community, which guarantees the free movement of persons (González & Ruggeri, 2022, p. 12).

In accordance with Art. 81 TFEU, Council Regulation (EU) 2016/1103 should apply in the context of matrimonial property regimes having cross-border implications.[34] In Art. 3 of the Council Regulation (EU) 2016/1103, a matrimonial property agreement is defined as any agreement between spouses or future spouses by which they organize their matrimonial property regime. Regulation in Art. 15 regulates the formal validity of the marital property agreement. The matrimonial property agreement is drawn up in writing and signed by both spouses. Any communication by electronic means that provides a permanent record of the agreement has the same value as if it had been made in writing. If the law of the member state in which both spouses have their habitual residence at the time of the conclusion of the agreement provides for additional formal requirements for matrimonial property agreements, these requirements must be met. Also, if the spouses have their habitual residence in different Member states at the time of the conclusion of the agreement and if the laws of those states provide for different formal requirements for matrimonial property agreements, the agreement is formally valid if it meets

[33] These Conventions were adopted under the special regime of enhanced cooperation, as provided for by Art. 20 of the Treaty on European Union (TEU) and Art. 326 to 334 of the Treaty on the Functioning of the European Union (TFEU). Enhanced cooperation means that only the EU Member States that have declared their wish to participate in the enhanced cooperation are bound by the Regulation. The others will continue to apply their national law (including their rules on private international law). Enhanced cooperation acts are not regarded as part of the acquis which has to be accepted by candidate countries for accession to the Union. See more about Council Regulation 2016/1103: Duraković, A. 2018. International property relations in married and registered unions in the European Union. *Proceedings of the Faculty of Law of the University "Džemal Bijedić" in Mostar*, Mostar, pp. 165-184.

[34] Recital 14. Council Regulation (EU) 2016/1103.

the requirements of any of those laws. If only one spouse is habitually resident in a Member State at the time of the conclusion of the agreement and if that State provides for additional formal requirements for matrimonial property agreements, these requirements must be met. If the applicable law for the matrimonial property regime imposes additional formal requirements, these requirements must be met.

Council Regulation (EU) 2016/1103 shall not affect the competence of the authorities of the Member States to deal with matters of matrimonial property regimes.[35] Council Regulation EU) 2016/1103 does not affect the application of bilateral or multilateral conventions to which one or more member states are parties at the time of the adoption of this Regulation or a decision based on Art. 331, paragraph 1, second, or third subparagraph of the TFEU and which refer to issues covered by this Regulation, without questioning the obligations of the member states based on Art. 351 of the TFEU. The Regulation stipulates that, regardless of paragraph 1, this Regulation, between member states, has priority over the conventions concluded between them to the extent that such conventions refer to issues regulated by this Regulation. Council Regulation (EU) 2016/1103 constitutes a further step towards the creation of a uniform framework of conflict rules to resolve cross-border issues arising within the family (González, 2022. p. 292).

Council Regulation (EU) 2016/1104 contemplates several grounds of jurisdiction, each one of them helping the parties of a civil proceeding to navigate among all the possible competent authorities. Bonding element like in other EU Regulations in family law, is the concept of habitual residence as a strong connecting factor between the parties and the territory of the Member State where the competent judge is located. In addition to this need for uniformity with other valuable instruments, the system of grounds for jurisdiction is shaped in such a manner as to avoid the risk of a couple being deprived of access to justice (Bruno, 2022, p. 27).

[35] Art. 2. Council Regulation (EU) 2016/1103.

Conclusion

The European legislator faces numerous challenges when it comes to the harmonization of family law matters. From a brief review of certain acts that are related to the matrimonial property agreement at the European level, the difficulties faced by the European legislation in the matter of family law are illustrated. In addition to the fact that the matter is extremely delicate and complex, there is no consensus on the necessity and usefulness of its unification even at the level of legal theory, and the question necessarily arises (in addition to the basic one, is it possible) is harmonization in family law even useful?

National family legislation is the carrier of the basic values of a society. It is part of cultural identity and as such needs to be protected just as is the case with national monuments and borders. Even though there are a lot of different influences on this area of law, still it is a strong representation of the traditions of a nation and its social morality. By changing or taking away a nation's traditions, its identity is also taken away, and over time it threatens to become a faceless mass of individuals. It is known that a nation that loses its tradition loses its nationhood. And if a people lose its traditions and values, it loses the need to have its state and becomes a suitable material for various geopolitical "tumbles". For these reasons, we consider all attempts to standardize the family law regulations of countries not only difficult, and laborious, but also with a possibly extremely harmful outcome.

Instead of the unification of substantive legal regulations, we believe it would be useful to harmonize formal legal procedures related to the recognition and enforcement of foreign decisions, as provided for in EU Council Regulation 2016/1103 on the implementation of enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes. In this way, possible difficulties of persons who enter into mixed marriages would be eliminated, while respecting and preserving the basic values of each nation in the Community.

References

Aguado, D. C. 2022. The Asymmetry In 'Dual' Habitual Residence Resulting from Cross-Border Divorce. An Approximation to The Competent Judicial Authority to The Thread of IB Case 289/20. In: M. Gonzales, L. Ruggeri (eds.). *Cross-Border Couples Property Regimes in Action Before Courts Understanding the EU Regulations 1103/2016 And 1104/2016 In Practice.* pp. 63-73.

Antokolskaia, M. 2006. *Harmonisation of Family Law in Europe: A Historical Perspective*. Antwerpen – Oxford: Intersentia.

Boele Woelki, K. 1997. The Road Towards European Family Law, *Electronic Journal of Comparative Law*, Vol. 1. 1, pp. 1-15.

Boele Woelki, K. 2002. Comparative Research-Based Drafting of Principles of European Family Law, in Faure/Smits/Schneider, eds., *Towards a European Ius Commune in Legal Education and Research* (Antwerpen/Groningen 2002), pp. 171-189.

Boele Woelki, K., Ferrand, F., et. Alt. 2004. *Principles of European family law regarding divorce and maintenance between former spouses*. Intersentia.

Boele-Woelki, K. 2010. *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws.* Martinus Nijhoff.

Boele-Woelki, K., Dethloff, N. & Gephart, W. 2014. *Family law and culture in Europe: developments, challenges and opportunities*, Intersentia.

Bruno, P. 2022. Subsidiary Jurisdiction in Regulation (Eu) 2016/1104 as a Safety Net for International Couples. In: M. Gonzales, L. Ruggeri (eds.). *Cross-Border Couples Property Regimes in Action Before Courts Understanding the Eu Regulations 1103/2016 And 1104/2016 In Practice.* pp. 17-29.

Bubić, S. 2010. Ugovorni bračni imovinski režim u pravu EU i uporednom pravu. [Contractual matrimonial property regime in EU law and comparative law]. *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru [Proceedings of the Faculty of Law, University of Mostar]*, br. XXI, 25-44.

Cvejić-Jančić, O. 2004. Jedinstveno porodično pravo Evrope. [Europe's single-family law] *Pravni život [Legal life]*, no. 9/2004, pp. 865-887.

Dethloff, N. 2003. Arguments for the unification and harmonization of family law in Europe, in Boele-Woelki, ed., *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerpen *et al*. 2003), pp. 37-64.

Duraković, A. 2018. Međunarodni imovinski odnosi u bračnoj i registrovanoj zajednici u Europskoj Uniji. [International property relations in married and registered unions in the European Union] *Zbornik radova Pravnog fakulteta Univerziteta „Džemal Bijedić“ u Mostaru [Proceedings of the Faculty of Law of the University "Džemal Bijedić" in Mostar]*, Mostar, pp. 165-184.

Giacomo, O. Judical co-operation in cross-border Family law matters, https://www. giacomooberto. com/lecco/reportonlecco. htm, (2.2.2024.)

Henrich, D. 2002. Zur Zukunft des Güterrechts in Europa [On the future of property law in Europe], *FamRZ* (2002], pp. 1521-1526.

Ignjatović, M. 2009. Da li ugovorno regulisanje bračnoimovinkih odnosa svjedoči o pokušaju unifikacije u okviru Evropske unije. [Does the contractual regulation of matrimonial property relations testify to an attempt at unification within the European Union?] In: Stojanović, N., Golubović, S. (ed.). *Pravo Srbije i pravo Evropske unije- stanje i perspektive. [The law of Serbia and the law of the European Union - situation and perspectives]* Niš, Pravni fakultet u Nišu [Niš: Faculty of Law in Niš], pp. 779-812.

Majstorović, I. 2003. Pravni propisi Evropske unije koji se odnose na obiteljsko pravo. [Legal regulations of the European Union related to family law] *Zbornik Pravnog fakulteta u Zagrebu [Collection of papers Faculty of law in Zagreb]*, 53 (2003), br. (no.) 3-4, pp. 759-782.

Majstorović, I. 2005. *Bračni ugovor –novina hrvatskog oviteljskog prava-.* [Marriage contract -a novelty of Croatian civil law-.] Zagreb: Pravni fakultet Sveučilišta u Zagrebu [Faculty of Law, University of Zagreb].

Martiny, D. 2005. Ein zusätzlicher Güterstand für Europa? [An additional property regime for Europe], in: *Perspektiven des Familienrechts - Festschrift für Schwab [Perspectives of family law - Festschrift for Schwab]* [Bielefeld 2005], pp. 1189 – 1207.

Martiny, D. 2010. „Is unification of family law feasible or even desirable?“, https://papers. ssrn. com/sol3/papers. cfm?abstract_id=1612157 (10.1.2024).

Mijatović, M. 2019. Izazovi recepcije prava evropske unije – primer korporativnog prava u Srbiji. [Challenges of the reception of European Union law - an example of corporate law in Serbia.] *Strani pravni život*, [Foreign legal life] god. [year] 63, br. [no.] 1, pp. 91-102.

Mostowik, P. 2018. The Questionable Impact of EU Regulations No 2016/1103 and 2016/1104 on the Identity of Marriage in a Member State. https://ruj.uj.edu.pl/server/api/core/bitstreams/331a7ed5-2dca-465a-8042-bcdcb4f1181e/content.

Panov, S. 2013. Harmonizacija porodičnog prava Srbije sa pravom EU: politički razlozi, društvene i pravne posledice [Harmonization of Serbian family law with EU law: political reasons, social and legal consequences]. *Sociološki pregled [Sociological review]*, vol. XLVII (2013), no. 1, pp. 53–74.

Pintens, W. 2005. Familie und Familienrecht in der europäischen Verfassung. *Perspektiven des Familienrechts - Festschrift Schwab*. pp. 1209 – 1225.

Pintens, W. 2008. Family law in Europe: developments and perspectives. *XLI CILSA 2008*. https://www.jstor.org/stable/23252722?read-now=1&seq=2#page_scan_tab_contents, (22.3.2024.)

Pintens, W. 2011. Matrimonial Property Law in Europe. In: Boele-Woelki, K., Miles, J. & Scherpe J. M. (ed.), *The Future of Family Property in Europe*. Intersentia, pp. 19- 45.

Sequeira, B. 2022. Practical Implications of Council Regulation (Eu) No 2016/1103 On Matrimonial Property Regimes and Council Regulation (Eu) No 2016/1104 On the Property Consequences of Registered Partnerships. In: M. Gonzales, L. Ruggeri (eds.). *Cross-Border Couples Property Regimes in Action Before Courts Understanding the Eu Regulations 1103/2016 And 1104/2016 In Practice.* pp. 233-242.

Šimović, I. & Ćurić, I. 2015. Europska unija i obiteljsko pravo međunarodnoprivatnopravni, procesnopravni i materijalnopravni aspekti. [The European Union and family law, international private law, procedural law and substantive law aspects] *Ljetopis socijalnog rada [Annals of social work]*, 22 [2], pp. 163-189.

Wysocka-Bar, A. 2024. A look into the future- The Harmonization of Substantive Family law in Europe. In: K. Duden and D. Wiedemann (eds.) *Changing Families, Changing Family Law in Europe*. Intersenta. pp. 317-334.

Acts

Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, “Vienna Action Plan“, (1999/C 19/01), https://www. refworld.org/docid/3f5341ce2. html.

Charter of Fundamental Rights of the European Union of 7 Dec. 2000 (OJ 2000, C 364/1), version of 12 December 2007, OJ 2007 C 303/1.

Consolidated version of the Treaty on the functioning of the European Union, OJ, C326/49, 26.10.2012.

Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, *OJ C 198, 12.8.2005.*

Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, *OJ L 159, 16.6.2016, p. 16–18* (5.3.2024.).

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *OJ L 183, 8.7.2016, p. 1–29* (14.3.2024).

Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, *OJ L 183, 8.7.2016, p. 30–56.*

Council Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). *OJ L 178, 2.7.2019, p. 1–115*

European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No. 5

Green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (presented by the Commission) (SEC(2006) 952), COM(2006) 400 final. Available at: https://eur-lex. europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52006DC0400.

Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ 2001, C 12/1.

Proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final - 2016/0190 (CNS).

Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

Resolution on the Protection of Families and Children of 28 Jan. 1999, OJ 1999, C 128/79

Resolution on Women and Parental Co-responsibility of 29 October 1993, *OJ* 1993, C 315/652.

Resolution on measures to protect minors in the European Union, *OJ* C 020, 20/01/1997 P. 0170.

Study on matrimonial property regimes and the property of unmarried couples in private international law and internal law. Available at: https://www.econbiz.de/Record/study-on-matrimonial-property-regimes-and-the-property-of-unmarried-couples-in-private-international-law-and-internal-law-rooij-michiel/10009637705 (1.3.2024.)

The Hague Programme: strengthening freedom, security and justice in the European Union, *OJ*, C 53, 03 March 2005.

The Stockholm Programme — An open and secure Europe serving and protecting citizens, Official Journal of the European Union, C 115, 04 May 2010.

Written question P-1905/00 by Michael Cashman (PSE) to the Commission. Marriage contracts. Official journal C72, 6. 3. 2001.